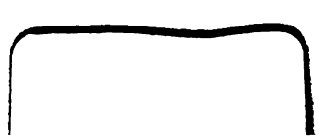

SCOTS REVISED REPORTS

COURT OF SESSION SERIES

General Editor.

JOHN RANKINE, Esq., K.C., M.A., LL.D.

ASSISTED BY

WILLIAM HARVEY, Esq., B.A., LL.B.,

AND ROBERT BERRY, Esq.

Consultative Committee.

THE RIGHT HON. LORD KINROSS, LORD JUSTICE-GENERAL.

THE HON. LORD M'LAREN.

CHAS. SCOTT DICKSON, Esq., K.C., LORD ADVOCATE.

THE SCOTS

REVISED REPORTS

COURT OF SESSION

THIRD SERIES—VOLUME X

CONTAINING

MACPHERSON X

1871-72

EDINBURGH
WILLIAM GREEN & SONS
LAW PUBLISHERS
1904

PRINTED BY MORRISON AND GIBB LIMITED

FOR

WILLIAM GREEN & SONS

NOVEMBER 1904

JUDGES

OF THE

COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

FIRST DIVISION.

Lord President, the Right Hon. JOHN INGLIS.
Lord DEAS.
Lord ARDMILLAN.
Lord KINLOCH.

SECOND DIVISION.

Lord Justice-Clerk, the Right Hon. Sir JAMES MONCREIFF, Bart.
Lord COWAN.
Lord BENHOLME.
Lord NEAVES.

PERMANENT LORDS ORDINARY.

Lord JERVISWOODE.
Lord ORMIDALE.
Lord MURE.
Lord GIFFORD.
Lord MACKENZIE.

REGISTRATION APPEAL COURT.

Lord BENHOLME. Lord ARDMILLAN. Lord ORMIDALE.

Lord-Advocate,	.	GEORGE YOUNG, Esquire.
Solicitor-General,	.	ANDREW R. CLARK, Esquire.
Dean of Faculty,	.	EDWARD S. GORDON, Esquire.

HOUSE OF LORDS.

PEERS

WHO DELIVERED JUDGMENTS IN SCOTCH APPEALS DURING THE PERIOD OF THESE REPORTS.

Lord Chancellor, Lord HATHERLEY,

Lords CHELMSFORD, WESTBURY, COLONSAY, and CAIRNS.

INDEX OF NAMES

IN

VOLUME X

I. HOUSE OF LORDS

II. COURT OF SESSION

REGISTRATION CASES

CASES

DECIDED IN

THE HOUSE OF LORDS

1872

No. 1. X. MACPHERSON H.L. 1. 19 Feb. 1872. House of Lords.—Lord Chancellor (Hatherley); Lord Chelmsford; Lord Westbury.

JAMES ADAMSON BEVERIDGE (Pursuer), Appellant.—*Sir Roundell Palmer, Q.C.* —*Wotherspoon.*

ROBERT BEVERIDGE AND OTHERS (Defenders), Respondents.—*Pearson, Q.C.* —*Cotton, Q.C.*

Partnership.—A business was carried on under a deed of copartnery by a body of testamentary trustees, whose interest extended to three-fourths of the capital and profits, and by a surviving partner, whose interest amounted to one-fourth. *Held*, that the trustees collectively constituted one partner, and that they could not act in name of the company without the concurrence of the other partner.

Partnership—Trustee—Power of Partners to Sign in Name of the Company—Powers of a Manager.—A contract of copartnery provided that the partnership should be carried on after the death of one of the two partners by the survivor and the testamentary trustees of the deceased. A manager of the business—a manufactory —was appointed by the contract. One of the partners having died, the trustees of the deceased partner delegated to one of their own number—the manager—power to sign the name of the firm in carrying on the business. In an action by the surviving partner, *held* (*aff.* judgment of the Court of Session)—(1) That the trustee to whom this power had been attempted to be given had no right to sign the name of the firm; (2) that the manager had no right to leave signed cheques, blank as to the sum, in the hands of a confidential clerk; nor (3) to lend money to banks, without the consent of all the partners; and (*rev.* judgment of Court of Session) (4) that the manager appointed by the deed of copartnery had not acted within his powers in raising the salaries of clerks, and in increasing the fixed capital of the company by introducing steam power-looms in place of hand-looms without the consent of both partners.

Question, Whether a partner, who has a good title to bring in his own name an action to have the rights of the other partners and of a manager settled, is entitled to bring it also in the name of the company?

(In the Court of Session, 10th July 1869, *ante*, vol. vii. p. 1034.)

For many years prior to 1864 Mr. Erskine Beveridge had carried on business as a manufacturer of linen goods in Dunfermline. His brother, Mr. Robert Beveridge acted as his manager, with a large salary. In October 1864 the pursuer, Mr. J. A Beveridge, and his father, Mr. Erskine Beveridge, entered into a contract of copartnery

by which J. A. Beveridge was taken into the business. It was provided that the partnership should [2] commence on 1st July 1865, and subsist until March 1874, and that Mr. Erskine Beveridge should have seven-eights of the profits, and Mr. J. A. Beveridge one-eighth. Further, it was provided that the trade and business "in all its departments shall be more particularly under the charge and control of the said Erskine Beveridge during his lifetime, and, after his death, of his brother, Robert Beveridge, who has been appointed manager until the period for the expiry, of this contract, but that without infringing upon the copartnery rights of the said J. A. Beveridge." The parties to the contract bound themselves to grant to Mr. Robert Beveridge "the necessary procuration, or other authority which may be required in the exercise of his office as manager, in granting and subscribing obligations for or on behalf of the copartnery." It was further provided that, in the event of the death of Mr. Erskine Beveridge, the copartnery should notwithstanding remain in force between Mr. Erskine Beveridge's trustees and his son, but that the son's share in that case was to be increased to two-eighths.

Mr. Erskine Beveridge died on 2d December 1864, before the date when the partnership was to commence. His testamentary trustees, of whom Mr. Robert Beveridge was one, by minute dated in January 1865, granted to Robert Beveridge "full power and authority on their behalf to subscribe by the firm name of Erskine Beveridge and Company all bills, promissory-notes, cheques, or other obligations necessary to the carrying on of the said manufacturing business; as also to draw, accept, indorse, and discharge all bills, promissory-notes, accounts, and vouchers of debt of every kind due to or by them, as representing the copartnery interest in the said business which belonged to the said Erskine Beveridge, and to subscribe by the said firm name all writings which may be necessary for that purpose; declaring that all such writings as are subscribed by the said Robert Beveridge shall have the same force and effect, and be equally valid and binding on them, as if they were subscribed by each and all of them as trustees aforesaid."

On 1st July 1865 Mr. J. A. Beveridge and trustees commenced business under the contract of copartnery, and the business proved very lucrative.

Mr. J. A. Beveridge raised this action in his own name and in name of the company against Mr. Robert Beveridge and the trustees, concluding for declarator that Mr. Robert Beveridge had no power, without the pursuer's consent, to sign the firm name, to remove hand-looms and to replace them by power-looms, and to alter the factory premises for that purpose, nor to entrust signed cheques, blank as to the amount, to a clerk or servant of the company, nor to deposit the company's funds in any bank, or with any person, or to apply the same in any adventure, or otherwise than in the proper management of the copartnery business, nor to enter into engagements at largely increased salaries with managers of departments of the business. There were also conclusions that Mr. Robert Beveridge was bound to accept from the company a written procuration, adjusted, if need be, at the sight of the Court, defining his powers as manager, and that he had no right to act as partner, nor to exercise control or authority over the pursuer.

The defender, Robert Beveridge, pleaded;—(1) Under the agreements libelled between the defender and his brother, the late Erskine Beveridge, the defender had and has right to superintend and manage the business carried on by the firm of Erskine Beveridge and Company, and to exercise in relation thereto the whole rights and powers competent to a partner of the firm. (2) The defender, in his management of the business of Erskine Beveridge and Company, is entitled to exercise the rights and powers aforesaid, in respect of the terms of the contract of copartnery [3] between the pursuer and his father, and of the trust-settlements of the latter; and the pursuer, who has accepted of the provisions of these deeds in his favour, is barred from objecting to the defender's using or exercising such rights and powers. (3) *Separatim*, The defender is entitled to use and sign the company firm or style of Erskine Beveridge and Company to all deeds and writings having relation to the business of the firm, in respect of the authority to that effect conferred upon him by the trustees of the late Erskine Beveridge. (4) The pursuer is not entitled to decree of declarator and interdict as concluded for, in respect that the whole acts of management by the defender complained of in the present action were proper acts of administration, and within the powers of the defender.

The trustees pleaded;—(1) The present action, in so far as it proceeds or bears

to proceed at the instance of Erskine Beveridge and Company, ought to be dismissed. (2) Under the memorandum of agreement between the defender, Robert Beveridge, and the truster, the late Erskine Beveridge, of date the 26th September 1864, and additional memorandum of agreement between them, dated 4th November 1864, the said defender became entitled, from and after the death of the truster, to superintend and manage the business carried on by the firm of Erskine Beveridge and Company, and to exercise, in relation thereto, the whole rights and powers competent to a partner of the firm. (3) It being in the contemplation of the truster, in the various deeds of settlement executed by him, that the business of Erskine Beveridge and Company should be managed by the defender, Robert Beveridge, in the manner and with the rights and powers aforesaid, the pursuer, who has accepted of the provisions of these deeds in his favour, is barred from objecting to the management of the said defender, or to his using or exercising such rights and powers. (4) *Separatim*, The defender, Robert Beveridge, is entitled to use and sign the company firm or style of Erskine Beveridge and Company to all deeds and writings having relation to the business of the firm, in respect of the authority to that effect conferred upon him by the defenders, as trustees of the late Erskine Beveridge. (6) The pursuer is in no event entitled to decree as aforesaid, in respect that the said acts complained of have the sanction of the present defenders, and that the defenders are ready, if necessary, to confer upon the said Robert Beveridge the whole right and powers of which the pursuer seeks to deprive him.

The Lord Ordinary pronounced this interlocutor:—"Finds that the pursuer, James Adamson Beveridge, is not entitled to insist in this action in the name of the firm of Erskine Beveridge and Company: Finds that, in the circumstances of the case, he is not entitled, in respect of anything alleged by him to have hitherto taken place, to decree in terms of any of the conclusions of the action: Therefore dismisses the action, and decerns: Finds the pursuer, James Adamson Beveridge, liable in expenses," &c.

The pursuer reclaimed.

The Second Division pronounced this interlocutor:—"Recall the said interlocutor, except in so far as it finds that the pursuer, James Adamson Beveridge, is not entitled to insist in this action in the name of the firm of Erskine Beveridge and Company, and to that extent adhere to the said interlocutor; but find that the pursuer, as a partner of the said company, has himself a sufficient title and interest to insist in the conclusions of the action: Find that the defender, Robert Beveridge, has no right or power to sign the company firm or style of Erskine Beveridge and Company to any obligations or other writings, but that any writings which he may have occasion to subscribe as manager of, or acting for, the company, must be signed by him with his own name as such manager, or as acting [4] as aforesaid: Find that the said Robert Beveridge, defender, was not and is not entitled, without the consent of the pursuer, the said James Adamson Beveridge, to place in the hands or within the control of any clerk or servant of the said company, drafts or cheques signed by him upon the funds or accounts of the said company to be filled up with an amount of cash by such clerk or servant in the defender's absence: Find that the said Robert Beveridge, defender, has no power or authority, without the consent of the said pursuer, to lend or deposit any sum of money, forming part of the funds of the said company, to or with the Oriental Bank Corporation, the Chartered Mercantile Bank of India, London, and China, and the Chartered Bank of India, Australia, and China, being banks or houses established for carrying on business in the colonial dependencies of Great Britain; and, to the extent and effect foresaid, decern and declare, in terms of the declaratory conclusions of the action, and interdict, prohibit, and discharge the said Robert Beveridge, defender, from acting in the contrary thereof, whether by subscribing the firm or style of the said company, or by leaving or placing such blank cheques in the hands or within the control of such clerk or servant, or by lending to or depositing with any of the said banks or houses any part of the said company's funds: Find that the said Robert Beveridge, defender, acted within his powers as manager, and for the benefit of the said company, in the purchase of power-looms for the use of the said company, and in the displacement of hand-looms in order to the putting up of such power-looms within the works of the said company: Find that the said Robert Beveridge, defender, acted properly and within his powers in fixing the salaries and emoluments of the persons in the employment of the said company:

Assoilzie the defender from the conclusions of the libel, declaratory and petitory, in reference to said purchases, and in reference to the salaries and emoluments foresaid, and *quoad ultra* dismiss the said action: Find the pursuer entitled to expenses, subject to modification to the extent of one-fourth of the taxed amount, and remit," &c.

J. A. Beveridge appealed in his own name and in name of the company, and as a beneficiary under his father's settlement, against the judgments of the Lord Ordinary and the Second Division in so far as adverse to him.

A cross appeal was presented by Robert Beveridge and by the trustees of the late Mr. Erskine Beveridge.

At the conclusion of the argument the appellant's counsel read and delivered a minute showing the form in which he craved the House to deal with the case.

LORD CHANCELLOR.— My Lords, this very valuable manufacturing business appears to have been founded by the father of the present pursuer, and to have been carried on by him under the firm of Erskine Beveridge and Company. The state of things immediately anterior to the cause of dispute between the parties seems to have been this,—the founder of the business, the father of the pursuer, being at that time in bad health, entered into an arrangement with his son for allowing his son, the present pursuer, to become, at a period at some little distance from the date of the arrangement between himself and his son, a partner with himself in the business. The reason of this arrangement not being immediate was that there was an existing partnership between the father and another gentleman of the name of M'Cance, which was to subsist until the month of July 1865, and it was not desired that the son should enter into that partnership, but that the new partnership should commence when that original partnership between the father and the stranger terminated, and that the son should then be introduced into the business, namely, in July, 1865. In fact, the father died before the partnership between himself and his son ever commenced, he having [5] been somewhat out of health at the time when the arrangement was made with the son. He expired in the month of December 1864.

In making this arrangement with the son, the father provided that his brother, a Mr. Robert Beveridge, the uncle of the pursuer, should be the manager of the concern, with very full powers, which were expressed in a deed between the father and the son, but it was also expressly stated in that deed that it was to be without any prejudice to the rights of the son under the partnership.

That arrangement appears to have been the source of all the difficulties that arose between the parties. The father by his will made provision for the carrying on of the business, and for the son's having a larger share than under the original articles of partnership between him and his father, if they had taken effect in his father's lifetime, he would have had, his share being brought up to one-fourth of the whole, and the remaining shares being reserved for the benefit of the family of the father, who appointed certain trustees under his will, in whom those shares so retained for the benefit of his family should become vested. They became, in effect, vested accordingly in a joint body, namely, the trustees under the father's testamentary disposition, that is, the persons who were to hold the shares reserved out of his estate, one of whom was Mr. Robert Beveridge, the uncle of the pursuer, who was to carry on and manage the business in the same manner as had been provided originally in the articles between the father and the son.

This gentleman so managing the business with these full powers would manage in effect for, and on behalf of, both of the parties interested. He would manage it for the parties who represented the father's interest, of whom he was one, being one of the trustees under the father's will; and he would also be the manager of the concern, as between the father's share of the business and the son's, the pursuer's, but subject to all the pursuer's rights and interests *qua* partner.

Now, although there is no complaint made with respect to the effect of Mr. Robert Beveridge's management, which seems indeed to have been extremely prosperous,—at least, the pursuer makes no complaint in that respect,—he appears unfortunately to have arrogated to himself powers which certainly and beyond all dispute exceeded the powers vested in him as manager,—I say beyond all dispute, because he himself has not appealed against the decision which was come to in the Court below with respect to his exercise of some of those powers in which he seems to have proceeded to a very great length, undoubtedly in perfectly good faith, and acting, as he thought, for the

benefit of the partnership, but with a decree of arrogation of a power and authority which was not entrusted to him. I need only mention two instances of this about which there is no question at all, namely, the fact of his signing blank cheques, and leaving them to be afterwards filled up by a clerk,—that being done for the better management, as he supposed, of the business,—and the fact of his leaving large sums with different bankers, which, in fact, amounted to investments of the partnership property. Besides that, however, there were other matters which led to a dispute between the pursuer and his uncle, the pursuer being of opinion that the uncle's acts were acts of assumption of an authority which exceeded his powers, and which it was not agreeable to him, the pursuer, to submit to.

Amongst other things, great complaint was made in respect of two specific points, with regard to which the pursuer now asks your Lordships to reverse the decision of the Court of Session. The Court of Session have decided that there was an excess of power with reference to the mode in which this gentleman proceeded as regarded the signing of blank cheques, and the loans which have been made to the banks.

But there were two other main questions raised before us. The one was with respect to a considerable augmentation of the salary of certain clerks and other persons employed by the partnership, which augmentation was made without the concurrence of the pursuer by his uncle in his capacity as manager. The other main complaint was of the manager, Mr. Robert Beveridge, having ordered a considerable number of power-looms, instead of hand-looms, to be introduced, at a considerable expense, into the business. He justified this order by saying [6] that the power-looms were wanted for the requirements of the business, and therefore he insisted in ordering them with or without the concurrence, at all events without asking for the concurrence, of the pursuer in the present action.

The Court below appears to have been of opinion that these acts were done in his capacity of manager, and with the authority and power of manager, and that they were justified on that ground. It appears to me, my Lords, I confess, that when the matter is strictly analysed, this gentleman seems in some degree to have mistaken his position, in consequence probably in part of his having previously been in the habit of managing the business with full power, without any fetter or control upon his exercise of that power, and partly also in consequence possibly of his being misled by his double position, namely, as manager and as one of the trustees,—but only one of the trustees,—under the father's will, of the share in the concern held in trust for those for whom the father had ultimately designated it, namely, the other members of the family. But these acts were done by him as manager, and I apprehend that, as manager, he could not, any more than the manager of any other business, act contrary to the express wishes of the firm, or any member of the firm. What he might do with the concurrence of the whole firm, he joining in that concurrence on the part of his co-trustees as representing the reserved shares, would be a totally different matter for consideration. The question is, whether as manager *simpliciter*, he could have power or authority, if it were objected to on the part of any one of the partners, to do those acts which would necessarily lead to a very considerable change upon the partnership property, namely, the increase of the sums allowed to the clerks and the increase of the capital of the concern, if one may so say, by a considerable addition to the machinery, which is the fixed capital in the buisness.

It appears to be proved,—the success of the business seems to show it, and that probably influenced the views of the Judges in the Court below,—that it was for the benefit of the concern that these additional looms should have been introduced, and the measure may have been necessary if the existing contracts were to be fulfilled, or if the execution of fresh contracts was to be undertaken for which increased manufacturing power would be required. Then if the introduction of power-looms was to take place, if may very well be that it was necessary that the manager should be the person to effect it, but that necessity could only arise when it came to be the joint will of the whole firm, that that scheme should be adopted for carrying into effect the extension of the business with a view to its greater prosperity and efficiency. The business could hardly be enlarged except with the concurrence of the partnership as a whole. It would not surely be enlarged by the simple act of him whose sole duty it was to conduct and manage on behalf of those by whom he was employed as manager.

That being so, another point of considerable importance to the parties arose as

to how this gentleman was to act with reference to the use of the signature of the partnership firm to documents by which the partnership firm might be charged. There is an express article in the deed of copartnery that the firm is only to be bound when the signature of the firm is adhibited to writings which may be produced in order to charge them. The question arose as to whether Mr. Robert Beveridge was entitled to make use of the signature of the firm in his capacity of manager. The Court below appears to have thought that the difficulty would be sufficiently met by saying that, whenever he signed anything as manager, he should not write *per* procuration of the firm, but that he should sign his name as manager for the firm. But the pursuer, on the other hand, says,—and it has been argued before your Lordships in this appeal,—that what he is entitled to is this, that for the purpose of defining what documents were and what were not to be signed by Mr. Robert Beveridge a special mandate of authority should be given to him on behalf of the firm, defining what his duties were with respect to this extremely important and vital point in the management of all partnership concerns, namely, the use of the signature by which the partnership may be charged.

Accordingly, a form was sent to Mr. Robert Beveridge, on the part of the pur-[7]-suer, to be executed by him as manager, defining the exact extent of the power under which he was to act, and his refusal to execute this document—as, of course, he was entitled to refuse, if it simply came from the pursuer alone, and had not the concurrence of the other partners—has also become a matter in dispute, and it is one of the points which have been argued now before your Lordships. There was another point raised by the appellant upon which it appears to me that your Lordships may follow the course which has been adopted by the Court of Session in not expressing any opinion, for it is unnecessary that any opinion should be expressed upon it—namely, whether or not the pursuer was entitled to use the name of the firm—Messrs. Erskine Beveridge and Company—in proceeding with this action of his, instead of using his own name. Mr. Robert Beveridge does not simply act as manager, but he and his co-trustees are also, jointly as a body, partners in the concern, and they have a very considerable interest in the partnership. That being so, the Lord Ordinary decided that it was not competent to the pursuer to make use of the name of the firm for sustaining this action in his individual capacity; and although the Court of Session at one time threw out some observations upon the subject, in some degree favouring the contention of the appellant that he ought to be left at liberty to use the name of the firm in the present instance, yet, in their decision, they ultimately affirmed, or rather did not meddle, with the decision of the Lord Ordinary in that respect. They did not think it necessary to give any directions upon the subject; and I think it is not necessary for us to decide this point, which may possibly hereafter be one of some importance in some case where it is not merely an abstract question, but one upon which the suit itself must depend. I think it is not desirable that we should now express an opinion upon the subject, regard being had to the considerable difficulty which was suggested by some of your Lordships, and by the counsel on the other side, which might arise if it was competent for every member of a partnership who was dissatisfied with any arrangements that were going forward, although his partners might be satisfied with them, to use the name of the copartnery, in which case any other member of the copartnership, a second or a third or a fourth member of the partnership—all of them possibly taking different views—might take upon themselves to use the name of the partnership firm, and the result might ultimately be what, to our minds—perhaps because we are more accustomed to the English form of pleadings—would be an exceedingly embarrassing form of record.

With reference to the rest of the minutes that have been handed in on behalf of the pursuer, as the form in which he would ask your Lordships to deal with the decree of the Court of Session, it appears to me that your Lordships may well concur in the view taken with reference to the part that declares distinctly that the right of this gentleman, as manager, did not extend to those points which I have mentioned —namely, the increase of the salaries of the clerks, and the introduction of additional loom power—which meant in effect additional capital—into the concern, without the concurrence of the copartners, and also that part which required that Mr. Robert Beveridge shall accept such powers as may be given to him by the whole body of the copartners—when I say "the whole body of the copartners," I mean not the pursuer alone, but the body of trustees as representing the other share in the copartner-

ship as one body, and the pursuer himself as another member of the copartnership—and that that authority, if the parties should unfortunately differ, which we hope they will not, considering that the prosperity of the concern depends upon the good feeling amongst them, should be settled—if it cannot be otherwise settled—by the Court of Session, in order that there may be a final end of the question as to how, and in what form, the respondent, Mr. Robert Beveridge's power should be exercised with respect to documents to which he appends the partnership signature.

My Lords, I think these are really the main points which have to be determined in this case, and these minutes appear to me to provide for them sufficiently, except as to expenses. That part, I confess, I do not thoroughly comprehend, in the mode in which the minutes are framed. The expenses were [8] reduced, I think, by one-fourth in the Court below, and what we propose is, that that portion which is so deducted should be repaid in a manner which it appears to me, I confess, in this case, would be reasonable and proper, regard being had to the whole facts of the case—those facts being that this a suit in effect in the interest and for the benefit of the copartnership—that it is a suit in which all the rights of the copartnership are sought to be adjusted under an instrument which certainly introduced considerable difficulty in consequence of the way in which it was framed (namely, the appointment of Mr. Robert Beveridge for a definite term of years with an absolute power of managing—rights being still reserved to the copartner who was about to be introduced)—that a subsequent complication arose from the testamentary disposition of the founder of the business, by which he introduced the trustees into the copartnery, as representing, in their collective capacity, the share which he reserved for the rest of the family—that under that by no means easy arrangement between the parties, under which Mr. Robert Beveridge filled the two capacities of manager and trustee, a state of circumstances arose which had not been fully foreseen, and as to which all the difficulties had not been fully anticipated by him who was the author of the arrangement,—I say, having regard to these facts, it would not be unreasonable that the expenses should be paid out of the partnership funds, in which case the effect would be that the pursuer would bear a small portion of the expenses, but he would bear it in proportion to his interest in the concern, whilst the heavier portion would fall upon the share which represented the interest reserved by the father under his trust-disposition, to be distributed amongst the family, and the heavier portion falling upon that share would exactly represent the larger amount of interest which the holders of that share have in the settlement of this dispute.

LORD CHELMSFORD.—I entirely agree with my noble and learned friend. I shall very shortly go through the various heads of objection which have been made to the management. I advert, in the first place, to the assumption by Mr. Robert Beveridge of a right to bind the partnership by the signature of the partnership firm. It has been contended that he was entitled to do this as manager, or, if not as manager, as a partner, and especially as fortified by the mandate of his copartners. Now, it is perfectly clear that, as manager, he had no such power as he had assumed. In September 1864 he agreed to undertake the superintendence and management of the business on the 1st of July 1865, that being the time at which the existing partnership between Mr. Erskine Beveridge and Mr. M'Cance would terminate; and there was an additional memorandum that, in case Mr. Erskine Beveridge should die before the 1st of July 1865, then Mr. Robert Beveridge should enter upon the management, but without prejudice to the rights of Mr. M'Cance. In the copartnery deed between Mr. Erskine Beveridge and Mr. James Adamson Beveridge, which was to commence on the 1st of July 1865, at the termination of the former partnership, there is a clause that "the said trade and business, in all its departments, shall be more particularly under the charge and control of the said Erskine Beveridge during his lifetime, and, after his death, of his brother, Robert Beveridge, who has been appointed manager until the period fixed for the expiry of this contract, but that without infringing upon the copartnery rights of the said James Adamson Beveridge.

It was contended that the power which Mr. Robert Beveridge was to possess was equivalent to that which was possessed by Mr. Erskine Beveridge. But it is quite clear that that could not be so, from the very terms of the contract, because, in the first place, it is provided "that the copartnery shall be conducted under the style or firm of Erskine Beveridge and Company, and all obligations, bills, contracts,

accounts, and other writings relating to the said trade shall be taken and given under the said firm and designation, and either of the partners subscribing such firm shall bind the other partners to performance in matters of the company's trade, but no deed whatever that is not so subscribed shall bind them to performance." Now, Mr. Erskine Beveridge being a partner, was, of course, entitled under this deed, as any partner, would [9] be entitled in a partnership business, to sign for the partnership firm. But that it was not intended that Mr. Robert Beveridge should have a power equivalent to that of Mr. Erskine Beveridge, in this respect, is clear from another clause of the contract—the 12th—"The said parties bind and oblige themselves to grant the necessary procuration, or other authority which may be required in the exercise of his office as manager, by the said Robert Beveridge, in granting and subscribing obligations for or on behalf of the copartnery." Now, it is perfectly clear that the argument that the power which Mr. Robert Beveridge was to have was to be equivalent to that which Mr. Erskine Beveridge possessed cannot hold, and there is no doubt that, as manager, he had no power whatever to sign for the partnership firm.

But then it is said that he was a partner, and that as a partner he had a right to sign for the firm. Now, there were five trustees appointed by Mr. Erskine Beveridge, which five trustees were to carry on the business upon the death of Mr. Erskine Beveridge. It is said that each of these five trustees was a separate partner—and, there being power to add indefinitely to the number of partners, there might have been twenty instead of five—and if Mr. Robert Beveridge, by reason of being a partner, under those circumstances, was fairly entitled to use the partnership name, then each of these five or those twenty persons would be entitled to do the same. And that would certainly be a strong argument against the possibility of such a power having been conferred under the circumstances of a trusteeship of this kind. But the very terms of the deed show that the trustees, in their collective capacity, were to be the partner, as I must call it, in respect of the share of Mr. Erskine Beveridge, because, look at the 10th clause :—"In the event of the death of the said Erskine-Beveridge during the subsistence of this contract, the copartnery shall, notwithstanding, continue and remain in force as between the representatives or trustees acting under his trust-disposition and settlement on the one part, and the said James Adamson Beveridge on the other part." And if any doubt whatever could remain, I think it would be removed by the arbitration clause, the 13th :—"The said parties agree, in the event of any difference arising between them, or between the trustees and assignees of the said Erskine Beveridge and the said James Adamson Beveridge, anent the copartnery, or the true intent and meaning of these presents, to submit and refer the same to the determination of two arbiters, one to be named by each of the partners"—clearly meaning the trustees in their collective capacity as one partner and James Adamson Beveridge as the other—"or of an oversman to be named by the said arbiters in case of variance between them, whose decreet-arbitral to be pronounced shall be final and binding," not on all parties, but "on both parties."

Therefore it seems perfectly clear that the argument that Robert Beveridge, being one of the five trustees, was himself a partner, and that all the other trustees, of course in the same capacity, are partners too, cannot hold.

Then, with regard to the mandate of the co-trustees of Robert Beveridge, I doubt whether it could have any effect at all, because it was a mandate given before the partnership commenced. It was in January 1865 that the mandate was given, and the partnership was not to commence till July 1865. Therefore I doubt very much whether it could have the slightest effect. But, supposing it could have an effect, I think it is quite clear that the trustees, being the representatives of the share of Mr. Erskine Beveridge, and in that respect being one partner, had no right, as trustees, to delegate to one of their number all the authority to act, thereby resigning altogether their duties in respect of the trust which was imposed upon them. It is therefore clear, to my mind, that neither as manager nor as partner, nor under the mandate of the copartners, could Robert Beveridge have any authority to use the partnership name.

The other matters I will run over very quickly. One of the objections, and a very formidable one, is, that Robert Beveridge, when he was unwell and unable to attend to business, left blank cheques with the clerks, which they might fill up to any amount. Now, it is not necessary to say that that is a most hazardous way, undoubtedly,

of conducting a business of this kind, and one which might have led to considerable loss and injury to the partnership, and [10] that there could be no power whatever, either as manager or as partner, to conduct the business in that way. I will merely mention, with reference to that point, that the Lord Justice-Clerk and Lord Cowan, I think, said that although he might not leave with the clerks blank cheques, yet he might leave cheques signed to a limited amount. Now, I confess that it appears to me that he could not provide for the contingency in that way, more especially when there was Mr. James Adamson Beveridge, a partner, who might, in the absence of Mr. Robert Beveridge, if necessary, sign the cheques which were required for the business.

What has been said with respect to leaving blank cheques would apply equally to lending money to the banking companies. It is quite clear that without the consent of the whole of the firm such a course of proceeding could not be adopted.

Then, with respect to the removal of the hand-looms and the substitution of power-looms, I will assume that that was beneficial. It was said that Mr. James Adamson Beveridge had at one time sanctioned the alteration, and therefore he must be taken to have admitted that it was a prudent and proper course to pursue. But at the time when Mr. James Adamson Beveridge assented to the alteration he reserved to himself all his rights to object to the former removal without his sanction and approbation.

With regard to the agreements with the managers and clerks of course a manager would have a right to engage and dismiss ordinary workmen, but I do not think he would have any power to bind the partnership by agreements entered into for a term of years, so as to compel it to continue those persons in its employment.

I omitted to mention, upon the subject of the signature of the partnership name by Robert Beveridge, that I think the trustees are bound, under the terms of the partnership deed, to give a procuration defining and limiting the authority of Mr. Robert Beveridge as to granting and subscribing obligations. The clause is the 12th—"The said parties bind and oblige themselves to grant the necessary procuration or other authority which may be required in the exercise of his office as manager by the said Robert Beveridge in granting and subscribing obligations for or on behalf of the copartnery." Now the trustees represent Mr. Erskine Beveridge in this respect—he binds and obliges himself to do this—therefore I apprehend it was incumbent upon the trustees to define and limit the power which Mr. Robert Beveridge was to possess, as manager, with regard to subscribing obligations. My Lords, agreeing as I do with my noble and learned friend as to the result of our judgment upon the matter, I have nothing further to say.

LORD WESTBURY.—My Lords, I have only one word to add, in order to prevent the danger of any misconstruction of these minutes. The minutes contain a declaration which, I think, is quite right—that Mr. Robert Beveridge, in his capacity of manager, with regard to the past, had no right to bind the firm by any instrument executed contrary to the wishes of either the firm—that is, the trustees and the pursuer—or the partner, the pursuer. But the words that are put into these minutes are not only that he had not, but that he has not. Now, the position of Mr. Robert Beveridge as manager will be defined by procuration, mandate, and authority for the future, which it is directed shall be executed, and which the Court of Session are to settle if necessary. Therefore, my Lords, I should have thought that it would be better to take out the words "and has."

Sir Roundell Palmer.—There is no reason for keeping those words, if your Lordship thinks so.

LORD WESTBURY.—It would be better to strike them out, otherwise this declaration may come into conflict with the mandate for the future, as settled by the Court of Session. It will be better to leave the future position of the manager to be wholly defined by that document and by that authority. Then the declaration will only amount to this, that, with regard to past transactions, Robert Beveridge had no authority to bind any reluctant partner. That would [11] certainly be quite right. With regard to the future, his rights will be defined by law. If that be so, the course would be to strike out the words "and by," and restore in their place the word "or," as suggested in the pursuer's original minute.

Sir Roundell Palmer.—Before your Lordship puts the question perhaps you will permit me to remind your Lordship that there was a cross appeal, which was directed

against the interlocutor so far as it dealt with the question of signature. That, I presume, your Lordships will dismiss, and you will say whether you do or do not dismiss it with costs.

LORD WESTBURY.—My Lords, I feel that the whole question is so much one with regard to the future, that I should be very glad if the parties would permit the cross appeal to be merged in the general consideration applying to the whole of the proceedings—namely, without weighing in very nice scales the right or the wrong in the conduct of an individual, to let the whole expense of the proceedings in the Court below be paid out of the partnership funds.

Sir Roundell Palmer.—I have not a word to say against that.

LORD CHANCELLOR.—Then the cross appeal will be dismissed, and the costs of all parties in the cross appeal will be added to the costs of the original appeal.

The following judgment was pronounced:—"It is ordered and adjudged that the said interlocutor of the Lords of Session in Scotland of the Second Division, of the 20th of July 1869, complained of in the original appeal, so far as it finds that any writings which the defender Robert Beveridge may have occasion to subscribe, as manager of or acting for the company, must be signed by him with his own name, as such manager, or as acting as aforesaid, be varied, by substituting for the words 'have occasion,' the words 'be entitled': And it is further ordered and adjudged, that the said interlocutor of the 20th of July 1869, so far as it finds that Robert Beveridge acted within his powers as manager in the purchase of power-looms for the use of the company, and in the displacement of hand-looms, in order to the putting up of such power-looms within the works of the company, be, and the same is, hereby reversed; and, instead thereof, it is hereby declared, that the said Robert Beveridge had no power or authority, against the remonstrances of the pursuer, James Adamson Beveridge, to make purchases of new and additional power-looms, or other machinery, on account of the copartnership, or to remove from the partnership premises the hand-looms, or other machinery previously used therein, in order to the reception of such new and additional power-looms or machinery, or to alter or adapt the factory for the reception of any machinery of a different character from that placed under the care of the defender, Robert Beveridge, as manager of the works: And it is further ordered and adjudged that the said interlocutor of the 20th of July 1869, so far as it finds that the said Robert Beveridge acted properly, and within his powers, in fixing the salaries and emoluments of the persons in the employment of the said company, and so far as it assoilzies the defenders from the conclusions of the libel, declaratory and petitory, in reference to the said purchases, and in reference to the salaries and emoluments aforesaid, and *quoad ultra* dismisses the action—and also so far as it modifies the expenses to which the pursuer, James Adamson Beveridge, is found entitled to the extent of one-fourth of the taxed amount, be, and the same is, hereby also reversed: And it is hereby further declared, that the defender [12] Robert Beveridge has not, apart from his co-trustees, the right to act as a partner of the firm of Erskine Beveridge and Company, and that the rights of the pursuer, James Adamson Beveridge, as such partner, are not superseded or in any respect impaired by the appointment of the said Robert Beveridge as general manager thereof, and that the said Robert Beveridge had no right, power, or authority to enter into any written or other contracts or agreements with the managers, heads of departments, or clerks of the said copartnership, which the firm, or the pursuer, James Adamson Beveridge, as a partner therein, disapprove or object to, and that the said Robert Beveridge is bound to accept, and that the other defenders, as trustees and partners with the pursuer, the said James Adamson Beveridge, are bound to join with the said pursuer in granting to the said Robert Beveridge a written procuration, mandate, or authority, authorising him to sign writs and documents as manager for and on behalf of the copartnership, and specifying the mode in which he shall sign them—the terms of such procuration, mandate, or authority to be adjusted by the Court of Session in case of difference between the parties: And it is further ordered and adjudged that it be remitted to the Court of Session to give effect to the above declarations, and to grant interdict restraining the defender, Robert Beveridge, from doing any act contrary thereto: And it is further ordered and adjudged that the said cross appeal be and the same is hereby dismissed this House: And it is further declared that, under the special circumstances of this case, it appears to this House to be right that the expenses of both parties of the proceedings in the Court of Session,

and also the costs of both parties—(appellants and respondents)—of both the appeals to this House, should be paid out of the estate of the copartnership now subsisting; and it is hereby directed accordingly;" and cause remitted.

SIMSON & WAKEFORD, London—WOTHERSPOON & MACK, S.S.C.—WILLIAM ROBERTSON, London—T. J. GORDON, W.S.

No. 2. X. MACPHERSON H.L. 12. 1 March 1872. House of Lords.—Lord Chancellor (Hatherley); Lord Chelmsford; Lord Westbury.

MRS. MARY MACKENZIE CATTON AND ALFRED ROBERT CATTON (Pursuers), Appellants.—*Pearson, Q.C.—J. M. Duncan.*

KENNETH MACKENZIE (Defender), Respondent.—*Lord-Adv. Young—Sir R. Palmer, Q.C.—Shand.*

Entail—Limitation—Provisions—Rutherfurd Act, 11 & 12 *Vict. c.* 36.—A deed of entail, after prohibitions against altering the order of succession, alienation, and contracting debt, proceeded thus,—"But with and under this exception, that it shall be lawful to" the institute and to the heirs of tailzie, "notwithstanding the limitations before written, to provide their younger children with three years free rent of the lands"; "but declaring that, where such power has been exercised, it shall not be lawful or in the power of any subsequent heir of tailzie to burden the lands and estate with new provisions until the former provisions are satisfied"; and declaring further, that no adjudication or other legal execution shall lie or be competent against the fee or property of the said lands and estate, or any part thereof, for payment of such provisions to younger children; nor shall it be lawful to nor in the power of any of the said heirs of tailzie to sell or dispone the said lands and estate, or any part thereof, for payment of the said children's provisions." The validity of the entail having been challenged, on the ground that the exception from the fetters, to the extent of making provisions to children, left an heir of entail to that extent a fee-simple proprietor able to burden the estate, and that the declaration [13] that the estate should not be adjudgeable was ineffectual to stay diligence to recover debt, *held* that the entail was valid.

(In the Court of Session, 19th July 1870, *ante*, vol. viii. p. 1049.)

On 14th July 1838 the late Murdo Mackenzie, formerly of Ardross, then fee-simple proprietor of Dundonnell, in the county of Ross, executed a deed of entail in the form of a procuratory of resignation, whereby he granted procuratory for resigning the lands of Dundonnell and others into the hands of his immediate lawful superiors for new infeftment of the same, to be granted to Hugh Mackenzie, his eldest son, as institute, and the heirs whomsoever of his body; whom failing, to Kenneth Mackenzie, his second son (the respondent in this appeal) and the heirs whomsoever of his body; whom failing, to certain other persons.

This deed was recorded in the Register of Taillies on the 8th of December 1838, being several years before the death of the maker, Murdo Mackenzie, which occurred on 9th May 1845.

On this event his eldest son, Hugh Mackenzie, succeeded under the procuratory to the lands of Dundonnell and others, and completed a title thereto, by infeftment, conform to instrument of sasine dated 15th, and recorded in the General Register of Sasines at Edinburgh 23d May 1845.

Besides the lands of Dundonnell and others, which he possessed under the procuratory, Hugh Mackenzie was, in and prior to the year 1854, likewise in possession of the lands of Strathnashalg and Mungusdale, also situated in the county of Ross, under fee-simple titles.

On 4th July 1854 Hugh Mackenzie executed a trust-disposition and settlement, whereby he appointed W. F. Skene, W.S., Edinburgh, and Mary Mackenzie, his (Mr. Mackenzie's) daughter, now Mrs. Catton, one of the appellants, as his trustees, and

conveyed to them (1) the said lands of Strathnashalg and Mungusdale *nominatim*; as also (2) " all and sundry lands and heritages, goods and gear, debts and sums of money, and in general the whole estate and effects, heritable and moveable, real and personal, of what kind or nature soever, or wheresoever situated, presently belonging, or which shall pertain and belong " to him at the time of his death, for the uses and purposes therein set forth. These purposes were (1) for payment of debts, (2) that the trustees should hold the residue of his whole heritable and moveable estate, particularly and generally conveyed to them, in trust for behoof of the appellant, Mrs. Catton, until she reached twenty-five years of age or was married, and (3) on the occurrence of either of these events the trustees were directed to convey to her, exclusive of the *jus mariti* of any husband she might marry, the residue of the whole heritable and moveable trust-estate.

Hugh Mackenzie died on 30th July 1869.

In December 1869 the appellants, Mrs. Catton and her husband, raised the present action, concluding for declarator (1) that the deed of entail of 1838 " is not a valid deed of entail in terms of the Act 1685, c. 22, but is invalid and ineffectual in regard to all and each or one or other of the prohibitions against altering the order of succession, against sales and alienations, and against the contraction of debt, therein contained; Or, otherwise, that the prohibitory, irritant, and resolutive clauses contained in the said deed of entail are not, or one or other of them is not, directed against, and were not or was not binding upon the said Hugh Mackenzie, the institute or disponee under the said deed of entail, and that, in either event, in virtue of the Act 11 & 12 Vict. c. 36, he, the said Hugh Mackenzie, at and from the date thereof, viz. the 14th day of August 1848, held the said lands and estate of Dundonnell and others free from one and all of the said prohibitions, and clauses irritant and resolutive, and [14] subject to his deeds and debts; (2) that the said Hugh Mackenzie did, by his foresaid trust-disposition and settlement, validly and effectually dispone and convey to his testamentary trustees the foresaid lands of Dundonnell and Aultchonier." The other conclusions of the summons were subsidiary.

The procuratory of resignation which constituted the deed of entail, after narrating the resignation to be made of the lands of Dundonnell in favour of Hugh Mackenzie, as institute, and the heirs substituted to him, declares that this was to be " with and under the restrictions and limitations under-written: viz. with and under this special limitation and restriction, that it shall be nowise lawful to, or in the power of, the said Hugh Mackenzie or his heirs, nor any of the heirs and substitutes above specified, to innovate, alter, or infringe this present tailzie, or the order of succession hereby established, or to do or grant any other act or deed that may infer any alteration, innovation, or change of the same, directly or indirectly. . . . And with and under this limitation and restriction also, that it shall not be lawful to, nor in the power of, the said Hugh Mackenzie, or the heirs of entail above specified, or any of them, to sell, dispone, alienate, burden, dilapidate, or put away the lands and others above-written, or any part thereof, either irredeemably or under reversion, or to contract debts, grant bonds or any other securities, or to do any act, civil or criminal, that shall be the ground of any adjudication, eviction, or forfeiture of the aforesaid lands and estate, or any part thereof, or anyways to affect or burden the same; nor shall the said lands and estate, nor any part thereof, be affectable or subject to any terce to the wife of the said Hugh Mackenzie, or to the wives of the heirs and substitutes above written, or any of them; but with and under this exception from the foresaid limitations, that it shall be lawful to and in the power of the said Hugh Mackenzie, and the heirs of tailzie before specified, as they come in course to succeed to the said estate, to provide their wives in a liferent locality of any part of the lands and estate before written, not exceeding one third part of the free yearly rent of the said lands and estate, after payment of all public burdens, liferent provisions, and the yearly amount of other burdens of whatsoever nature affecting the same, and provided the said wives shall not be anyways infeft and secured in any yearly interest or annuities to be uplifted furth of the said estate, or any part thereof, in lieu or consideration of the liferent provisions hereby allowed to be granted, but shall be infeft in the said lands themselves by way of locality, so as that the liferenters may uplift and receive the rents, and the succeeding heirs of tailzie may not be bound for payment thereof, or the fee and property of the said lands and estate afterwards affected therewith; but declaring that it shall be noways lawful to include or comprehend

in such liferents the mansion-house of Dundonnell, or enclosures adjacent thereto; and with and under this farther exception, that it shall be lawful to the said Hugh Mackenzie, and to the heirs of tailzie above specified, notwithstanding the limitations before written, to provide their younger children with three years' free rent of the said lands and estate; but declaring that, where such power has been exercised, it shall not be lawful or in the power of any subsequent heir of tailzie to burden the lands and estate with new provisions until the former provisions are satisfied and paid, and in case a part thereof shall be paid, then it shall be lawful to the said heirs of tailzie to provide their younger children in so far as the prior provisions are extinguished, so that the lands and estate shall at no time be burdened with provisions to younger children to the extent of more than three years' free rent thereof, after deduction of all other burdens; and declaring further, as it is hereby ex-[15]-pressly provided and declared, that no adjudication or other legal execution shall lie or be competent against the fee or property of the said lands and estate, or of any part thereof, for payment of such provisions to younger children, nor shall it be lawful to nor in the power of any of the said heirs of tailzie to sell or dispone the said lands and estate, or any part thereof, for payment of the said children's provisions."

The pursuers (appellants) maintained—1. That upon a sound construction of these clauses it followed "(1) that, consistently with the provisions of the entail, the institute and the heirs-substitute respectively might contract debt, by way of provisions to younger children, to an extent at least equal in amount to three years' free rent of the estate; (2) that, consistently with the provisions of the entail, the institute and heirs-substitute respectively might burden the estate with such provision debt; (3) that, consistently with the provisions of the entail, the creditor in right of such debt might, under the powers of sale in his bond, sell the estate, or part thereof, for payment of such debt; (4) that, consistently with the provisions of the entail, the creditor in right of such debt might adjudge the estate for payment thereof, or, at all events, that the creditor in right of such debt contracted by the institute might do so; and (5) that, consistently with the provisions of the entail, the institute might himself sell the estate, in whole or in part, for payment of such debt." *

2. The pursuers further maintained that the resolutive clause was not directed against Hugh Mackenzie, the institute, in respect that the word "person" therein could not be held to include him, seeing that the right to the estate was declared to devolve upon "the next heir of tailzie,"—words which could not apply to the first substitute.

3. The irritant clause was objected to on the ground that the words "debts and deeds" therein did not include or apply to alterations of the order of succession.

The pursuers pleaded;—(5) The said procuratory or deed of entail being an invalid and ineffectual entail, the lands therein contained were, in terms of the 11th & 12th Vict. c. 36, liable to the deeds and debts of the said Hugh Mackenzie. (7) In virtue of the directions and clause or clauses of conveyance contained in the said trust-disposition and settlement, the pursuers are entitled to decree in terms of the second, third, and fourth conclusions of the libel.

Defences were lodged for Kenneth Mackenzie (the respondent), in which he pleaded that he was entitled to absolvitor, in respect (1) That the deed of taillie of 1838 was a valid and effectual strict entail. (2) That even on the assumption that the entail was defective, as alleged by the pursuers, the trust disposition and settlement of the late Mr. Mackenzie did not operate as a conveyance of these estates, or interfere with the taillied destination thereof. (3) That Mr. Mackenzie did not intend to convey the estate of Dundonnell by the said trust-disposition and settlement, and that he did not thereby convey that estate.

On 7th June 1870 the Lord Ordinary (Mackenzie) pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators, and considered the closed record, and deed of entail libelled on, Repels the pleas in law for the pursuers, assoilzies the defender from the whole conclusions of the summons, and decerns: Finds the

* Lindsey v. Oswald, *ante*, vol. iii. H. of L. p. 17; Hay Newton v. Hay Newton, May 9, 1870, *ante*, vol. viii. H. of L. p. 75; Earl of Kintore v. Lord Inverury, April 16, 1863, *ante*, vol. i. H. of L. p. 33; Martin v. Kelso, 1857, 2 Macq. 556; Cathcart v. Cathcart, 1831, 5 W. and S. p. 344; 11 & 12 Vict. c. 36; Howden v. Rocheid, July 16, 1869, *ante*, vol. vii. H. of L. p. 110.

pursuers liable in ex-[16]-penses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor to tax and to report." *

[17] The pursuers having reclaimed, the First Division being of opinion that it was desirable to avoid the question of the validity of the entail, in which [18] substitute

---

* "NOTE.—The pursuer, Mrs. Mary Mackenzie Catton, and her husband, have raised the present action to have it found and declared that the deed of entail under which the deceased Hugh Mackenzie, the institute, was infeft in and held the lands and estate of Dundonnell, is invalid and ineffectual, and that the said lands and estate were conveyed and carried by Mr. Mackenzie's trust-disposition and settlement, under which Mrs. Catton is now the sole beneficiary.

"The pursuers maintain that no limitation was imposed by the deed of entail on Hugh Mackenzie, the institute, as to the mode in which, or the time when, he might have granted and made payable the provisions to younger children mentioned in the entail, and that the said Hugh Mackenzie, the institute, was not prohibited from contracting, but was permitted to contract debt for children's provisions, for which the entailed estate of Dundonnell might be adjudged during his life or after his death. And further, that the said Hugh Mackenzie was permitted by the entail to sell the said estate for payment of such children's provisions.

"The prohibitory clause is directed both against the institute, Hugh Mackenzie, and the heirs and substitutes of tailzie, and prohibits in full and distinct terms alteration of the order of succession, sale, alienation, contraction of debt, the doing of any act which shall be the ground of any adjudication, eviction, or forfeiture of the estate, and the affecting or burdening the same in any way. This is not disputed by the pursuers. But they maintain that these prohibitions are inserted in the entail with and under the exception therefrom 'that it shall be lawful to the said Hugh Mackenzie, and to the heirs of tailzie above specified, notwithstanding the limitations before-written, to provide their younger children with three years' free rent of the said lands and estate,' and that while there is a declaration in the deed of entail directed against the heirs of tailzie, there is no declaration directed against Hugh Mackenzie, the institute, that it should not be lawful to sell or dispone the entailed estate, or any part thereof, for payment of the said children's provisions. The pursuers contend that this clause with reference to younger children's provisions derogates from the prohibitory clause, and that it was competent to Hugh Mackenzie, the institute under it, to have granted provisions to his younger children, payable not only on his death, but during his lifetime, and to have burdened the entailed estate with these provisions, and also to have sold it for payment of them.

"The Lord Ordinary can see no sufficient grounds on which the construction of the clause as to children's provisions contended for by the pursuers can be maintained. He considers that this clause merely conferred power upon the institute and heir of entail to grant provisions of three years' free rent to those of his children who at his death should occupy the position of younger children. The term 'younger children' in such a clause excludes, he thinks, the interpretation that such provisions could be granted so as to be prestable during the life of the institute. These words, according to their ordinary construction, mean children who do not take the entailed estate, whether their position in the family be older or younger than that of the heir succeeding thereto. The term 'younger children,' according to its true construction in the deed of entail, therefore applies, and can only apply, to those who answer the description at the death of the institute or heir in possession—Dickson, 12th June 1854, 1 Macq. 729. A power to grant provisions to younger children of so many years' free rent is an ordinary clause in deeds of entail. The mode of exercising the same is also well known. The provisions made in virtue of it are invariably prestable only upon and after the granter's death. The institute, or heir in possession, could do with the rents accruing during his life as he pleased. No empowering clause was required to enable him to do so. But at his death all right as proprietor under the deed of entail ceased, and in order to enable him to provide for his younger children out of the rents falling due after his death an express power in the deed of entail was required prior to the passing of the Aberdeen [17] Act. The clause in the deed of entail in question is a clause conferring such power. Indeed the clause expressly speaks of the right conferred as a 'power'; and its whole tenor

heirs who had not appeared in the action were interested, unless it was necessary for the decision of the case, took up the question of the effect of the general convey-

---

shows, the Lord Ordinary is of opinion, that it merely conferred power upon the institute and heirs of entail to grant provisions to younger children, which, when granted, the subsequent heir or heirs of entail would be liable to implement. No power was given to burden the estate, to contract debt upon it, or to convey or sell it for payment of these provisions. All such deeds were expressly prohibited by the prohibitory clause. The power conferred is merely 'to provide younger children with three years' free rent'; and that power must, it is conceived, be exercised in accordance with the plain meaning of the words employed, and subject to the very clear conditions of the prohibitory clause. The deed expressly declares that no heir is to be entitled to exercise this power until former provisions should be satisfied, and if in part satisfied, then only to that extent; and in order to exclude from affecting the fee all diligence from being used, and all deeds granted for payment of these provisions after they became payable, either by the younger children or those in their right, or by the heir or heirs who should succeed, the clause with reference to children's provisions concludes by a declaration 'that no adjudication or other legal execution shall lie or be competent against the fee or property of the said lands and estate, or of any part thereof, for payment of such provisions to younger children; nor shall it be lawful to nor in the power of any of the said heirs of tailzie to sell or dispone the said lands and estate, or any part thereof, for payment of the said children's provisions.' The fee of the estate could not be affected, but only the rents falling due after the death of the granter. No doubt the latter part of this clause does not apply to the institute. But that was a proper omission, seeing that implement of any deed of provision which the institute or an heir might grant could only be asked upon his death from the succeeding heir. It was also unnecessary, because the previous prohibitory clause clearly applied to the granter of such a deed, and excluded him from selling or disponing the estate in implement of younger children's provisions, or doing anything in virtue of which it could be adjudged.

"2. The pursuers further maintained that the resolutive clause is not directed against Hugh Mackenzie, the institute, in respect that the word 'person' therein cannot be held to include him, seeing that the right to the estate is declared to devolve upon 'the next heir of tailzie,'—words which cannot, they say, apply to the first substitute. The Lord Ordinary considers this objection to be inconsistent with the plain meaning of the words—Syme *v.* Dickson, 27th February 1799, Dict. 15,473, and 4 Paton, 471. He is also of opinion that the resolutive clause is full and complete, and that the words at the close of the irritant clause do not derogate from it—Elibank, 21st November 1833, 12 S. 74.

"3. The irritant clause was objected to on the ground that the words 'debts and deeds' therein do not include or apply to alterations of the order of succession. The Lord Ordinary is of opinion that this objection is groundless, seeing that the debts and deeds declared null and void are 'all the debts and deeds' of the institute and heirs, contracted, made, or granted 'in contravention of this present tailzie, and provisions, conditions, restrictions, and limitations herein contained.' These words can only be interpreted as applying to the whole provisions of the prohibitory clause—Lumsden, 2 Bell's App. 104; Anstruther, 2 Bell's App. 242; Kintore, 4 Macq. App. 520. The irritant clause also clearly and distinctly declares all adjudications or other legal executions or diligences to be null that shall happen to be obtained or used against the fee or property of the said lands and estate, or any part thereof, upon all such debts or deeds. The irritant clause, therefore, applies to everything done in violation of the prohibitions mentioned in the deed, either by the institute or heirs of entail, and against all adjudications or diligence used upon the same. This includes [18] younger children's provisions, adjudications and legal execution on which are also in a previous part of the deed declared incompetent—Elibank, 12 S. 74.

"After careful consideration, the Lord Ordinary is of opinion that the objections stated to the Dundonnell entail are groundless, and that it is a valid and effectual entail in terms of the Act 1685, c. 22, and that the trust-disposition and settlement of the institute did not operate as a conveyance of the estate of Dundonnell, or interfere with the destination in the deed of entail."

ance, and subsequently pronounced this interlocutor:—"Recall the interlocutor, sustain the second and third pleas in law for the defender; in respect thereof assoilzie the defender from the conclusions of the summons, and decern: Find the pursuers liable in expenses," &c.

The pursuers appealed against both interlocutors.

Upon the question of the validity of the entail the appellant maintained that consistently with the provisions of the entail (1) both the institute and the heirs of entail might burden the fee of the estate for children's provisions to the amount of three years' free rent; and (2) the institute might sell portions of the estate for payment of such provisions, thus rendering the estate or part thereof liable to be evicted from succeeding substitutes, contrary to the requirements of a strict entail under the Act 1685, c. 22. The declaration by the entailer, that adjudication was incompetent, was inoperative, as the creditors could not be prevented from attaching an estate for a debt which its owner could contract.

LORD CHANCELLOR.—My Lords, in this action Mrs. Catton sought to recover the estate of Dundonnell. The ground upon which she proceeded was this—That she was entitled, by virtue of a deed of disposition of a testamentary character made by her father, Mr. Mackenzie (she not being legitimate), to the whole of the property of which he was entitled to dispose. She says that this property, Dundonnell, was in such a position that he was, notwithstanding a certain deed of taillie, entitled under the Rutherfurd Act to make this disposition, and that, although the testamentary disposition contained no direct mention of Dundonnell, but did contain direct mention of another property called Mungusdale, still it contained general words of disposition which were sufficient to dispose of the Dundonnell estate, had it been in his power to dispose of it. Against this claim on her part two propositions were maintained by the respondent, the heir of taillie under the original entail of Dundonnell. First, it is said that the entail was a perfectly good entail under which he claims his right and interest; and, secondly, that even if it were not so, even if the property were subject to the disposition of Mr. Mackenzie, yet he has not in effect by the general disposition contained in the testamentary instrument made an effective disposition of this property.

The Lord Ordinary pronounced a judgment in favour of the respondent upon the first point, namely, that the taillie was a good and subsisting taillie, and was on that account placed sufficiently beyond the control of Mr. Mackenzie.

The case was then brought by way of appeal before the Lords of the First Division, and they passed by the question as to whether or not the instrument of taillie was effective under the Rutherfurd Act, and, passing by that question, they came to a conclusion in favour of the respondent equally effectual for his purpose of resisting this action. They held that the general words employed in the deed of disposition would not pass Dundonnell, even if it was subject to the disposition of Mr. Mackenzie. They therefore recalled the interlocutor of the Lord Ordinary, but decided upon the other point in favour of the respondent.

My Lords, the appellant now seeks at your Lordships' bar to sustain that in-[19]-terlocutor, in so far as it recalls the decision of the Lord Ordinary, but to reverse that interlocutor in so far as it sustains the pleas in law in favour of the respondent upon the second point.

Now, we have heard a very elaborate argument on behalf of the appellant with reference to the second point, namely, whether or not the deed of disposition would pass the estate supposing it were subject to the disposition of Mr. Mackenzie. But we were very desirous to hear a full argument upon the first point, namely, the validity of the deed of entail, for certainly the doctrine that was contended for on behalf of the appellant was exceedingly wide in its extent and consequences. Mr. Duncan most ably argued the case, and most clearly brought out the points which he undertook to sustain in objection to the deed of taillie, and he admitted that the question was one affecting the validity and sufficiency of a very large number of entails which had been made under the Act of 1685, which, if we were to hold the construction now contended for of the 43d section of the Rutherfurd Act, would be more or less very seriously jeopardised, if not rendered wholly ineffective, as the result of any decision that we might come to in the present case in favour of the views which Mr. Duncan maintained.

Now, the point which arises upon the deed of tailzie is this—It is contended that

that deed is perfect and effectual in the destination of the property as regards the taillie *per se*, supposing it to stand by itself. It is conceded also,—I think I may say, because there was no very great stress of argument upon that part of the case,—that with the exception of provisions which might be made for younger children upon the part of the institute or of the subsequent heirs of tailzie, there was a sufficient prohibition against encumbering the estate, charging it with debt, or alienating it. So far the deed is admitted to be an effective and valid deed under the Act of 1685. But there was contained in the instrument a provision by which a sum, not exceeding three years' free rent, might be charged for the benefit of younger children, either upon the part of the institute or upon the part of the heir of tailzie. When I say "charged," of course it was a question which was raised in the discussion of the case in the Court below, as to how far a direct and distinct charge making this a burden on the estate, which could be realised by adjudication (should the money be raised by means of any security given for the purpose of obtaining a provision for the younger children), was effectively provided for in the deed, and if it was so provided in the deed, whether the releasing of the fetters by which the estate was bound, to the extent of enabling such a burden to be laid upon the estate, was or was not a relaxation of the fetters of the entail which brought the case within the provisions of the 43d section of the Rutherfurd Act, and placed the tailzie wholly at the disposal of the institute or of the heirs of tailzie, in consequence of the instrument falling within the description of being an instrument which was rendered invalid by the operation of the 43d section of the Rutherfurd Act.

Now, the Rutherfurd Act, 11th & 12th Vict. cap. 26, section 43, enacted "That where any tailzie shall not be valid and effectual, in terms of the said recited Act of the Scottish Parliament passed in the year 1685, in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, in consequence of defects either of the original deed of entail or of the investiture following thereon, but shall be invalid and ineffectual as regards any one of such prohibitions, then and in that case such tailzie shall be deemed and taken, from and after the passing of this Act, to be invalid and ineffectual as regards all the prohibitions; and the estate shall be subject to the deeds and debts of the heir then in possession, and of his successors, as they shall thereafter in order take under such tailzie; and no action of forfeiture shall be competent at the instance of any heir-substitute in such tailzie against the heir in possession under the same by reason of any contravention of all or any of the prohibitions."

Now, the question is, whether or not what is here done in this tailzie brings the tailzie within the provisions of the Act. The argument has been this, that if you look to the words by which provision is allowed to be made for younger children to the extent of three years' rent, although you do find general clauses, [20] resolutive and irritant, all of them effectively framed with regard to charging, or encumbering, or alienating, or disponing the estate, yet you find a subsequent relaxation to the extent of a provision of three years' free income for the benefit of younger children, remitting the person in possession to his original position with regard to his right, to that extent at least, of encumbering the property; and that therefore the deed of tailzie is an invalid instrument under the Act of 1685, as not having complete and perfect prohibitions properly and adequately fenced with regard to charging and encumbering the property.

One main point to be considered before entering into the details is this, whether or not it is a sound and rational construction of the clause in the Rutherfurd Act, that a relaxation for a limited purpose, and to a limited extent, of the prohibitory clauses with regard to encumbering or disponing the estate, is to have the effect not merely of releasing the fetters and opening the tailzie to all those who may be in possession to the extent to which it is opened, and for the purpose for which it is opened by the provision which is so made for children, but whether it shall also have the effect of opening the whole property to absolute disposition upon the part of every heir of tailzie who shall be in the ordinary course in possession.

Now, the mischief which it was intended by the Act to remedy was certainly not one of that character. The mischief which was intended to be dealt with was this—that there were, not unfrequently, entails under the Act of 1685 in which, although care had been taken in their preparation to make a decided and close entail of the whole property, yet through some degree of hesitancy at one particular moment

on the part of those who prepared them, or from some accidental slip of some kind or another in the directions given by the parties for the preparation of the instruments, a case sometimes arose in which one particular person in possession might not have been sufficiently provided against in reference to his acts or deeds in regard to dealing with the property. The Rutherfurd Act struck immediately at this, and said that it should not be left to this uncertain and unsettled state, that one of the heirs of tailzie in the course of succession should not have the absolute and entire disposal of the whole property, but that if one heir could dispose of it, then it should be open to every heir who came into possession to deal with it as if it were an estate which was not subject to restrictions imposed upon it by the stringent operation of the Act of 1685. So, again, with reference to encumbering or charging. If it was in the power of any one of the heirs of entail to charge or encumber or dispone the whole or any part of the property without any definite purpose being specified (like a provision for younger children), then, in order to avoid the inconveniences which were found to arise from having estates unreasonable fettered in the manner I have described, advantage should be taken by each and all of the heirs of tailzie, of doing that which any one of the heirs of tailzie might do from the want of adequate provision being made with regard to securing the property against his acts or encumbrances. But to say that, if there is any power reserved of relaxing the fetters for any special given purpose, such as a provision for younger children, defined and limited as it is here—for the 43d section in that case strikes against the whole disposition and destination of the property under the deed of tailzie—appears to me to be an unreasonable conclusion to arrive at. It was candidly admitted by Mr. Duncan that the determination in support of which he has argued is one which has never yet been arrived at, although there are numerous instances in which, if your Lordships should now for the first time so decide, the point might arise, and tailzies which exist in large numbers under the Act of 1685, hitherto unimpeached by the operation of the 43d section of the Rutherfurd Act, would be effectually destroyed. That of itself seems to me to be a sufficient reason why one should be very careful in holding that if there be any remission or relaxation of the fetters imposed upon an estate with regard to this distinct and specific purpose, that circumstance should not lead your Lordships to come to the conclusion that the whole entail of the estate is destroyed.

Now, the particular questions which are raised in this case are some of them of the very minutest description; and I prefer resting upon the broader ground [21] that a case in which a provision is made for younger children in the way in which it has been here made is not a case to which the 43d section of the Rutherfurd Act has any application at all. But even supposing it had any application, it is a matter for serious consideration whether the argument of Mr. Duncan has satisfied your Lordships that this is in effect a power against charging and affecting this estate inconsistent with the prohibitory clauses. It is expressly provided in the instrument that no creditor shall have the power of adjudication. Of course one agrees at once with the argument of Mr. Duncan, that you cannot give a man a charge over an estate and say that he shall not exercise all his remedies for that charge, but there is no more difficulty in the Scotch law, any more than in the English law, in providing in the instrument by which you are supposed to raise this fund for the benefit of younger children, security for the payment of the money and the mode of payment, so that there shall never be execution against the estate on the part of the creditor—*volenti non fit injuria*; and as regards the creditor, I apprehend that there is a mode in which he could deal with the property in order that his security may be realised without affecting the estate. But further than that, it is said that, as regards Mr. Mackenzie at least, there is no provision against his raising the money in any mode in which he thinks fit, because when you come to the provision as regards the specific power (there being a general provision which affects undoubtedly Mr. Mackenzie as well as anybody else in the succession) it is said that none of the "heirs of tailzie" shall be able to raise this particular charge by way of charge or encumbrance, and so on; but the word "heirs of tailzie" would not include Mr. Mackenzie, who was the original institute in the entail. I think that the Lord Ordinary has dealt with that question in a satisfactory manner, by saying that as regards the first taker, Mr. Mackenzie, there wanted no relaxation at all to enable him to deal with the property in any way he might think fit during his lifetime as regarded the rents and profits. The charge is only to be effective by way of encumbrance as against those whom

the person in possession could not effectually charge under the restrictions imposed upon him by the deed of entail. As against them it would, no doubt, be necessary that he should have power and authority if the money is to be raised by way of charge as against their interests. But the charge in this case, your Lordships will observe, is a charge entirely for the benefit of younger children—and authorities are cited in the case of the respondent which seem to hold in the Scotch law, as we do in the English law, that the position and status of younger children is a matter not to be ascertained until the death of the parent; because the construction in Scotch law, as in English law, is that the younger child is a child unprovided for in this sense, that the child does not take the estate—the heir according to the destination succeeds to the estate under the tailzie, and the younger children are unprovided for at the death of the person, whether he is the institute or one of the heirs in succession. At his death it is ascertained who are the younger children who are unprovided for; so that, leaving this matter open as regards Mr. Mackenzie, the institute, it would not be a fatal objection (if it could at all prevail, which I think it could not) as to the relaxation not having been made in his case in such a manner as to enable him to charge the estate, contrary to the general prohibitions against disposing and charging the estate. But these are mere matters of detail. And when the case stands upon a ground of such importance as this case does stand upon, as affecting all dispositions of Scotch property under deeds of tailzie, I very much prefer resting the decision upon this ground—which I trust will be your Lordships' opinion—that the 43d section of the Rutherfurd Act, dealing with invalid and ineffective entails, does not include the case of a provision being made for younger children in the mode and form in which it is here made, and that, when the fetters are relaxed to that extent and for that purpose, they are not so relaxed as to enable the estate to be dealt with in a manner contrary to the provisions and purpose of that 43d section. I think the 43d section is intended only to have the general view I have attributed to it, and if any corroboration is wanted of that view there is certainly something remarkable in this, that some sections (I think it is the 25th) in the Rutherfurd Act carefully looks at provisions being made for younger children, and even actually gives the power of disposing of the fee [22] in the very case which the Lord Ordinary described of the three years' rent—only in that form, and not accompanied by any power of disposition. It would be a very singular thing indeed if the provision made in the bulk of Scotch settlements for younger children, which the very Act we are now considering, the Rutherfurd Act, recognises as an object worthy to be pursued and facilitated, should have this result, that by some unforeseen effect of the language of the 43d section the whole of the entail should be destroyed and swept away simply because there is this particular provision made for a particular case.

I apprehend that the doctrine would be similar, and similarly applied, with regard to any similar limitations of excepted portions of the estate. One of my noble and learned friends put the case of a small portion of feuing or building ground. It would be very singular if the relaxation of fetters of the entail for that particular purpose were to have the effect of destroying the whole of the limitations of the entail. But, without pursuing that argument with respect to other supposable cases, I think in this particular case, as regards the provisions for young children, it would be an erroneous construction that this Act should have that enlarged application given to it for the first time. And it is sufficient to say, therefore, that upon that ground, and for that reason, the decree of the Lord Ordinary was perfectly right. If that be so, I presume that the course now to be taken will be to recall the decision of the Inner-House in all respects, except so far as it decrees expenses to be paid, and to affirm the decree of the Lord Ordinary, and to give to the respondent the expenses of this appeal.

LORD CHELMSFORD.—My Lords, as your Lordships have arrived at the conclusion that this appeal may be satisfactorily determined upon the question of the validity of Murdo Mackenzie's entail, I cannot help regretting that we have not the advantage of the opinions of the learned Judges of the Court of Session on the subject, as it is admitted that there are no previous authorities to guide us, but that the case is one of the first impression, to be decided upon principle, upon which the judgment of those familiarly conversant with the law of Scotch entail would have been pre-eminently useful.

After the best consideration I have been able to bestow upon the subject, and

notwithstanding the very able arguments of Mr. Duncan, I have satisfied myself that there is no ground for impeaching the validity of the entail.

Before the passing of the Rutherfurd Act a tailzie made under the Act of 1685, c. 22, in which any of the prohibitions contained in it were not fenced by proper irritant and resolutive clauses, was void only as to that prohibition, and effectual for the rest. But by the 43d section of the Rutherfurd Act (11 & 12 Vict. c. 36), "where any tailzie shall be invalid and ineffectual as regards any of the prohibitions against alienation and contraction of debt, and alteration of the order of succession, it shall be deemed and taken to be invalid and ineffectual as regards all the prohibitions."

The objection made to the present tailzie is, that it contains no effectual provision against burdening the estate with the payment of debts. The tailzie is made "under the limitation and restriction that it shall not be lawful for Hugh Mackenzie, or the heirs of entail, to sell, dispone, alienate, burden, dilapidate, and put away the lands, or to contract debts, &c., or any ways to affect or burden the same, under this exception, that it shall be lawful for them, notwithstanding the limitations before-written, to provide their children with three years' free rent of the said lands and estate. The irritant clause provides, that "if Hugh Mackenzie or the heirs of tailzie shall contravene any of the conditions, provisions, or limitations, by acting contrary to them, or any of them, excepting as is above excepted, the person so contravening shall forfeit all right, title, and interest to the foresaid lands and estates."

It was argued on behalf of the appellant that the effect of the exception of the provision for younger children was to enable Hugh Mackenzie or the heirs of tailzie to burden the lands and estate. This, it was contended, was shown by the clause declaring that where such power has been exercised it shall not be lawful or in the power of any subsequent heir of tailzie to burden the lands and estate with new provisions until the former provisions are satisfied and paid, [23] and by the following words:—"That the lands and estate shall at no time be burdened with provisions to younger children to the extent of more than three years' free rent thereof,"—the words "three years' free rents," it was said, merely limiting the quantity of the burden. It was therefore insisted that the irritant clause referring to the above exception rendered it imperfect, and that there was no fence against the burdening of the estate; and, consequently, the whole entail was invalid.

I certainly am disposed to think, with the Lord Ordinary, that the fair construction of the exception is, that it merely confers a power on the institute and heirs of entail to grant provisions of three years' rent to those of his children who should occupy the position of younger children at the time of his death. I agree that the established rule in construing entails is, in cases of doubt, to adopt that construction which will release the estate from the fetters; but that rule does not appear to me to be applicable here. This is not a question as to the meaning of the fencing clauses of the entail, but as to the extent of an exception out of the limitations and restrictions imposed upon the institute and heirs of entail, and the consequent reference to this exception in the irritant clause. Now, the exception is to provide the younger children with three years' free rent of the lands and estate. This is an ordinary provision for younger children in deeds of entail. And the following words against burdening the lands with further provisions till the former ones are paid, ought, in my opinion, although inaccurately expressed, to be construed as prohibiting any further provisions being made out of the rents till those for the three years have been satisfied. And I put the same construction upon the words, "so that the lands and estate shall at no time be burdened with provisions to younger children to the extent of more than three years' free rent"; which may mean, and I think ought to be construed to mean, that there shall be no obligation to provide free rents of the lands and estate beyond three years.

I am a good deal influenced in my view of this provision for younger children from its following a restriction upon any ways affecting or burdening the estate, and being followed by a clause that no adjudication or other legal execution "shall lie or be competent against the fee or property of the lands and estate, or any part thereof, for payment of such provisions to younger children." Now, if the provisions to younger children were a burden upon the estate, this exemption of the lands and estate from execution for payment of the provisions would be utterly void; and therefore it appears to me that the intention of the parties as to the

nature of these provisions, being clearly expressed originally, it ought not to be affected by any inaccurate description in the reference to the provisions afterwards.

But, assuming that the proper construction of the provision for younger children extends it not merely to the rents, but to the estate itself, then the effect of it will be that the estate, to the extent of this provision, may be altogether removed and withdrawn from the prohibition of the entail. Consequently, the exception out of the irritant clause in no way disables it and renders it invalid and ineffectual as regards the prohibition against burdening the estate, but merely expresses that it shall not extend to the portion of the estate which would thus be withdrawn from the entail.

The conclusion at which I have arrived is, that the provision for younger children either is confined to the rents of the estate, and therefore is not a burden upon the estate, and consequently does not offend against the prohibitory clause, or that, if it is to be regarded as giving a power to make a disposition of the estate itself for the provisions for younger children, the irritant clause excepts it as not within its province, that clause being a perfect fence against a disposition of the rest of the estate. *Quacumque via* therefore it appears to me that the entail is valid.

I think that the appeal should be disposed of as proposed by my noble and learned friend.

LORD WESTBURY.—My Lords, in the Court below there were two issues—one, that this was an imperfect and therefore an invalid deed of tailzie; the other, that [24] the deed of tailzie being invalid, the estate passed under the residuary gift contained in the trust-settlement of Mr. Hugh Mackenzie, and that that residuary gift was of sufficient power to evacuate the destination contained in the deed of tailzie. Now, if the first issue be found in favour of the claimant, the second issue does not arise. And the more natural course therefore is to consider the first issue. I thought that ingenuity had been exhausted in raising questions upon the Act of 1685; but that does not appear to be the case, and it probably never will be the case. And accordingly we have now an attempt to impeach a tailzie on the ground of its being imperfect, although, with regard to the estate, so far as it is left within the operation of the fettering clauses, there is no attempt to contend that any portion of the fettering clauses is invalid or ineffectual as a proper fetter in the deed of tailzie.

The attempt that has been made here is, that the appellant seeks to avail himself of the exception in the deed of tailzie of making a modified provision for younger children. He says that that exception relaxes the fettering clause so far as to admit of the estate being dealt with to a limited extent, and that therefore that exception prevents the operation of the deed as a complete deed of tailzie. And then he contends that a deed of tailzie which is an imperfect deed of tailzie in that sense is a deed of tailzie falling within the operation of the 43d section of the Rutherfurd Act.

Now, the 43d section of the Rutherfurd Act is limited entirely and expressly to all cases where some one of the fetters is imperfect in consequence of a defect either in the original deed of entail or in the investiture following thereon. It says,—"Where any tailzie shall not be valid and effectual in terms of the said recited Act of the Scottish Parliament, passed in the year 1685, in regard to the prohibitions against alienation and contraction of debt," and so forth. Now, I do not mean to say that if there be an exception enabling you to relax the estate from the fetters of the entail to a considerable extent, and enabling you to burden or dispone the estate by virtue of that exception, so as to withdraw from the fetters a portion of the principal of the estate, there might not be some validity in the argument, or at all events some reason for considering it well before you came to the conclusion that such general provision might be inserted in the deed of tailzie. But that is not the case here. The exception here, making the estate liable to a particular charge, limits the amount of the charge, and is so carefully worded that it does not open the door to charging the principal of the estate, or disposing or aliening any portion of the principal of the estate; but the remedy for the sums which the heir of tailzie is enabled to raise for younger children is to be sought only in the ordinary remedy against the rents and profits of the estate. Accordingly the exception is guarded by a due set of restrictions—first, that no advantage shall be taken of it to subject the estate to any adjudication; neither shall advantage be taken of it to enable the heir of tailzie to dispone or sell any part of the estate. Consequently, the ordinary remedy of a mortgagee, or of a bond creditor, or of a judgment creditor, or

of an alienee, is entirely taken away. The only thing that is given is the power to raise three years' rent out of the rents of the estate. Therefore it is impossible to say that the exception can be made the means of withdrawing any portion of the principal of the estate from the fetters of the deed of tailzie.

Well, now, is there any objection to this? It has been done in hundreds of tailzies. It exists at this present moment in, I dare say, a very great number of deeds of tailzie; and if it were possible now at this time of day to open the door to another doubt upon the effectual operation of the Act of 1685 we should unsettle an enormous number of titles, by reason of our entertaining a doubt which has not been thought of up to the present moment; for it was candidly admitted by the counsel for the appellants that they could cite no case, nor even a dictum, to the effect of warranting the general proposition that a limited provision for younger children, so guarded that it cannot be made a means of destroying the effect of any one of the fettering clauses, would be an objection to the validity of the entail under the statute.

Your Lordships will observe that it is not a faculty. It is an exception. It is a provision undoing the fetters to a certain extent, and the limitations upon [25] the use of the power are part of the exception itself. The fetters are relaxed and fall off from so much of the estate as will enable you to raise the amount of the three years' free rent, and to raise it in a manner which shall not admit of adjudication, or of alienation, or of mortgage of any part of the principal. It is impossible to hold that that has the effect of withdrawing any part of the principal or the estate from the fetters of the entail. Entails are made, and have been made for centuries, with provisions for limited purposes, relaxing the fetters in a certain definite and restricted manner in order to accomplish those purposes, as in the case of granting feus of small plots of land for building purposes; but these provisions are quite consistent with the maintenance of the entails.

It was objected that the fencing clauses which accompany the exception itself were bad, because they did not apply to the institute. It is quite clear that they could not apply to the institute, for the provision or exception only becomes available in the case of the institute at the death of the institute, when the objects entitled to the benefit of the exception can for the first time be ascertained.

There were two or three other exceptions which I think were not much relied upon here, but which appear to have been taken before the Lord Ordinary. One was as to whether the words "acts and deeds" extended to prohibit alienation, and so forth. Those points, I think, are hardly worthy of the attention they seem to have been regarded with by the Lord Ordinary, and here, I think, they were, very rightly, not insisted upon.

What, then, is the result? It is unquestionable that this deed of tailzie contains everything which the statute requires. It contains, with regard to the whole *corpus* of the estate, completely valid and effectual fettering clauses. It relaxes these clauses only to the extent of three years' rent, to be received and recovered as rent, and that for a purpose which was consistent with the object of the settlement. We should do very great mischief if we encouraged ingenuity further than it has hitherto been encouraged in discovering doubts as to the operation of the Rutherfurd Act. The statute requires that which I have stated to your Lordships, and we have it here. In this case the fetters of the entail are relaxed for a purpose which is usually provided for in all settlements, and which will certainly be found in a great majority of the settlements constructed under the Act of 1685.

I think, therefore, that this attempt to impugn this tailzie has failed in every respect. There is no colour for it either in the language of the statute or in the language of the deed of tailzie. Nor is there any support for it to be derived from authority, nor even from what are called in Scotland (with very great comprehensiveness of name) text writers. And I think your Lordships will feel considerable satisfaction in discouraging attempts of this kind by dismissing the appeal as thoroughly unfounded, and by dismissing it with costs. But in doing so we must provide for the peculiar made in which the case has been disposed of in the Court below. The Lord Ordinary pronounced for the validity of the entail. It went to the Inner-House, and the Inner-House recalled the Lord Ordinary's interlocutor not because it was wrong, but because they thought it preferable that the judgment should be upon the second issue instead of the first. I submit to your Lordships that we must recall that interlocutor, because that interlocutor recalls the interlocutor of the Lord

Ordinary; and, therefore, I should propose to your Lordships to make your order in this form :—" Recall the interlocutor of the Inner-House, save so far as it finds the pursuer liable to expenses; and affirm the interlocutor of the Lord Ordinary; and direct that the respondent's costs in this appeal be borne and paid by the appellants."

Pearson.—Will your Lordships allow me respectfully to point out that the interlocutor of the Lord Ordinary, which your Lordship proposes to set up, really decides the question of the conveyance, which, I understand, your Lordships do not intend to pronounce any opinion upon, because " the Lord Ordinary repels the pleas in law for the pursuers, assoilzies the defender from the whole conclusions of the summons, and decerns." Now, the last plea in law for the pursuers was that which related to the disposi-[26]-tion of conveyance. And I would humbly suggest that it should be, " repels the first six pleas in law for the pursuers, and in respect thereof assoilzies the defendant."

LORD WESTBURY.—We could not do that; we must exhaust the whole action. I see no objection to the form of the order which has been proposed.

Interlocutor of the Inner-House recalled, save so far as it finds the pursuers liable in expenses, and interlocutor of the Lord Ordinary affirmed.

JOHN GRAHAM, Westminster—MURRAY, BEITH, & MURRAY, W.S.—LOCH & MACLAURIN, Westminster—W. F. SKENE & PEACOCK, W.S.

No. 3. X. MACPHERSON H.L. 26. 22 Feb. 1872. House of Lords.—Lord Chancellor (Hatherley); Lord Chelmsford; Lord Westbury.

WILLIAM HARVEY (Pursuer), Appellant.—*Sol.-Gen. (Sir G. Jessel)*—*Anderson, Q.C.*

ARTHUR FARQUHAR (Harvey's Trustee), (Defender), Respondent.—*Lord-Adv. Young—Sir R. Palmer, Q.C.*

Husband and Wife—Divorce—Donatio propter nuptias—Provisions.—An antenuptial contract of marriage provided that the annual interest of certain funds provided partly by the husband and partly by the wife's father should be paid to the husband during the survivance of both spouses, and, after the dissolution of the marriage by the death of either, to the survivor. The husband having been divorced by his wife on the ground of adultery, *held* (*aff.* judgment of the Court of Session) that thereafter the wife was entitled to the whole interest of the trust-funds as if her husband had been dead.

(In the Court of Session, July 12, 1870, *ante*, vol. viii. p. 971.)

This was an action by William Harvey, who had been divorced by his wife on the ground of adultery, against Arthur Farquhar, his sole surviving marriage-contract trustee, for exhibition of the accounts, and count, reckoning, and payment as to the interest of the marriage-contract funds.

The facts were these :—By antenuptial contract of marriage, dated in 1842, between the pursuer and Miss Hunter, with consent of her father, the pursuer bound himself to pay to certain trustees the sum of £4000, and Miss Hunter disponed and assigned to the trustees the whole sums of money and estate to which she should become entitled in virtue of two bonds of provision which her father bound himself to execute in favour of his younger children,—the one over his entailed, and the other over his fee-simple estates.

The objects of the trust were :—" (Third), During the joint lives of the said William Harvey and Rachel Hunter, the said trustees shall pay the interest or annual proceeds of the trust-funds received by them to the said William Harvey for the maintenance and support of himself and his spouse and family, after deduction always of all expenses and disbursements incurred by said trustees in the matters of this trust. (Fourth), On the dissolution of the marriage by the death of either of the contracting parties, in the event of there being children of the marriage alive at that time, the

trustees are to pay the interest or annual proceeds of the whole trust-funds to the survivor of the contracting parties, during all the days of his or her life, and after the death of such survivor the trustees are to pay the principal sums to the children of the marriage equally among them, share and share alike, as they attain the age of majority. . . . (Fifth), That on the dissolution of the marriage by the decease of the said Rachel Hunter without issue thereof, or, leaving issue thereof, who shall all predecease the pursuer, the trustees shall pay and make [27] over to the pursuer, as his own absolute property, the principal sum of £4000 sterling, settled by him as aforesaid, and shall further pay to him during his life the free annual proceeds of such funds as shall come into their hands, in virtue of the bond of provision and obligation before referred to of the said William Hunter, and that after the pursuer's death the trustees shall pay the said principal sums received in virtue of the said bond of provision and obligation to the heirs or assignees whomsoever of the said Rachel Hunter; and in the event of the pursuer predeceasing the said Rachel Hunter under the like circumstances, then the trustees shall pay and make over to her, as her own absolute property, such funds as shall have come into their hands under the said bond of provision and obligation, and also during her life the annual free proceeds of the said principal sum of £4000 secured by the pursuer; and that after her death they shall pay the said sum of £4000 to the heirs and assignees whomsoever of the pursuer."

In 1844 the pursuer granted a bond to the trustees over his estate for £4000, and on Mr. Hunter's death in 1866 two sums were paid to the trustees to account of his daughter's share of the bond over his entailed estates, and of his residuary estate. No sum had as yet been received from the bond over the unentailed estates.

In 1848 the pursuer was divorced for adultery. There were three children of the marriage, but two died before reaching majority, and only one survives. Mrs. Harvey subsequently entered into a second marriage. From the date of the divorce she received payment from the trustees of the interest of the trust-funds. The pursuer objected to these payments.

The pursuer pleaded;—(1) The defender is, under the contract of marriage libelled on, bound to pay the interest of the trust-funds to the pursuer. (3) The decree of divorce has not the effect of depriving the pursuer of the rights pertaining to him under the contract of marriage in reference to the trust-funds in question.

The defender pleaded;—(6) In respect that the pursuer was divorced for adultery, he forfeited all right under the marriage-contract, and, in particular, all right to the income of the trust-funds in question, and the same became payable to his wife as if he were naturally dead.

This interlocutor was pronounced:—"Find that there are no grounds set forth by the pursuer upon which he can support the conclusions of the summons, and therefore assoilzie the defender thereform: Find the pursuer liable in the expenses of process," &c.

The pursuer appealed.

LORD CHANCELLOR.—My Lords, in this case the appellant, Mr. Harvey, seeks at your Lordships' hands the reversal of certain interlocutors which have been pronounced by the Lord Ordinary and the Court of Session in Scotland with reference to his rights in certain funds which were settled by a contract which he made upon his marriage with his wife, a lady of the name of Hunter. The marriage appears to have been an unhappy one, inasmuch as not very long after it had been contracted it was dissolved by a sentence of divorce pronounced in the proper Court on account of Mr. Harvey's adultery. It is said that the sentence was pronounced in his absence; but whatever may have been the form in which the proceedings were taken, no steps have ever been taken to set aside that sentence; and for nearly twenty years this divorce has continued in full effect.

The question that is brought before your Lordships for consideration is as to the effect of that divorce upon the interest which Mr. Harvey would, except for the divorce, be entitled to under and by virtue of the marriage-contract. The marriage-contract provided funds derived from two sources,—partly derived from Mr. Harvey, the intended husband, and partly derived from his intended wife's [28] property. It is not very material what the proportions of their several contributions were; they appear to have been about £4000 on the part of the husband, and £1700 or thereabouts on the part of the wife, besides certain other provisions made by a bond.

Now, these particular funds in question in this case before your Lordships were vested in trustees, and the trustees were directed to invest them, from time to time, in the manner described in the contract of marriage; and after they had been so invested they were directed to be dealt with in the following manner:—"First, That the sums of money and others falling under this trust shall be held by the said trustees, exclusive of the *jus mariti* or right of administration of the said William Harvey, which he thereby for ever renounces, and shall not be subject or liable to his debts or deeds, or the legal diligence of his creditors." Secondly, the direction was a trust to invest. And thirdly, the direction was, that the income was to be paid to the husband for the maintenance of himself and his wife, and any children of the marriage. The fourth direction was, that the income was to be paid, in case there were any children, to the survivors of the husband and wife; and if there were no children there was a further disposition which it is not necessary for me to mention, because, in the events which have happened, there is a child existing at this present moment, and the limitations over would make no difference with regard to the matter which we are now called upon to decide.

What has been decided in the Court below is this, that in consequence of this divorce of Mr. Harvey for adultery, he being the offending spouse, all his interest in the property disposed of by this contract of marriage at once ceases, just as if he were actually dead, and that the wife's rights are immediately brought into operation in the same manner as if the offending spouse had predeceased her.

That principle appears to have been one which has been settled by authority in Scotland for between two and three hundred years. But it is said that the point has never been brought under the consideration of your Lordships' House, and that, therefore, whatever may be the opinion of the Judges in Scotland, bound as, of course, they would be by so long a series of decisions as has undoubtedly taken place, it is competent for your Lordships to review those decisions, and to see if they rest upon a sound and sure basis, and particularly to examine whether they have not arisen from an error which commenced at a very considerable distance of time back (however long it may be), which being demonstrated, as the appellant undertook to demonstrate it, to be an error, ought now to be corrected, and set right by a contrary course of decision, in which the Judges in future would be guided by the opinion which your Lordships should come to in this particular case.

Now, the case seems to stand thus:—As long ago as 1573, that is nearly 300 years from this time, a statute was passed in Scotland with reference to desertion by a husband of his wife. That statute was framed in a somewhat singular manner. Proceedings were to be taken to establish the fact of wilful desertion, desertion after remonstrance, the party being summoned in the proper way before a Court sufficiently constituted for that purpose, and it was to be ascertained whether he persisted obstinately in the act of desertion. If so, a course was taken for his excommunication, and a course was then taken for his divorce; and a forfeiture was declared by the statute undoubtedly of all the goods and provisions made in respect and in consideration of the marriage, whether made from the property of the wife or of the husband. There was some little contest and discussion at your Lordships' bar as to the latter, but I think the statute plainly intimates that all the provisions made in respect of and in regard to the marriage, including the provision made by the husband, were to be forfeited as if the husband were dead, as the Judges have decided in the case with regard to the present divorce of Mr. Harvey.

It is then said that by an error originated by one who bears a very great name, Lord Stair, the Judges by degrees began to assume that by analogy to this statute they would be entitled to say that in cases of divorce, which would be analogous to desertion on the part of the husband, on the supposed ground that the husband could no longer consort with his wife, and that she could no longer be required to consort with him, the same description of forfeiture ought to take [29] place, and that his interest under the marriage-contract would, on similar grounds of reasoning, be lost to him by way of forfeiture, just as if he had predeceased his spouse.

Now, whatever may be said as to some expressions which are found undoubtedly on the part of the learned Judges, to the effect of an analogy having been followed with regard to that statute, even down as late as the case of Beattie *v.* Johnstone,*

* Johnstone Beattie *v.* Johnstone, Feb. 5, 1867, *ante*, vol. v. p. 340.

where, in the opinion of Lord Curriehill, something is said which appears to have a little bearing that way, I think your Lordships will be of opinion that the appellant cannot succeed by resting his case upon that supposed error having prevailed as a ground of decision; because, when the matter comes to be sifted, the argument comes to this:—Anterior to the Reformation there was no possibility of divorce. That is true as to divorce *a vinculo*. And that being so, it was argued by the Solicitor-General that there cannot have been any common law which authorised this forfeiture, and that the statute law, which was directed against one particular offence, namely, desertion, cannot be extended to another independent offence which it was not intended to strike at; and then he said that there was another, a different statute, by which a forfeiture was effected of the property, or at least the moveable property, of the husband to the Crown, and that it would be inconsistent with such a statute as that to say that any analogy could now be set up by which it could be said that the property of the offending spouse was not to be forfeited to the Crown, but was to cease for the benefit of the unoffending spouse.

But in pursuing that line of argument it is forgotten that although there was no divorce *a vinculo*, yet at all times, both when the Roman Catholic Church prevailed in Scotland, and also down to the present time, there has been a divorce *a mensa et thoro*, independently and irrespectively of the divorce *a vinculo matrimonii*. It appears by some ancient authorities,—one of them being as old as 1540, anterior to the statate of 1573,—that with regard to a part of the property, the property I think that was provided by the wife in that particular case, a forfeiture did take place as if the husband were dead, upon the simple ground of the divorce *a mensa et thoro*, as we should call it, having taken place upon his default,—that is to say, through his adultery. That appears to have rested in great measure upon doctrines in Scotland of a far severer character with reference to the crime of adultery than any which exist in this country; because there appears to have been a statute in Scotland at one time, which is probably obsolete at present by desuetude, though it has not been distinctly repealed, by which the offending husband in the case of his adultery was to be punished by death. Therefore, one can see many reasons operating upon the minds of those who had to decide cases of this description in Scotland which would scarcely be held to be a legitimate foundation for similar decisions in our English Courts, and one can understand how it came to pass that at the time I mentioned, anterior to the statute, namely, in 1540, a doctrine could be held that forfeiture, in respect of the husband's adultery, took place in exactly the same manner as if he were actually dead, and removed therefore from any rights under the nuptial contract.

Now, that being so, there is a series of decisions from that time downwards which were said, indeed, in argument to have originated in this mistake of the distinguished jurist, Lord Stair, but which, if it was a mistake, appears to have been participated in by all the learned Judges who succeeded him, down to the very recent case of Beattie *v.* Johnstone, where the principle certainly appears to have been tried to the utmost. It is not necessary for us on the present occasion to pronounce any opinion upon the particular circumstances of that case. I only mention it for this reason, that Lord Curriehill, who differed from the rest of the learned Judges in that case, for particular reasons, himself said that the law was undoubted, it having been settled by a long course of decisions, that the husband forfeited, as if he were dead, all his rights under the nuptial contract, in consequence of his adultery.

In that case of Beattie *v.* Johnstone the father had agreed to pay during his [30] (the father's) lifetime, to his son, whom failing, to his intended wife, an annuity of £200 a-year. The husband having committed adultery, it was held in pursuance of this long course of decisions, that he was out of the way just as if he were actually dead, and that the annuity to the wife, which was only covenanted with the father to be paid to her upon the decease of her husband, not upon his divorce, became immediately payable. The case is a remarkable one certainly, as carrying the doctrine with regard to adultery to a very great extent. Lord Curriehill objected to its being carried to that great extent, and opposing his view to the view of the rest of the Court in that respect he nevertheless intimated that the matter was quite settled with reference to the provisions made as between the intended spouses *inter se* in the marriage-contract.

My Lords, having stated this I think that I have stated all that is necessary to be stated in this case, to show that we should not take upon ourselves to alter a

course of settled decisions which seems to extend backwards for a period of nearly, if not quite, three hundred years; because, in the arguments in some cases which have taken place, and in some text writers, and possibly in some dicta of Judges, we may find a reason assigned for that course of decision, which, possibly, it may be difficult to support, namely, the reason of analogy with the statute, which has been relied upon in some of the writers as the cause of this law having now become the established law of Scotland. Now, an application of one penal statute to another case by analogy, of course, would be a very serious thing, and not one that your Lordships would be inclined in any way to sanction by your authority. But, on the other hand, we have great reason to suppose, looking at what happened before the passing of the statute, and looking at what was the law of Scotland with regard to adultery, that the statute with respect to desertion followed the analogy of the law that existed with reference to divorce *a mensa et thoro*, in consequence of the husband's adultery, because it is remarkable that in that statute proceedings were directed to be taken to bring the matter to a case of divorce before the penalty was actually inflicted. You begin with desertion, then proceedings are taken to render that desertion plain and manifest as an act of obstinate and wilful desertion on the part of the husband, then you proceed to divorce, and then you proceed to the penalty in question. I do not see in any of the authorities which have been cited that I can find any distinction between the forfeiture of the provision brought in by the wife and the forfeiture of any provision made by the husband. It is simply a forfeiture of all his rights under the marriage-contract, which takes place just as if he were actually dead.

The case of Justice *v.* Murray (1761, Mor. 334), which was referred to as simply a case depending entirely on its own peculiar circumstances, and the reasons given for it, are perfectly consistent with the general doctrine. In that case, the lady having recovered other rights, namely, a jointure to which she was entitled by virtue of this doctrine, took upon herself afterwards to seek to recover a tocher which had been paid to the husband, and which had become mixed up with his property, and which (as was said in that case) was on that account not recoverable by her; for that was the reason given for the decision, whether good or bad. It is not necessary to inquire whether the decision was a correct decision or not—that is immaterial to the present question altogether—but that decision is put upon that ground that the tocher had become mixed with his property, and that all her right was only to be exactly in the position in which she would be if he were dead, and that if he were dead she would not recover the tocher. If that be so that case would have no application to the present; but it was ingeniously attempted to make an application of it by saying that the payment by these trustees into the wife's hands of the interest from the funds since the separation was in fact a payment made to the husband himself. Of course it could be no such thing. The limitations and declarations of trust affecting the fund are declared in the marriage-contract; these limitations for the benefit of the husband are limitations which, according to the law, he is unable to retain, because he is taken to be dead and to have predeceased his wife; and the wife, therefore, was correctly held in the Court below to be entitled to the benefit of those provisions, which, in fact, she has enjoyed for the last twenty years.

[31] My Lords, that is all that appears to be necessary to be said upon this particular case. In my judgment the decision of the Court of Session ought to be affirmed, and the appeal dismissed, with costs.

LORD CHELMSFORD.—My Lords, the appellant claims by his action the right to have an account and payment of monies received by the trustee under a marriage-contract entered into prior to his marriage with Rachel Hunter. The provisions in this contract were, on the one hand, a sum of £4000, which the appellant bound himself to pay to the trustees, and on the other, certain sums which the father of Rachel Hunter agreed to provide on the part of his daughter. The whole of these funds were to be held by the trustees in trust during the joint lives of the two parties, for the maintenance and support of the appellant and his spouse and family, and upon the death of either of the spouses the interest was to be paid to the survivor, and upon the death of the survivor the principal sum was to be divided equally amongst the children of the marriage.

The marriage took place on 1st February 1842. In January 1847 Mrs. Harvey obtained a decree of divorce from her husband on the ground of his adultery, and

afterwards married a second time. There is one child of the first marriage living, a daughter, who is married and has children. Since the divorce the trustee has paid the interest of the £4000 to the wife, and it is now, after the lapse of more than twenty years, insisted by the appellant that these payments were wrongful.

The ground upon which the payments were made to the wife is, that by the divorce for adultery the appellant lost all benefit under the marriage-contract, and that his wife became entitled to its provisions as if the marriage had been dissolved by his death.

It is unnecessary to dwell upon the argument which was first addressed to us on the part of the appellant, that there was no law in Scotland that a husband divorced for adultery forfeits anything; but (as was said) that after the passing of the Act of 1573, which provided for a divorce for non-adherence, and the consequences of such a divorce to the offending party, the Judges acted by analogy to this Act, and made the same law applicable to a divorce for adultery.

I think there is ample proof that before the Act of 1573, the law of divorce for adultery existed by the common law. It is true that before the Reformation there could be no divorce *a vinculo*, but there were divorces for adultery *a mensa et thoro*; and the same consequences followed from these divorces, and attached upon the guilty party, as from divorces *a vinculo*.

It is admitted that there are several authorities in support of the position that upon a divorce for adultery the offending party loses all the benefit which he is entitled to under the marriage-contract. But these decisions have never been appealed from, and the appellant questions their propriety. It is, however, a strong presumption in their favour that they have been acquiesced in for many years, and that such institutional writers as Lord Stair, Lord Bankton, Erskine, and Bell, have treated the law upon the subject as settled.

Some question was raised indeed as to the authenticity of the passage cited from Lord Stair, book 1, tit. 4, s. 20, where he speaks of marriages dissolved by divorce either upon wilful non-adherence or adultery giving to the party injured the same benefit as by the other's natural death, in so far as the words "or adultery" are contained in it. But we cannot entertain any doubt of the accuracy of the printed edition of Stair, when we are informed that in no fewer than nine manuscripts of this work in the Advocates' Library the words "or adultery" are to be found.

It is, however, argued that the forfeiture which is incurred by the husband's adultery, and consequent divorce, must be confined to the benefit which he derives from his wife's fortune. But there is no ground for such an argument if the bond for £4000 provided by the appellant in the marriage-contract is a *donatio propter nuptias*, which it may be observed is something different from a tocher, as the Act of 1573 makes a distinction between them in providing that "the party offender shall tyne and lose the tocher and *donationes propter nuptias*." The tocher I understand to be the marriage portion or dos which the [32] wife brings to her husband. If that be paid over to the husband at the time of the marriage, it may be that upon a divorce on account of his adultery he may not be bound to restore it. But if the effect of such a divorce be that the provisions of the marriage-contract are to be dealt with as if the offending party were naturally dead, there is no reason to be given why, upon such an event, the interest of the offender in a *donatio propter nuptias* should not cease, and the right of the innocent party immediately commence and take effect.

A rather extraordinary argument was addressed to us on the part of the appellant, to prove that there was no forfeiture of his rights by the divorce. It is provided by the marriage-contract that the sums of money falling under the trust shall not be subject or liable to his "debts or deeds or the legal diligence of his creditors." It was said that "deeds" here means acts, and that the divorce was the act of the appellant, because his adultery was the cause of it. Now, although the word "deeds" may mean every act of the appellant by which the trust-monies may be transferred from him, I am at a loss to see how the divorce can be an act of this character attributable to him, since it is not his act at all, but only a consequence of his act, and the loss of his interest in the trust-funds is the legal consequence not of his adultery, but of the decree of divorce.

It is also said that the provisions in the marriage-contract being of an alimentary nature, the clause as to the trust-monies not being subject or liable to the appel-

lant's debts or deeds, prevented his conveying or forfeiting his interest under it. That he had no power to convey his interest while the marriage subsisted is unquestionable. I consider the clause in question to be intended to protect the wife and family against the acts of the husband, by which they might be deprived of the maintenance and support provided for them by the marriage-contract. But the loss of the husband's interest in the fund as a consequence of the divorce does not deprive it of its alimentary character. And as the effect of the divorce is to treat the interest of the appellant as if he were naturally dead, I do not see how a clause which relates to his acts and deeds can after the divorce have any operation.

On the whole, the grounds upon which the interlocutor of the Court of Session proceeded having been so long regarded as the law in Scotland, and there being no decision that I am aware of opposed to it, if I entertained a doubt upon the subject (which I certainly do not) I should hardly feel myself at liberty to give effect to it. But being satisfied that the interlocutor appealed from is correct I am of opinion that it ought to be affirmed.

LORD WESTBURY.—My Lords, I have very little to add to what your Lordships have already said. In the marriage-contract between these parties, the husband and wife, there was contained a provision that the interest of the consolidated fund should, during the joint lives of the husband and wife, be paid to the said William Harvey, the husband, for the maintenance and support of himself and his spouse and family. After the divorce the trustees paid the interest of the fund to the wife, and this is an action by the husband, Mr. Harvey, proceeding on the ground that that interest was not properly paid.

We have been asked here to reverse by our decision not only a great number of cases, but also a rule or principle which appears to have been long incorporated into the law of Scotland, and to have become an established rule and institution in the marriage law in that country. The rule is one which I am by no means surprised to find, having regard to the extreme severity which that country once manifested upon the subject of adultery. The rule, I think, is this, that the interest provided by a marriage-contract for the benefit of either of the spouses is by the adultery of the delinquent lost for the benefit of the other spouse. But when we use the words "lost or forfeited" we must remember that the interest ceases only for the benefit of the other spouse, and to the extent of the provision, as if the delinquent spouse were naturally dead. What I mean to observe is this, that supposing a marriage-contract which gave to the husband a liferent in very considerable property, and provided for the wife to the extent of an annual sum, not perhaps being one-half of the interest which she would take after the death of the husband, if the husband commits adultery the provision made for the wife emerges, and comes into actual possession, in like manner [33] *quoad* that provision as if the husband were naturally dead, and the husband would remain entitled to the surplus of the fund *ultra* the provision that arises for the benefit of the wife.

There can be no doubt that a marriage-contract containing a variety of conventional provisions, although there be included in it property contributed by the husband and property contributed by the wife, is a *donatio propter nuptias* in the sense in which that phrase is used in the Scotch law. And the result therefore is that the husband's loss or forfeiture in the case of a divorce for adultery is not limited to the property of the wife, but extends to the whole of the property, whether brought in within the operation of the *donatio propter nuptias* by himself or by his wife.

With regard to tocher, which is a sum paid by the intended wife to the intended husband *intuitu matrimonii*, when it is accompanied by a settlement or *donatio propter nuptias*, it must be regarded as a consideration paid by the wife for the provisions contained in that *donatio*. Of course if the wife claims the benefit of those provisions she cannot at the same time claim restitution of the tocher, which is the consideration for what remains to her under the marriage-contract.

Now, applying this to the third provision of the marriage-contract, there is a direction for the payment of the income for the purpose of maintaining the husband and the wife and the children of the marriage; and there can be no doubt that, by the law of Scotland in the case of a divorce for adultery, the interest which the husband has in that joint-trust or direction becomes extinct for the benefit of the wife, and, through the wife, of the children of the marriage. I think therefore that the decision in this case is most unquestionably in strict conformity with the rule

of law in Scotland. And, my Lords, it is by no means the function of this House (and it would be very unwise and mischievous indeed if your Lordships arrogated to yourselves any such function) when sitting here in your appellate capacity, in which you are bound only to correct decisions which are contrary to the established law of the country in the Courts of which the decisions appealed from may have been pronounced, to extend that power and authority to the alteration of rules of law which have long been established, long accepted, and long acted upon, and which have formed the basis of the ownership, the administration, and the dealings with private property in the Courts of that country. I have, therefore, no hestitation in advising your Lordships to adhere to the established rule in Scotland, which is evidenced not only by decisions, but by a long series of writers who have taught the law to generations of lawyers; and we should be very rash indeed if we attempted to alter the application of that established rule. I regret very much that this appeal should have been presented after so long a period of time, but what your Lordships are bound to do is, I think, to dismiss it, and to dismiss it with costs.

Interlocutors affirmed, and appeal dismissed, with costs.

SIMSON & WAKEFORD, Westminster—JOHN SHAND, W.S.—GRAHAMES & WARDLAW, Westminster—STUART & CHEYNE, W.S.

[*Principle applied*, McElmail *v.* Lundie's Trs., 1886, 16 R. 47.]

No. 4. X. MACPHERSON H.L. 33. 22 Feb. 1872. House of Lords.—Lord Chancellor (Hatherley); Lord Chelmsford; Lord Westbury.

WILLIAM HARVEY (Pursuer), Appellant.—*J. Anderson, Q.C.—J. T. Anderson.*
JOHN LIGERTWOOD (Defender), Respondent.

Reduction—Aliment—Husband and Wife.—In an action brought by a divorced husband to reduce a disposition *omnium bonorum*, granted by him in favour of his creditors, in so far as it conveyed his rights under his marriage-contract, on the ground that these were alimentary and excluded from the diligence of his creditors, *held* (*aff.* judgment of the Court of Session) that in so far as the pursuer's rights had not been forfeited, they had been validly assigned to his creditors.

See previous case of Harvey *v.* Farquhar, *supra*.

In an action brought by William Harvey, after he had been divorced by his wife on the ground of adultery, against Farquhar, the trustee under his marriage-contract, concluding for count, reckoning, and payment, the [34] defender, *inter alia*, pleaded that the pursuer had no title to sue, in respect that he had granted a disposition *omnium bonorum* in favour of John Ligertwood as trustee for his creditors.

Harvey then raised the present action, concluding for reduction of the disposition *omnium bonorum*.

The grounds of reduction are fully stated by the Lord Ordinary (Ormidale) in his note, quoted below.

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary, having heard counsel for the parties, and considered the argument and proceedings, finds that no relevant or sufficient grounds of reduction are averred by the pursuer entitling him to insist in the present action: Therefore repels the reasons of reduction, dismisses the action, and decerns: Finds the defender entitled to expenses; allows an account thereof to be lodged, and remits it when lodged to the Auditor to tax and report." *

---

* "NOTE.—This action must be looked at in connection with the former one mentioned in the record, at the instance of the pursuer against his marriage-contract trustees, judgment in which was pronounced by the Court on 12th July 1870, and is reported in 8 Macph. 971. In that former action the pursuer referred to the

The pursuer having reclaimed, the Second Division adhered to the Lord Ordinary's interlocutor.

The pursuer, Harvey, appealed.

No appearance was made for the respondent in the appeal.

LORD CHANCELLOR.—My Lords, in this second appeal Mr. Harvey, the husband, who was the appellant also in the former case, seeks to set aside an inter-[35]-locutor pronounced by the Lord Ordinary, and affirmed by the Court of Session, by which

---

present as being about to be brought by him in order to clear his title. But the Court, by the judgment referred to, found, independently altogether of the objection that the pursuer's title might be held as affected by the disposition *omnium bonorum* now sought to be reduced, that he had no right to insist in the claims made by him, in respect he had been divorced from his wife on the ground of adultery. This result was arrived at on the ground that the pursuer had forfeited, by the dissolution of the marriage by his adultery, all right to his marriage-contract provisions which might otherwise have been available to him, just as they would have been by his natural death. It was therefore in that action, where the pursuer restricted his claim to the interest or income of the funds held in trust under the marriage-contract between him and his wife, expressly held that, in respect of his divorce for adultery, there were no grounds on which he could maintain such a claim.

"What interest, therefore, the pursuer can have in now insisting in the present action is not apparent. And, at any rate, the Lord Ordinary cannot see that he has set forth any relevant or sufficient ground for insisting in the action. (1) He says it was *ultra vires* of him to have granted the disposition *omnium bonorum*, so far as it had reference to his rights and interests under his marriage-contract, as these rights and interests were declared to be beyond the diligence of his creditors. It is now, however, *res judicata* that in consequence of the dissolution of his marriage, in respect of his adultery, he had forfeited all claim to at least the interest or income of the marriage-contract funds. It was argued, however, that eventually, on the death of his wife, the pursuer's claim to the income or interest of the marriage-contract funds will revive, and the case of M'Alister, 18th July 1854, Scottish Jurist, was referred to in support of this view. But the Lord Ordinary cannot see how the pursuer's claim to the interest or income in question can again revive, and neither can he see the application of the case of M'Alister. There is only a very short report of that case, from which it appears that the only contested point was the right of the offending wife, not to any marriage-contract provisions in favour of herself, but to exercise a certain power of division of provisions constituted in favour of her children. The Lord Ordinary must therefore hold that no question as to the pursuer's rights under the marriage-contract can arise, except as regards his eventual claim under the [35] fifth head of the marriage-contract,* as referred to in article 3 of the pursuer's condescendence; but, in regard to such claim, it does not appear to the Lord Ordinary that the pursuer was under any disability to assign the same to his creditors by the disposition *omnium bonorum* now challenged. (2) As to what the pursuer called his second ground of reduction, viz. the constraint under which he says, in article 10 of the condescendence, he acted in granting the disposition *omnium bonorum*, the Lord Ordinary thinks it is obviously quite untenable; his allegations amount to nothing more than that he was obliged, before being liberated from prison, to do what every debtor similarly situated is legally bound to do. (3) The only thing else on which the pursuer founded in support of the reduction was his statement in article 11 of his condescendence" (which contained averments regarding Ligertwood's actings as trustee for the creditors); "but clearly that statement does not entitle the pursuer to have the disposition *omnium bonorum* cut down and set aside. Possibly Mr. Ligertwood may not have properly discharged his duty as trustee under that deed, and if so, the pursuer may have his remedy, but certainly not by reducing the deed itself."

---

* The 5th head of the marriage-contract bore that on the dissolution of the marriage by the death of the wife without issue, or, leaving issue thereof, who should all predecease the pursuer, the trustees should pay to the pursuer, as his absolute property, the sum of £4000, and the annual income of the wife's provision from her father's estate.

they refused, in an action which he brought for a reduction of certain deeds, to give him that relief. He appears to have been imprisoned for debt at the instance of the trustees under his marriage-contract, and after having been imprisoned for fourteen months he was desirous of availing himself of the provision made in Scotland, a provision which is also made in this country, for enabling persons who are utterly insolvent to be released from prison upon their taking upon themselves to execute deeds by which they make over the whole of their property for the benefit of their creditors. A *dispositio omnium bonorum* was made accordingly by Mr. Harvey, and in return for that disposition he obtained his liberty. He now says that he is entitled to set this disposition aside, because by it he has made a disposition of certain rights, which, being in the nature of an alimentary provision for the benefit of himself and his descendants under his marriage-contract, were incapable of alienation, and that therefore there ought to be a declarator on the part of the Court, which, if it did not set aside the deed *in toto*, would nevertheless declare that portion of the deed to be void, by which he purported to assign and make over any property which is of an inalienable character. He says that he is entitled to have that declaration made, not being obliged by the law of Scotland, as he would be by our law, to wait until his interest actually emerges by the death of those who have a previous interest in the fund in question, and that having done that which is contrary to the true effect of the marriage-contract, he is now entitled to have so much of his *dispositio omnium bonorum* set aside as would subject him to the consequences of having hereafter, unless he now succeeds in setting aside the disposition, to litigate the question whether the property was actually assignable.

My Lords, the only arguable point (which I may say was extremely ably put for the appellant by Mr. James Thoms Anderson, who argued it in the absence of his leader) was reduced to a very narrow one indeed by a previous decision which had occurred in Scotland before the Lord Ordinary pronounced his interlocutor in this action for the reduction of the deed, which previous decision has now received your Lordships' affirmation. The present case came to be determined after it had been held that Mr. Harvey had forfeited all his interest provided by the marriage-contract in consequence of his adultery, as if he were dead, and his interest stands thus,—he takes in the first instance under that marriage-contract a certain provision for the benefit of himself and his children, which has been commented upon and disposed of by the previous decision. After that, in the event of there being children (and there is a child of the marriage [36] now existing) there is a provision for the benefit of the survivor of the spouses. After that, in case of there being children, the trust-property goes over to the children, but if there be no children it comes back to Mr. Harvey, from whom it originally proceeded. As to that last interest the Lord Ordinary says that it is an interest which is clearly disposable and alienable, and of which Mr. Harvey had a clear right of disposition by a *dispositio omnium bonorum*. Therefore he cannot complain of or reduce the deed on the ground of any question arising upon that portion of his property; it was in fact a restitution to him of his original rights in the property, and it was clearly and distinctly alienable.

But it is said with regard to this possible life interest, in case he should survive his spouse, that that is inalienable by the provisions of the marriage-contract, and that if the wife died and he survived he then would find himself in the possession of this life interest which he cannot aliene, because it is an alimentary provision made for him under the marriage-contract. M'Alister's * case was cited in aid of that proposition, and the Lord Ordinary says (and it appears to be the true view of the case) that in that case it is not very clear what was the precise point that was actually determined. It seems rather to have been as to whether the wife, who was the person in regard to whom the claim arose, had forfeited not only her interest but also her right and power of appropriating and disposing amongst the children of the funds there in question. There are other cases in which this has been decided, namely, that when the wife dies and the husband has been the guilty party, the provision which has been made for the wife by means of the husband's property arises at once. But he does not forfeit that which is not included in the contract in any way. Of course he is not actually dead, although the law presumes him to be dead as between himself and his spouse. He being still *in esse*, his rights revive as soon as the marriage-

* 18th July 1854, 26 S. J. 597.

contract is dissolved, and as soon as the wife has exhausted all the interests secured to her, the innocent party under the contract. Therefore the interest which would go over in case of children failing came back to Mr. Harvey, and was disposable by the deed.

The question here is really whether this possible life interest of the appellant, which may survive the interest which the wife takes under the marriage-contract, is or is not an alimentary provision which the husband could not dispose of. Now, I can see no authority to shew that this provision, made partly out of the £1700 of the wife's, and partly out of the £4000 provided by the husband, is an alimentary provision which the husband could not dispose of; because the case appears to stand in this dilemma, if it is a provision which he takes under and by virtue of the marriage-contract, then, according to the law of Scotland, this forfeiture accrues. If it is not a provision that he takes by virtue of the marriage-contract—if it is some remainder of his own interest or property, subject to the emergency of the interest of the children (if they attain the character which the deed specifies), upon his death, but which interest of the children possibly, by their dying before him, may all be exhausted before his own death—then that fragment of interest so remaining in him would, of course, not be an alimentary interest, but an interest which he could dispose of as being his own, and undisposed of. As regards that which was provided for him by his wife, of course that would be forfeited as between himself and his wife by his adultery. As regards the remainder of his own interest, subject to its being possibly burdened by the interest of his children if they should acquire an interest, and which, if they did not acquire it, would come to him absolutely as soon as the children were out of the way, that species of interest is vested in him in such a manner as to be disposable by him, and as the Lord Ordinary has very properly held, is included in the *dispositio omnium bonorum*. It was said that he could not possibly aliene this interest, and it was necessary shortly to examine that point, but I think, when it is examined, there is really no substance in the claim so made; and, accordingly, I am of opinion that the Lord Ordinary came to the right conclusion in this case. It seems to me, therefore, that, with the approbation of your Lordships, this appeal must follow the fate of the last appeal, and that the interlocutor must be affirmed, and the appeal dismissed.

[37] LORD CHELMSFORD.—My Lords, this case appears to me to be abundantly clear, and to require very few observations in deciding it. The appellant seeks to reduce a disposition *omnium bonorum* made by him in favour of his creditors in a process of *cessio bonorum* under the provisions of the 6th & 7th William IV. chapter 56, in so far as it bears to alienate the whole, or any part of his claims, rights, and interests under his marriage-contract.

By the 6th & 7th of William IV. it is provided that in the process of *cessio bonorum* it shall be optional with the creditors to require the debtor to execute a disposition *omnium bonorum*; and in the disposition made by the appellant it is recited that he had been required by his creditors to execute such a disposition. He thereby (*inter alia*) alienated and disponed his "whole claims, rights, and interests, present as well as future, and contingent under and by virtue of the contract of marriage," and "specially his claims, rights, and interests, present as well as future, and contingent, whether of liferent or of fee, in the sum of £4000" granted by him to the trustees under the marriage-contract. By that contract this sum of £4000, as well as certain monies given by the father of the intended wife, were settled as stated in the former case. In the first place, interest was to be paid by the trustees during the joint lives of the parties to the appellant, for the maintenance and support of himself and his spouse and family, and upon the death of either of the spouses the interest was to be paid to the survivor, and upon the death of the survivor the principal sum was to be divided equally amongst the children of the marriage. And then followed a clause that in the event of the children of the marriage predeceasing the appellant then the trustees were to pay to him this principal sum of £4000. It is contended that this disposition, so far as it extends to the appellant's rights under the marriage-contract, is void, the appellant having no power to convey those rights, they being declared to be alimentary and not to be subject to his debts or deeds.

By the decree of divorce obtained against the appellant he forfeited all his interest in the trust-funds under the marriage-contract, except that which was contingent upon the death of his intended wife. The alimentary provision is expressly confined

to the joint lives of the husband and wife. On the dissolution of the marriage by the death of either of the parties (and divorce for adultery is equivalent to death), the trustees are to pay the interest and proceeds to the survivor during his or her life. The appellant has no right in any part of the fund while it is payable to Mrs. Jopp, formerly his wife. If the fund continued to be alimentary after it became payable to Mrs. Jopp it has long ceased to be so, as the only living child of the marriage is forisfamiliated, having become a married woman. Upon the death of Mrs. Jopp the principal sums become payable to children of the marriage, and in this provision the appellant had no interest. The only claim which he has upon the fund is upon the contingent possibility of his former wife dying without issue, in which event the trustees are to pay over to him the £4000 which he brought into settlement. Now, this interest, remote and shadowy as it is, he had clearly a right to dispose of; and if so, how can a disposition of his claims, rights, and interest under the marriage-contract be reducible? If any creditor of the appellant were to bring an action against the trustee to make the disposition *omnium bonorum* available beyond the contingent interest of the appellant he would necessarily fail, as the trustee would be able to shew that since the divorce he had nothing else left over which he had the power of disposition.

With respect to the clause as to the monies under the marriage-contract not being liable to the debts and demands of the appellant, which it is contended rendered them inalienable, whatever be the effect of this clause, it clearly cannot apply to the contingent interest of the appellant in the £4000, which, in the event, would belong to him absolutely, which he would have a clear right to dispose of, and which he could not legally protect against the diligence of his creditors.

The case is almost too clear for argument, and it must not be supposed that we adjourned it on account of any doubt which we entertained, but merely that it might be taken into consideration at the same time with the other appeal which we have just disposed of.

[38] It is painful to think of the waste of money and of time which has been occasioned by the vexatious proceedings of the appellant. I am of opinion that the interlocutors appealed from must be affirmed, and I am sorry that we cannot affirm them with costs.

LORD WESTBURY.—My Lords, this is an action of reduction. It seeks to set aside, to annul, and to reduce the whole of the *dispositio omnium bonorum* executed by the appellant.

The first ground put forward for the reduction is rather an amusing one, if one can be amused by anything of this kind. It is put thus, I think, according to Scotch phraseology, by the appellant, that the whole deed is reducible because it was executed *in squalore et caligine carceris*—in a dark and dirty dungeon. But unfortunately the law provides for that very case, because this is a deed executed by the appellant by reason of his insolvency, and which must be executed by him as a condition of his release from prison. The law contemplates that it will be a prisoner's deed. I daresay that prisons in Scotland, as in England, when this deed was executed, were very bad abodes—but that is the law—and it affords no ground whatever for reduction.

Unfortunately the other ground of reduction trenches rather on the province of interpretation. Now, you cannot reduce a deed upon any ground that can be set right by the construction of the deed. If the deed professes in terms to convey that which the granter or maker of the deed has no right to convey, you may have a remedy by reduction, or you may have a remedy by declarator; but whatever may be corrected by the proper interpretation or construction of the deed forms no ground of reduction. The argument was put thus—under the first trust, namely, that contained in the third provision of the marriage settlement, there is a direction to apply the money substantially for the maintenance of the husband, the wife, and the children. The divorce operates as a cessor, for the benefit of the wife, of the husband's interest in that trust.

But, then it is said, suppose the wife should die first, leaving the husband surviving, the interest of the husband would revive and be emancipated from the forfeiture produced by the divorce, and he would be entitled to the benefit of the trust for the maintenance of himself and his children. And then it is assumed by those who propound the argument, that this alimentary provision, contingently arising on the husband's surviving the wife, does pass by the deed in terms, whereas it could

not pass by the *dispositio omnium bonorum*, seeing that that contingent provision would be subject to the declaration contained in the first provision of the marriage settlement, namely, that the *jus mariti* should be excluded, and that the provisions contained in the deed should be inalienable. Now, I admit that that declaration, to the extent of the alimentary provision, would be good, but then the argument is this, that it does not pass under the disposition, for all that does pass under the disposition is what the husband is entitled to dispose of. The language of the disposition is this—he professes to pass " my whole claims, rights, and interests, present as well as future and contingent." Now, nothing is better settled in insolvent and bankrupt law than the proposition that a deed of assignment for the benefit of creditors, whether it be made by law or be made by the act of the parties, passes only what the husband is lawfully entitled to part with. And if the husband is not, as I grant he would not be, lawfully entitled to aliene the contingent alimentary trust that might possibly arise under the fourth provision in the marriage-contract on the death of the wife in the lifetime of the husband, then certainly it does not pass under the words in the disposition, which are limited entirely to this, " my whole claims, rights, and interests." That would not be a personal, private, and individual right of the husband. It is not, therefore, a right within the terms of the deed. In that respect, therefore, there is nothing whatever to reduce. The deed is a good deed, and, rightly construed according to the law, it would not touch that which it is said the maker of the deed had no right to dispose of.

There are two other interests given to the husband by the settlement, one of which is a life interest on the death of his spouse, leaving him surviving. The [39] counsel for the appellant, Mr. Anderson, who of course knew, as he always does, both the strength of the case and its weakness, felt that his only course, in order to rescue this life interest, was to make it out that it was somehow charged with an alimentary character in favour of the children, and accordingly he attempted to establish that. But that is a mere imagination. It is not charged with any such thing. It is very true that the husband might possibly be personally liable to maintain the children, even when adults, in case of their falling into a state of indigence and necessity. But there is no charge of that kind fastened upon the life estate; and the life estate cannot be brought within the declaration against alienation, for it is a principle of Scotch law as well as of English law that you cannot retain an interest to yourself in your own estate and make it inalienable. The same observation must apply also to the contingent fee which is given to the husband in the event of the children failing, and of his surviving his wife. That also cannot be made inalienable. And, therefore, the liferent, if he survives his wife, and the fee, if the children fail and he survives his wife, are two things that fall within the legitimate scope and operation of the *dispositio omnium bonorum*, and do not therefore subject that deed to any impeachment, so as to justify its being reduced or set aside.

My Lords, this appeal is an instance of great pertinacity in litigation, which we must regret very much. Under all the circumstances we must dismiss the appeal, and I am happy to be relieved from the obligation of dismissing it with costs.

Interlocutors affirmed, and appeal dismissed.

SIMSON & WAKEFORD, Westminster—JOHN SHAND, W.S.

No. 5. X. MACPHERSON H.L. 39. 25 April 1872. House of Lords—Lord Chancellor (Hatherley); Lord Chelmsford; Lord Westbury.

First Appeal.

MRS. MARIA ANSTRUTHER OR SMITH CUNNINGHAME AND HUSBAND (Pursuers), Appellants.—*D.-F. Gordon, Q.C.—Sol.-Gen. Jessel—A. S. Kinnear.*

MRS. ANNABELLA ANSTRUTHER AND OTHERS (Anstruther's Trustees) (Defenders), Respondents.—*Lord-Adv. Young—Sir R. Palmer, Q.C.—J. T. Anderson.*

Et e contra.

Second Appeal.

MRS. ANNABELLA ANSTRUTHER AND OTHERS (Anstruther's Trustees) (Defenders), Appellants.—*Lord-Adv. Young—Sir R. Palmer, Q.C.—J. T. Anderson.*

MRS. ANNIE ANSTRUTHER OR MERCER AND HUSBAND (Pursuers), Respondents. —*D.-F. Gordon, Q.C.—Sol.-Gen. Jessel—A. S. Kinnear.*

Et e contra.

Parent and Child—Marriage-Contract—Provisions to Children—Power of Appointment—Discharge—Reduction—Essential Error.—By antenuptial contract of marriage £4000 belonging to the husband, and all the property of the wife then belonging to her, or to which she might acquire right during the marriage, were settled on the spouses respectively, and the survivor, in conjunct fee and liferent, declaring that, in the event of there being two or more children, the father, or the mother if she survived him, should have power to divide among them the £4000 foresaid; while as regarded the mother's property the same power was conferred on the parents jointly, or the survivor; and it was provided that, failing such division, the children should take share and share alike. These provisions were declared to be in full of legitim. There were three children, all daughters. Their mother at the date of the marriage had £8000, and she afterwards succeeded to upwards of £50,000. The marriage-contract of the eldest daughter, to which her father and mother were parties, contained an express discharge of all her claims under their marriage-contract, in consideration of £5000 paid to trustees for her own and her husband's liferent use, and their children in fee. The marriage-contract of the second daughter contained a discharge in like terms, [40] but the mother was not a party to the deed (being then dead). Thereafter the father contracted a second marriage, having previously executed a trust-settlement, by which £20,000 was directed to be paid to his youngest and unmarried daughter, in full satisfaction of her claims under his marriage-contract, and £30,000 was settled upon his second wife in liferent, and his said youngest daughter in fee, to the express exclusion of her sisters. This settlement was signed by the youngest daughter in token of her acceptance of its provisions as in full of her claims.

In separate actions brought by the married daughters after their father's death for reduction of the discharges contained in their respective marriage-contracts, on the ground of essential error, and for declarator that no valid apportionment had been made of the provision of the mother's estate, the Court of Session held (1) that the eldest daughter had during her mother's life no right of fee in the provision from the mother's estate, but merely a protected *spes successionis*, and that the transaction between *the mother* and daughter contained in the daughter's marriage-contract was valid, and the discharge not reducible; (2) that the second daughter had after her mother's death a vested right of fee in the provision from her mother's estate, subject to the father's power of apportionment, and that the transaction with the father had been concluded while the parties thereto were under essential error as to their legal rights, and that the unappropriated portion of the mother's estate feel to be divided between the second daughter and her unmarried sister. *Held* (in reversing the judgment of the Court of Session in the first action, and in affirming the judgment in the second action), (1) that the three discharges obtained

from the daughters by their father and mother and by their father respectively, being prejudicial to the daughters, whom they were bound to protect, were ineffectual to limit the rights of the daughters; (2) that according to the true construction of the father's marriage-contract, the power of appointment conferred upon him admitted of being exercised from time to time by several appointments; (3) that there had been valid appointments in favour of the married daughters of £5000 each and of the unmarried daughter of £20,000; and (4) that the three daughters were entitled to participate equally in the unappropriated balance of the fund.

Parent and Child—Trust.—Observations on the validity of transactions between a father and his children.

(In the Court of Session, Smith Cuninghame *v.* Anstruther's Trustees, March 18, 1869, *ante*, vol. vii. p. 689; July 19, 1870, vol. viii. p. 1013; Mercer *v.* Anstruther's Trustees, March 6, vol. ix. p. 619.)

In 1828 James Anstruther, W.S., entered into an antenuptial contract of marriage with Miss Marian Anstruther, whereby he settled £4000 upon himself and his spouse, and the survivor, in conjunct fee and liferent, for her liferent use only, and on the child or children of the marriage and their issue, whom failing, his own heirs and assignees, in fee.

Mr. Anstruther also bound himself and his representatives to provide "the whole lands, heritages, sums of money, and other funds that he shall happen to conquest or acquire during the present marriage, whether by purchase, succession, or donation, after deduction of the debts due by him, and over and above the said sum of £4000, to the foresaid Marian Anstruther, his promised spouse, in liferent, for her liferent use only, in case she shall happen to survive him, and to himself and his heirs and assignees in fee."

The marriage-contract contained a power to Mr. Anstruther, in the event of there being more than one child of the marriage, "at any time of his life, and even on deathbed, to divide and proportion, as he shall think proper, the above-written provisions in their favour; and in case of his death without making such division, the said Marian Anstruther, if she shall survive him, shall have the same power while she continues unmarried; and failing of any such division, the said provisions shall belong to and be divided among the said children equally, share and share alike."

[41] These provisions were declared to be in full of legitim, and everything else that the child or children of the marriage could ask or claim by and through the decease of their father, except what he might think fit to bestow of his own good will only.

On the other hand, Miss Anstruther, in consideration of the provisions in her favour contained in the marriage-contract, did thereby convey, "to and in favour of the said James Anstruther and herself, and the survivor, in conjunct fee and liferent, and to the child or children, one or more, of the said intended marriage, and the issue of the bodies of such child or children, whom failing, to the said Marian Anstruther's own nearest heirs and assignees, in fee," all property then belonging to her, or that should pertain and be owing to her during the subsistence of the marriage.

With regard to Mrs. Anstruther's property, it was by the contract declared that it should be in the power of the spouses, "jointly during their joint lives, and to the survivor of them at any time of their lives, or even on deathbed, to divide and proportion the same among the said children as they shall think proper; and in case of their deaths without any such division the same shall pertain and belong to them equally, share and share alike."

At the date of her marriage Mrs. Anstruther's property amounted to about £8000, and she afterwards succeeded to upwards of £50,000. There were three children born of the marriage, viz. Maria, afterwards Mrs. Smith Cuninghame; Annie Catherine, afterwards Mrs. Mercer, and Lucy Sarah, who at the date of the proceedings aftermentioned was unmarried.

Mr. and Mrs. Smith Cuninghame were married in 1847, when they entered into an antenuptial contract, in which Mr. and Mrs. Anstruther, who were parties thereto, bound themselves to pay (and did pay) to trustees £5000, to be invested for behoof of Mr. and Mrs. Smith Cuninghame in liferent, and the issue of their children in fee, "which said sum of £5000 is hereby declared to be and the said Maria Anstruther

hereby accepts of the same, in full satisfaction of all legitim, portion-natural, or bairns' part of gear, and of all claims whatsoever which she, the said Maria Anstruther, has in any manner of way, by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, dated 24th and 26th March 1828, and as the share or division hereby allotted to her of her said father and mother's property settled by said contract, all which claims are hereby settled accordingly; saving always and reserving to the said Maria Anstruther the good will of her said father and mother as accords."

Mrs. Anstruther died in 1859. Her second daughter, Annie Catherine, was married to Mr. Mercer in 1861, when an antenuptial contract was entered into, to which Mr. Anstruther was a party, and he thereby bound himself to pay (and did pay) to trustees £5000, to be invested for behoof of the spouses and their issue, with a declaration "that the said sum of £5000 to be received by the said trustees under the before-written obligation by the said James Anstruther is accepted, and the said Annie Catherine Anstruther, with consent of the said John Henry Mercer for his interest, hereby agrees to accept of the same, in full satisfaction of all legitim, portion-natural, or bairns' part of gear, and of any claim she, the said Annie Catherine Anstruther, has or may have in any manner of way, by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, dated 24th and 26th March 1828, and as the share or division allotted to her of her said father and mother's property, settled by said contract of marriage, all which claims are hereby declared by the parties hereto to be settled [42] accordingly; saving always and reserving to the said Annie Catherine Anstruther the good will of her said father, and her right to succeed to him in the event of his not otherwise disposing of any estate or property at his death."

In 1866 Mr. Anstruther contracted a second marriage with Miss Annabella Agnes Anderson. In contemplation of this marriage he executed a trust-disposition and settlement, dated a few days previously, in which he directed his trustees, after payment of his debts, to invest £20,000 for the sole use and behoof of his youngest daughter Lucy, and her heirs and assignees, declaring that the provision so made on the said Lucy Sarah Anstruther should be held and taken by her in full satisfaction of all claims she might have for legitim, or in any other manner of way, by and through his death, or through the marriage-contract between him and the deceased Marian Anstruther, her mother; and in token of the said Lucy Sarah Anstruther accepting the foresaid provisions in full of all such claims she subscribed the trust-disposition and settlement along with her father.

By the same deed Mr. Anstruther settled £30,000 upon his second wife in liferent during her survivance and widowhood, and on their child or children in fee, whom failing, his own nearest heirs and assignees, subject to various conditions and provisions; and he nominated his said wife his residuary legatee, with a declaration that in the event of any property whatever devolving on his own nearest heirs by the failure of the said Annabella Agnes Anderson it should belong to his daughter Lucy, whom he nominated his heir, to the express exclusion of Mrs. Smith Cuninghame and Mrs. Mercer, or their heirs or assignees.

Mr. Anstruther died in 1867 without leaving issue of his second marriage.

Thereafter Mrs. Smith Cuninghame and Mrs. Mercer raised separate actions against their father's trustees, concluding to have the trustees decerned to separate the funds of the testator from those of his first wife in order that his estate might be divided equally among his three children in terms of the marriage-contract of 1828; for declarator that there had been no valid apportionment either of their mother's estate or of the £4000 settled by Mr. Anstruther himself; and that the pursuers, Mrs. Smith Cuninghame and Mrs. Mercer respectively, were each entitled to one-third of the provisions in favour of the children of Mrs. Anstruther's first marriage, with conclusions for reduction of the pursuers' own marriage-contracts, and of Mr. Anstruther's trust-deed, in so far as these might be held to exclude their claims.

The grounds on which it was proposed to reduce the marriage-contract of the respective pursuers were—(1) fraud, and (2) essential error. The ground on which Mr. Anstruther's deed of settlement was challenged was want of power.

In the action at the instance of Mrs. Smith Cuninghame, the First Division, on March 18, 1869, pronounced an interlocutor, containing, *inter alia*, the following findings: "Find that under the said contract of marriage" (of Mr. and Mrs. Anstruther)

" the fee of the means and estate therein mentioned as provided by Mrs. Anstruther was vested in her, the said Marian Anstruther, subject to a right of liferent by the said James Anstruther in the event of his surviving his said wife, and that the children of the marriage had, in regard to the said means and estate of Mrs. Anstruther, a right of succession which could not be gratuitously defeated: . . . Find that in regard to the said means and estate of Mrs. Anstruther it is by the said contract provided that it should be in the power of Mr. and Mrs. Anstruther jointly, and of the survivor, to 'divide and proportion' the said means and estate of Mrs. Anstruther among the said [43] children, as they should think proper, and in case of their death without such division the same should be equally divided among the children: Find that James Anstruther survived his said wife, and that neither by the said spouses jointly, nor by him as the survivor, was any deed executed, purporting in terms to be a deed of division and apportionment amongst the whole of the children, either of the said sum of £4000" (provided by Mr. Anstruther), " or of the means and estate of Mrs. Anstruther aforesaid: Find it not averred that in regard to the pursuer, Mrs. Maria Anstruther or Smith Cuninghame, individually, any other deed of apportionment was executed, except what is alleged to be contained in her marriage-contract with Mr. Smith Cuninghame, bearing date 30th and 31st July and 2d August 1847: Find that by the said marriage-contract a sum of £5000 was settled by the said James Anstruther, and Mrs. Marian Anstruther, his wife, on the said Mr. and Mrs. Smith Cuninghame, and the survivor in liferent, and on the children of the marriage and their lawful issue in fee; and it was declared by the said marriage-contract that the said Maria Anstruther thereby accepted of the same in full satisfaction of all legitim, portion-natural, or bairns' part of gear, and of all claims whatsoever which the said Maria Anstruther had in any manner of way, by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, dated 24th and 26th March 1828, and as the share or division declared to be allotted to her of her said father and mother's property, settled by said contract, all which claims were declared to be thereby settled accordingly, saving always and reserving the good will of her said father and mother: Find that the validity of the said acceptance, discharge, or settlement by the said Maria Anstruther or Smith Cuninghame is challenged by the pursuers in the present action, on the ground of the same having been granted by her and her husband when in essential error as to her legal rights, and on the other grounds set forth in the revised condescendence, articles 16, 17, and 18; and before further answer allow to the pursuers a proof of the averments in the said articles, and to the defenders a conjunct probation."

A similar interlocutor was pronounced in the action at the instance of Mr. and Mrs. Mercer.

A proof having been led in the action at the instance of Mr. and Mrs. Smith Cuninghame, the Court were unanimous in holding that the facts alleged as the ground of reducing the discharge had not been proved.

Upon the question whether the discharge in Mrs. Smith Cuninghame's marriage-contract thus left unreduced was a bar to her claim, the Judges (the First Division, with three consulted Judges) were divided in opinion, the majority of the seven Judges holding that the discharge was a bar to the pursuers' claim. The defenders were assoilzied by an interlocutor dated July 19, 1870.

The proof in the action at the instance of Mr. and Mrs. Mercer, which had been delayed by the pursuers' absence abroad, was not reported to the Court until after the decision in the action at the instance of Mr. and Mrs. Smith Cuninghame, but in respect of the intimate connection between the two cases Mr. and Mrs. Mercer's action was also appointed to be heard in presence of three Judges of the Second Division. The import of the proof, so far as material to the decision, will be found in the opinions of the Judges in delivering judgment (*ante*, vol. ix. p. 626).

The Court (on 6th March 1871) pronounced this interlocutor:—" Sustain the defences, and assoilzie the defenders from the conclusions of the summons in so far as they apply to and embrace the sum of £4000, provided by the deceased James Anstruther in his contract of marriage with [44] his spouse, the now deceased Marian Anstruther, dated 24th and 26th March 1828, and decern: But find that the marriage-contract between the pursuer, John Henry Mercer, on the one part, and the pursuer, Annie Catherine Anstruther or Mercer, with consent of the said James Anstruther, her father, on the other part, dated 10th December 1861, and particularly the clause

therein contained by which the said Annie Catherine Anstruther or Mercer discharged all right and claim which she had or might have under the marriage-settlement of her father and mother to a share of the estate of her then deceased mother, Marian Anstruther, was entered into and concluded by the parties thereto under essential error as to the nature of the right and claim which the said Annie Catherine Anstruther or Mercer thereby discharged and declared to be settled, and of the relative rights and power of herself and her said father in the estate of her deceased mother, as defined and settled by the said marriage-contract of 1828: Therefore, in so far as regards the said marriage-contract of 4th December 1861, reduce, decern, and declare, in terms of the reductive conclusions of the summons, but in so far only as by the said clause the right and claim of the said Annie Catherine Anstruther or Mercer, pursuer, to a share of the estate and effects of her deceased mother under the said marriage-contract of 1828, were discharged and declared to be settled, or are otherwise excluded or injuriously affected: Find that the said marriage-contract, being to the extent and affect foresaid reduced and set aside, the said Annie Catherine Anstruther or Mercer was and is entitled, along with her sister, Lucy Sarah Anstruther, defender, to so much of her said deceased mother's estate and effects as has not been settled and apportioned by her said father and mother jointly, or by her said father after her said mother's decease: Find that of the said estate and effects of the said deceased Marian Anstruther the following sums must, in the circumstances of this case, for the purpose of fixing the principle of division of the unappropriated balance of the said Marian Anstruther's estate between the said two children, be held and taken to have been settled and apportioned as aforesaid—*videlicet*, the sum of £5000 settled on the said Annie Catherine Anstruther or Mercer by her marriage-contract foresaid, and the sum of £20,000 settled on the said Lucy Sarah Anstruther by the trust-disposition and settlement of her father, the said James Anstruther, dated 8th October 1866: Find that during his life the said James Anstruther had in fact the sole possession and management of the estate and effects which belonged to his said deceased wife at the time of her death: Find that said estate and effects of his said deceased wife were not effectually conveyed by the said James Anstruther to the defenders as his trustees by his said trust-disposition and settlement, and that the said defenders have no title to administer the estate and effects of the said deceased Marian Anstruther: Find that the said defenders have since the decease of the said James Anstruther uplifted and intromitted with the estate and effects belonging to him, and also with the estate and effects left by the said Marian Anstruther as aforesaid: Find that the said defenders are bound to separate and set apart the estate and effects belonging to the said Marian Anstruther at the time of her death from the estate and effects belonging to the said James Anstruther: Ordain the said defenders to prepare and lodge in process, on or before the second box-day in the ensuing spring vacation an account shewing the entire property, funds, and effects belonging to the estate of the said Marian Anstruther as aforesaid: Reserve in the meantime all questions as to the proportion in which the estate of the said Marian Anstruther remaining unapportioned falls to be divided between the pursuer, Annie Catherine Anstruther or Mercer, and the defender, [45] Lucy Sarah Anstruther; also all questions as to the amount for which in any event the pursuer may be entitled to decree under the conclusions of the summons: Reserve also in the meantime all questions of expenses."

The pursuers in the first action, Mr. and Mrs. Smith Cuninghame, appealed against the judgment in that action, in so far as adverse to them, and the defenders presented a cross appeal against certain findings in the interlocutor.

The defenders, Mr. Anstruther's trustees, appealed against the judgment in the second action, and the pursuers presented a cross appeal.*

LORD CHANCELLOR.—My Lords, in this case great litigation has unfortunately arisen with reference to the provisions of a marriage-settlement made as long ago as the year 1828, upon the marriage of Mr. and Mrs. Anstruther. The provisions of that settlement may be very concisely stated. They were to this effect—that the husband provided a sum of £4000 which he engaged should be invested in the manner therein described. And the effect of the dispositions made as to that sum of £4000 was this—that the husband and the wife had the benefit in conjunct liferent. And then there was a provision for the children of the marriage or their remoter

* The terms of the appeals are fully narrated in the judgments of the House. *postea.*

issue, in such manner as the intended husband should apportion, and if his wife survived him, as she should apportion, and in the event of no apportionment being made, then it was to be for the benefit of all the children of the marriage in equal shares, whom failing, it was to be for the absolute benefit of the husband, who was to take for him and his heirs the absolute benefit of the £4000 so settled.

With regard to the intended wife, Mrs. Anstruther, the case was somewhat different. No specific sum was settled, but the whole of her property, then present or future, was disposed of in this way :—There was a conveyance in favour of the spouses in conjunct fee and liferent, there was then a provision for the benefit of the children of the marriage or their issue if the spouses were so minded, proportionately, and then the apportionment was to be made by the spouses conjunctly during their joint life, and by the survivor after the death of one. And in regard to that portion of the property, it was settled that on failure of the children of the marriage it was to go to the wife and her heirs.

Now, the events which subsequently took place were these :—There being three daughters the issue of the marriage, the eldest daughter, now Mrs. Cuninghame, married in 1847. On her marriage a trust-disposition by way of settlement was made, which was in this form :—Mr. and Mrs. Anstruther, the father and the mother, concurred in the settlement, and the father of the intended husband concurred in it. The father of the intended husband made a considerable provision, amounting to £10,000 I think. With that, however, we have nothing to do in this present controversy, and Mr. and Mrs. Anstruther conjointly engaged to pay £5000 for the benefit of Mrs. Cuninghame on this her intended marriage, and for the benefit of the children of the intended marriage.

Then, upon this arrangement being made, nothing being specifically stated in that part of the settlement on Mrs. Cuninghame's marriage with regard to the previous settlement which had been made in 1828 on the part of the father and mother, but the father and mother concurring in this instrument, a discharge is taken, and that discharge is in these words :—"And which said sum of £5000 is hereby declared to be, and the said Maria Anstruther hereby accepts of the same, in full satisfaction of all legitim, portion-natural, or bairns' part of gear, and of all claims whatsoever which she, the said Maria Anstruther, has in any manner of way, by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, dated 24th and 26th March 1828, and as the share or division hereby allotted to her of her said father's and mother's property settled by said contract, all which claims are hereby settled accordingly."

[46] An exactly similar instrument was executed subsequently on the marriage of the second daughter, Mrs. Mercer, but in the interim between the two settlements this difference had occurred in the position of the family, namely, that Mrs. Anstruther, the original spouse referred to in the marriage-contract of 1828, had died, and the settlement of £5000 made on the marriage of Mrs. Mercer was of course made by the father alone (Mr. Anstruther), but he took a discharge which may be described as being in substance identical with that which I have read as having been made upon the marriage of Mr. and Mrs. Cuninghame.

Some years after that the father married again, in 1866, and on his marriage a trust-disposition was again executed. And by arrangements which he there makes, in effect, £20,000 is apportioned by him, or made over by him, to Lucy, the third and only remaining daughter, and there is a similar discharge contained in Lucy's settlement. Provisions are also made for his intended second wife. And Lucy, in the second instrument, in a similar form of words, discharges her interest under her father's and mother's settlement.

Now, that being the state of the circumstances of the family, the question arises as to what is the legal effect to be given to these several instruments—to the original marriage-settlement of 1828, and the two settlements executed on the marriage of Mrs. Cuninghame and Mrs. Mercer respectively, and the £20,000 made over to Lucy, for which she gave her discharge.

There appears to have been considerable difference of opinion in the Court below with reference to the position of Mrs. Cuninghame as contrasted with the position of Mrs. Mercer, and in the action in the present case, which we are first considering, Mrs. Cuninghame's—(Mrs. Mercer's case is, however, really in substance extremely similar to it, if not identical)—I say, in the action brought by Mrs. Cuninghame,

she sought to have a declaration that she was entitled to regard that £5000 as an apportionment of a part of the fund included in her father's and mother's settlement; that it was not competent to her father to aver that discharge which was contained in her settlement as a discharge of the whole fund from all possible claims upon it in the event of there being no further apportionment by him; but that what was taken by her, the £5000, was taken only as a partial apportionment of the whole fund which had been provided by the settlement of 1828. And in so far as it did not exhaust that fund, and in so far as the fund was not exhausted by any other apportionment of the property made to the children of the marriage, there would remain a surplus divisible as provided in the original settlement amongst the children, according as each parent had the power of apportionment, because it might have been made by either of the parents. She sought to have a reduction of that discharge if she was to be prevented by it from thus having such an apportionment as she desired to have made to her.

Now, the case has been argued very fully before us—first, upon the effect of the original settlement of 1828, and next, upon the effect of the apportionment made, or rather the sums provided, in the first instance to Mrs. Cuninghame and Mrs. Mercer, and ultimately to Lucy. And that being the first point, it will be right to say a few words upon the subject of the first settlement, first premising that the fortune of Mrs. Anstruther, which does not seem to have been so large at the time of the settlement of 1828 as it afterwards became, did become very considerable, so much so that the whole of Mrs. Anstruther's fortune in present or future, including the whole which had been realised ultimately before her death, is said to amount, together with the £4000 which was provided by the father, to a sum of nearly £60,000—at all events, it was a very large sum, considerably exceeding the two sums of £5000 provided for the two elder daughters and the £20,000 provided for Lucy.

Now, after the settlement of 1828, what is to be considered as the position of the parents with reference to the fund? The Lord Ordinary, before whom the matter came in the first instance, conceived that the father, Mr. Anstruther, became, by virtue of the instrument of 1828, fiar as to both funds—both the fund of £4000 which Mr. Anstruther had applied, and the sum that was provided by Mrs. Anstruther. The Court of Session, on appeal from that decision of the Lord Ordinary, recalled his interlocutor in that respect, and held that the hus-[47]-band was a fiar of the £4000, but that he had only a liferent in the sum coming from Mrs. Anstruther, that she, in effect, was the fiar of that sum, subject to her husband's liferent, and subject (as all the learned Judges held), as to both the sum provided by the father and the sum provided by the mother, to the rights of the children, whatever they might be, which rights could not be put lower—and it is quite sufficient for the conclusion I have come to in this matter to put them as high as I am about to state—but that they could not be put lower than at least a *spes successionis* in each fund, which expectancy could not be defeated gratuitously, for, if defeated at all, it could only be defeated by some alienation for onerous or good cause.

Those being taken to be the rights of the parties when the settlement of Mrs. Cuninghame came to be executed, what is the effect of that settlement? Upon that point some degree of doubt existed among the learned Judges in the Court below. Four of them were of one opinion and three of another opinion as to the case of Mrs. Cuninghame, although they were more united as to the case of Mrs. Mercer, for a reason that I shall afterwards have to mention; but the ultimate conclusion come to in Mrs. Cuninghame's case by the majority of the learned Judges was this, that the sum of £5000 provided in her settlement, coupled with the release or discharge which she gave in the terms that I read from the settlement itself, operated as a complete extinguishment of the right of Mrs. Cuninghame to any portion of the fund, and therefore, of course, the consequence was an absolute failure of her action, and, accordingly, the defenders were assoilzied absolutely.

On the other hand, it was contended and it was so held by three, I think, of the learned Judges in the Court below, that that could not be taken to be the right view of the case; that the £5000 was in reality to be taken as an apportionment of the fund *pro tanto* to that daughter upon her marriage, and that that sum so apportioned would, of course, operate to the extent of that apportionment, as handing over to her a share in the fund which she would take, subject to the possibility of her having another portion—a third share falling to her in the event either of the whole

residue of the fund or of any part of it remaining unapportioned. In the one case she would take a third of the whole remainder; in the other case she would take a third of whatever might remain unapportioned.

It appears to me, my Lords, that that is the true and right conclusion to come to upon the whole case. The first question is, whether that sum of £5000 was really to be taken as an intended apportionment or not. I apprehend that there can be no doubt upon one point, which seems to have excited some doubt in the minds of some of the learned Judges—I say that there can be no reasonable doubt that in Scotland, as here, there is no necessity, where there is a power of apportionment of this description existing in the parent, for him to apportion the whole fund at one time; he may apportion it at intervals as the exigencies of his family require. Of course the very object of such a power of apportionment is to provide for such exigencies as they occur.

One argument which was pressed upon us for a different consideration is this —that the interest being a *spes successionis*, one which was wholly contingent during the lifetime of both the father and the mother, it might have failed in both of the funds had Mrs. Cuninghame predeceased the distribution of the fund and the period of her acquiring a complete and absolute interest in it, and that therefore the payment of the £5000 on the part of the father might be regarded (as some of the learned Judges, who were, in fact, the majority, decided) as a purchase by the father of the absolute right to all the interest of the child in the fund, and not as an apportionment of the fund itself. Now, it appears to me that there are two reasons very strongly weighing against such a conclusion. In the first place, the very notion of a parent bargaining with a child in the language used by the learned Judges in Scotland, entering into a transaction with his child for the purpose of purchasing her share in this species of expectancy, would be a notion inconsistent with the law which has prevailed, I apprehend, in every country as to the protection of a child's interest that is to be expected on the part of a parent—such a protection as makes it very difficult, [48] indeed, for a parent under any circumstances to deal with a child, and certainly does not render it possible for him to deal with a child without the child being fully protected and fully informed of all the rights vested in him. Therefore one would hesitate at any time to give to an instrument the construction of a bargain on the part of the parent, in respect of an expectant interest on the part of his child.

Now, in the particular case before us, it is undoubted that the child herself was not of full age. She was only eighteen years of age, and the child herself had to look to that parent, and that parent only, for protection. Some of the learned Judges say that the intended spouse might have afforded her sufficient protection. They seem to think that that actually was the case, and that she was so protected. But I think, according to any system of law that can be administered in any civilised country, it could not be permitted that a parent, without the fullest evidence of such being the intention, and the circumstances of the case warranting the intention, and warranting the transaction, should become the purchaser of an unascertained interest in the child—an interest which could never be ascertained if the child died in the mother's lifetime—for a sum of money paid down when the child's necessities required it at the period of her marriage. But putting that aside, I think there is quite abundant evidence to shew that the parties did not intend anything of the kind. In the first place, the father and mother joined. If it was an interest to be acquired by the father why did the mother join at all? In the next place, there is no previous recital of the settlement until we come to the discharge, and when we come to the discharge we find it to be an express discharge of all rights in the words I referred to just now, and refers expressly to the contract of marriage. It says, "all claims whatsoever, by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, and as the share or division hereby allotted to her of her said father and mother's property settled by the said contract."

Now, it seems to me, my Lords, that there is quite plain and sufficient reference to the instrument, and to the object and interest of the parties in the very form there used, and though it is quite true that it goes on to give a general release of her father's property under any circumstances whatever, yet even that is not inconsistent with the original settlement, because in the original settlement, whatever portions the children were to take under the settlement of 1828 are there expressed to be in dis-

charge of whatever share they might be entitled to of the parent's property, either by way of legitim, portion-natural, or otherwise, so that it is only repeating the effect intended to be given to the original settlement, and to the taking under that settlement.

Now, as matters stood thus, even taking that £5000 as a part of the money that was to be settled, it was to be considered that Mrs. Cuninghame would have her £5000 out and out, and she was disposed of, and as some of the learned Judges expressed it, she was to be treated thereupon as if she were dead, as if she were wholly taken out of all interest under the settlement of 1828, and that whatever remained of that fund would fall to the remaining daughters, Mrs. Mercer and Lucy. The argument was pressed upon us to that extent, that it operated as an appointment to her of the £5000, and a discharge by her of all further interest in the existing fund, and that thereupon, by force of the appointment so made to her, there was an actual handing over of the residue of the fund to the other two children, operating by way of appointment, as if the whole residue of the fund had been given to the remaining two children.

Now, certainly, I do not think that the instrument bears at all that construction, and it is a construction which one would not place upon the instrument unless one found some very clear and concise words to that effect. For observe what might happen—and what, in fact, really did happen—so that there is no need to put it hypothetically as that which probably might occur. On the next daughter marrying, Mr. Anstruther does the same thing—he gives £5000 in the same form, and with the same discharge, and there is very little doubt that if Lucy had married, the form would have been exactly the same in her case, or, at least, it might have been so—so that he might have made three appointments [49] of £5000 each—taking all the daughters on that theory out of the case, as if each daughter were dead, depriving them of all further interest in the fund. And having thus provided £15,000 out of the £60,000, he might have said—everybody is now swept out of the fund, the whole fund is clear, and the consequence is that it will go back to the parties who provided it, the father having his share and the mother having her share, so that the provisions orginally contemplated would never have taken effect. But that would be an entire contradiction of the whole scope and frame of the original settlement, which was that the children were to take the whole, except where it was disposed of for onerous considerations.

Now, that being so, it appears to me that this dealing with this sum of £5000 could only take effect as an apportionment *pro tanto* of the fund, leaving the rest of the fund to be apportioned. It was said, even by those who opposed Mrs. Cuninghame's claim, that they could not put their argument so high as to say that the parent had no right to increase her portion if he thought fit.

It was conceded, as regarded the father, that however he might be himself protected by the discharge, he was not himself prevented from making a further apportionment if he thought fit.

When we come to Mrs. Mercer's case, the sole difference is this—the mother having died, that interest which was a *spes successionis* had become absolute in Mrs. Mercer, as regards the mother's property, subject only to the liferent of the father. The learned Judges were unanimous, I think, upon this case of Mrs. Mercer, in setting aside the discharge in Mrs. Mercer's settlement.

LORD CHELMSFORD.—Lord Deas differed.

LORD CHANCELLOR.—But the other Judges, I think, all concurred, because they said that in Mrs. Mercer's case the discharge was made in ignorance of her position—that there was ignorance of the true state of the case as regarded her, namely, that she would be placed in a much more favourable position than Mrs. Cuninghame by the circumstance of her mother's death and her having acquired a positive interest in this fund with which she was parting to so large an extent. I need not deal now with Mrs. Mercer's case, because, according to my view of the case, it was, if anything, *a fortiori*,—it could not be weaker than Mrs. Cuninghame's case. I apprehend that what has happened is this—an apportionment was made, first, of £5000, part of the fund, to Mrs. Cuninghame, and her discharge has not prevented her having any other part that may be unapportioned. And Mrs. Mercer is placed in the same position, so that the two sums of £5000 having been taken out of the fund, it now remains to be seen what is to be done with the rest of it.

Then there is the dealing with Lucy, which is subject to the same remarks as I have made upon Mrs. Cuninghame's case and Mrs. Mercer's, namely, that there

is an express recital that it is intended to operate by way of apportionment of the fund, and there is a discharge by Lucy, as in the other deeds. Therefore it appears to me that the proper conclusion to come to on that part of the case is that the £20,000, made over to her upon the occasion of Mr. Anstruther entering into arrangements for his second marriage must be taken as an apportionment of the fund *pro tanto*, so that you find that £30,000 out of the whole fund has been apportioned. It is said, and it is not denied, it is not proved, and it must be a matter of inquiry, that the £30,000 exhausts the whole fund. We have every reason to suppose that it does not, but that must be a subject of inquiry. If the precise amount cannot be ascertained by the parties without inquiry, inquiry and investigation must be made into the whole fund, taking the two amounts together, the £4000 of Mr. Anstruther's and Mrs. Anstruther's whole property included in that settlement of 1828. When you have added those two funds together you have to consider that the £30,000 has been paid out of that fund, and Mr. Anstruther's estate is, of course, discharged entirely to the extent of the £30,000. Then the amount of the remainder will have to be ascertained, and when ascertained it will have to be divided among these three ladies in [50] equal proportions. I think that in substance really reaches the whole of the case we have before us.

It is a case which, when analysed, may, I think, be reduced to these simple propositions,—the first proposition being, that the children, in the event of the fund not being alienated for onerous causes, clearly had the right which has now accrued in the two funds—that of the father and that of the mother; that the sum paid over to the first child of the marriage, and accepted by her as her allotted portion, does not operate to bar and sweep her out of the whole benefit to be derived from the settlement, but only operates *pro tanto* as far as the £5000 goes; and that the sum allotted to Mrs. Mercer in effect amounts to a similar appropriation or apportionment of the £5000 apportioned to her: Therefore what your Lordships have to do in this case will be this—To make a declaration that the settlement of Mrs. Cuninghame and Mrs. Mercer are respectively appointments or apportionments (the Scotch call it apportionment) under the power contained in the settlement of 1828; but that the alleged release contained in each of these settlements does not amount to or effect any bar to the right of participation in any portion of the property subject to the power of apportionment which may not be apportioned under that power, and that the release given by the third child in the same way does not operate as barring her from taking any share in the remaining fund, and that the gift made by the trust-settlement of 1866 of £20,000 to the third daughter Lucy is also an appointment to Lucy under the power which it was fully competent to the donee to make; and then to order that if the two sums of £5000 and £20,000 do not in the aggregate amount to the whole of the funds brought into the two settlements, the balance of those funds is unappointed property, and is distributable under the trusts of the settlement of 1828 among the three children in equal shares, and that there must be an inquiry in order to ascertain of what those funds consist. That will be in substance the whole of the decree. We should desire to take a little time to frame the exact form of the decree, in order to put it in a complete and correct form. But the rights of the parties, I apprehend, taking the view of the case which I have taken, if that be the view of your Lordships, will be expressed by what I have already stated.

I ought to add, with reference to another noble and learned Lord who was present at the hearing of this case, Lord O'Hagan, that he expressed his desire that the judgment should not be postponed on account of his absence, and he also expressed his concurrence in the views I have expressed, that the sums advanced to Mrs. Cuninghame and Mrs. Mercer were in effect appointments made, and that the parties to whom the appointments were made were not debarred from sharing in the fund which might remain unappropriated and unappointed. I am not, of course, able to say that he knew absolutely all that I have now stated in giving my reasons for this judgment, but he concurs in the conclusions to which I have now come.

LORD CHELMSFORD.—My Lords, the questions upon which this appeal arises may be conveniently considered under the following heads:—

(1) What is the nature of the right or interest which the children of Mr. and Mrs. Anstruther took under their parents' marriage-contract?

(2) Was the power of apportionment amongst their children contained in that marriage-contract duly exercised by the obligation which the parents jointly took

upon themselves in Mrs. Cuninghame's marriage-contract, and Mr. Anstruther alone in Mrs. Mercer's marriage-contract, to pay £5000 to trustees in trust for them and their children respectively, and by the acceptance of each of them of that sum in satisfaction of all claims which they had under the marriage-contract of their parents ?

(3) Is there any ground for the reduction of the clause of discharge in Mrs. Cuninghame's and Mrs. Mercer's marriage-contract, or either of them ?

(4) Assuming that the sums of £5000 paid to trustees for Mrs. Cuninghame and Mrs. Mercer on their respective marriages were proper exercises of the power of apportionment, and the £20,000 given to Lucy Anstruther by her father upon his second marriage was also a good apportionment of that sum to her, and these [51] several sums did not exhaust the fund over which the power existed, how is the unappropriated fund remaining after the apportionment to be dealt with ?

The nature of the right and interest of the children under the marriage-contract of Mr. and Mrs. Anstruther seems to me to admit of little dispute. In the case of each property brought into settlement the fee was in the party from whom it proceeded, subject respectively to a liferent in the other surviving ; and the children had a succession which has been indifferently called a *spes successionis* and a protected interest, but whatever its proper name, it was a contingent right which could have been defeated by a disposition for onerous causes, but not by a gratuitous alienation. The Dean of Faculty argued that the question whether the fee was in the parents or the children was one of intention, and that when there is a power of division among children the parent necessarily becomes fiduciary fiar for behoof of the unborn children. If this is the law it is rather extraordinary that it was not adopted by any one of the learned Judges of the Court of Session. They were unanimously of opinion that the fee of the £4000 provided by Mr. Anstruther was in him, and they did not agree with the Lord Ordinary that the fee of the provisions made by Mrs. Anstruther was in Mr. Anstruther surviving, but, with the exception of Lord Deas, who thought that the question did not require to be determined, they held that it passed upon her death to the children.

Upon the death of both their parents the children would have been entitled equally to the whole of the property, whether derived from their father or their mother, unless the power of apportionment amongst them contained in the marriage-contract were duly exercised. As to the father's £4000 a power is reserved to him to divide and apportion it as he should think proper among the children, and the mother if she survived him was to have the same power. And as to the property provided by the mother, the power to divide and apportion it among the children was given to the parents during their joint lives, and afterwards to the survivor, and in both cases, failing any division, the provisions were to be divided among the children equally, share and share alike.

The next question, therefore, to be considered is, whether this power of apportionment amongst the children was duly exercised by the obligation to pay £5000 to trustees under Mrs. Cuninghame's and Mrs. Mercer's marriage-contracts respectively, and their acceptance of those sums in satisfaction of all their claims under the marriage-contract of their parents. There is no difference in the cases of these two children, except that at the time of Mrs. Mercer's marriage her mother was dead, and the obligation to pay the £5000 was undertaken by the father surviving. The clause of discharge in their claims is in the same terms *mutatis mutandis* in the marriage-contracts of each of the daughters.

Taking Mrs. Cuninghame's as the example, it runs thus :—" And which said sum of £5000 is hereby declared to be, and the said Maria Anstruther hereby accepts of the same in full satisfaction of all legitim, portion-natural, or bairns' part of gear, and of all claims whatsoever which she, the said Maria Anstruther, has in any manner of way, by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, dated 24th and 26th March 1828, and as the share of division hereby allotted to her of her said father's and mother's property settled by said contract, all which claims are hereby settled accordingly."

It was argued on the part of the appellants that this could not have been intended as an execution of the power of apportionment, because there was no reference to the power, and because of the release, not only of the daughter's claim under the marriage-contract of her parents, but also of the legitim, portion-natural, and bairns' part of gear, but that it was a transaction between the father and daughter, by which

he, paying the £5000—not out of the trust-funds but out of his own monies—purchased the release of his daughter's claims for his own benefit, and that this opened to the appellants the grounds of reduction of the clause of discharge upon which they insisted.

It appears to me that the obligation to pay the £5000 was intended to be, and was understood by all parties to be, an execution of the power of appointment. Little reliance can be placed upon the circumstances that the clause con-[52]-tains no express reference to the power. As Lord St. Leonard says in his book on Powers (8th edition, p. 289)—a donee of a power may execute it without referring to it, or taking the slightest notice of it, provided that the intention to execute it appears—and the reason of this is given in Scrope's case (10 Rep. 143 b) to which he refers, "quia non refert an quis intentionem suam declaret verbis an rebus ipsis vel factis."

It appears clearly that the powers must have been in the contemplation of the parties from the words of acceptance of the £5000 by Mrs. Cuninghame in satisfaction (*inter alia*) of the share or division thereby allotted to her of her said father and mother's property settled by their marriage-contract. It seems difficult to put any other construction upon these words than that of an acknowledgment that the £5000 was the share or division which Mr. and Mrs. Anstruther had the power to allot by their marriage-contract. The acceptance of this sum, not only as the allotted share, but also in satisfaction of the legitim, portion-natural, or bairns' part of gear, which is used as an argument against its being an exercise of the power, strengthens my opinion that it must have been so intended. For the creation or reservation of the power in Mr. and Mrs. Anstruther's marriage-contract is immediately followed by the words, "which provisions conceived in favour of the child or children of the said marriage shall be in full satisfaction to them of all bairns' part of gear, legitim, portion-natural, executry, and everything else that they could ask or claim by and through the decease of the said James Anstruther, their father, except what he may think fit to bestow of his own good will only." The satisfaction of these rights and interests would have been followed up on the due execution of the power, and therefore it was unnecessary that it should have been expressly mentioned, but, having been so, it shews that the clause must have been framed with direct reference to the power, and it leaves no doubt in my mind that it was intended to be an exercise of it.

An objection was made to the execution of the power, that the appointment of the £5000 to the daughters respectively was not confined to them, but made to others who were not objects of the power. This is answered by the case of White *v.* St. Barbe (1 Ves. & B. 339), in which it was decided that under a power to appoint among children interest may be given to grandchildren by way of settlement, with the concurrence of their mother (an object of the power), and her husband.

Having shewn that the £5000 given to the daughters on their respective marriages was in exercise of the powers of apportionment, and not a transaction with their parents, the next proposed question as to the reduction of the clauses of discharge in their marriage-contracts, and all the evidence given as to their ignorance of their rights at the time of their acceptance of the £5000 in satisfaction of their claims, fall to the ground, because if a parent has a power of appointing a fund amongst children in such proportions as he may think proper, he may exercise that power at his own will and pleasure; and whether the child who has a share allotted is a minor or of full age, or whether he knows or is ignorant of the extent to which he might eventually become entitled in succession, or whether he expressly accepts or not the provision which is made for him, is wholly material, as he can by no possibility control the parent in his discretion to distribute the fund amongst the children as he thinks proper.

Mrs. Mercer's case differs in no respect in the character of the provision made for her upon her marriage from that of Mrs. Cuninghame. Both were in exercise of the power of apportionment or neither. Mrs. Mercer's release of her claims could only be reduced upon the ground of its being a transaction with her father in ignorance of her right in the succession to her mother's property, and if it were of that character the clause in Mrs. Cuninghame's marriage-contract is precisely similar. I cannot understand, if in Mrs. Mercer's case it was a transaction which ought to be reduced, why the same conclusion was not adopted in favour of Mrs. Cuninghame's. The Lord President draws this distinction between the two cases,—"When Mrs. Smith Cuninghame was married in 1847"—(he says)—"she had nothing but a contingent claim either against her father or mother under their marriage-contract, and she

was receiving a present considera-[53]-tion in money for a discharge of that contingent claim. But when Mrs. Mercer was married in 1861 she had much more than a contingent claim, she had a joint fee along with her sister Lucy in the whole estate of which her father was liferenter." But, with great respect, the question in the case of both daughters was not as to the nature of their rights, but as to their knowledge or ignorance of them ; and, in this view, it seems to be immaterial whether the interests with which they were respectively dealing were contingent or vested. If they are to be considered as transactions which may be reduced on the ground of ignorance of facts, which disabled the daughters from exercising a right judgment, whether they should accept the £5000 in satisfaction of their respective claims, the case of Mrs. Cuninghame seems to be stronger in favour of reduction than that of Mrs. Mercer, as she was a minor, and her natural guardian, her father, does not appear to have afforded her the protection which she was entitled to expect from him. I could not avoid making these remarks upon the interlocutor of the Court of Session reducing the discharge in Mrs. Mercer's marriage-contract, and refusing to do so with respect to a similar clause in the marriage-contract of Mrs. Cuninghame, although, as I have already shewn, these clauses being in both cases introduced into the contracts in the exercise of the power of apportionment contained in Mr. and Mrs. Anstruther's marriage-contract, reduction of them is out of the question.

There only remains to consider what is to be done with the trust-fund which, after all the allotments made in exercise of the powers of apportionment, is left unappropriated. I do not think that by these allotments the parents put it out of their power to increase the provision made for the daughter, nor was the joint power in Mr. and Mrs. Anstruther so exhausted by their exercise of it in Mrs. Cuninghame's favour as to render it incompetent to Mr. Anstruther, surviving, to make an addition to what had been before given to her.

Out of the unappropriated residue of the fund a sum of £20,000 was given to trustees by Mr. Anstruther for his daughter Lucy, upon the occasion of his second marriage. There was a doubt suggested in argument, whether this ought to be regarded as an appointment of the fund over which the power existed, or was not rather a bargain with Lucy out of Mr. Anstruther's own property. He certainly entertained the idea that after the death of his first wife he had the absolute fee in her property, and was entitled to transact with it at his pleasure ; and the trust-disposition and settlement, upon his second marriage with Miss Anderson, proceeds upon this supposition. He thereby assigns, dispones, conveys, and makes over to trustees his whole means and estate, heritable and moveable, real and personal, in trust after payment of his just and lawful debts, deathbed and funeral charges, and the expenses of carrying the trust into execution, to pay over or invest the sum of £20,000 for the sole use and behoof of Lucy Anstruther, and her heirs and assignees ; and his trustees are to hold and invest the sum of £30,000 for payment to his promised spouse of the interest during his lifetime, and after her death the principal to the children of the marriage. The whole of the settlement has more the appearance of a disposition of his own property than of the exercise of a power by which his authority was limited. But as in the allotment of the shares of the two other daughters, the provision for Lucy is declared to be in full satisfaction of all claims she may have for bairns' part of gear, legitim, portion-natural, or through the marriage-contract between her father and mother, and Lucy, in token of accepting the provision in full of all such claims, subscribes the settlement. I think that if it had been to Lucy's interest to reject this provision as not being in exercise of the power of apportionment in her favour, it would not have been competent to her to do so, nor can her sisters successfully contend that there has been no due exercise of the power to the extent of this £20,000, and, consequently, that it is part of the unappropriated residue. But the £30,000 given to the second wife could only be a valid disposition if Mr. Anstruther were fiar of the fund remaining unapportioned amongst the children of his first marriage, because it would then be, as the Lord Ordinary said, subject to his disposal for onerous causes or just and rational consideration. But he having only a power to divide and proportion the fund amongst the children of the first marriage, the disposition to [54] the second wife was clearly void, as she was not an object of the power. The result is, that the whole remaining fund beyond the two sums of £5000 to Mrs. Cuninghame and Mrs. Mercer, and the £20,000 to Lucy Anstruther, comes to be distributed equally amongst the three sisters, share and share alike, according to the provisions of the

marriage-contract of Mr. and Mrs. Anstruther. I agree with my noble and learned friend in the judgment which he has proposed to your Lordships.

LORD WESTBURY.—My Lords, I cannot part with this case without adding a few observations to what has been said by my noble and learned friends. It is matter of regret, no doubt, to observe the uncertainty and variety of opinions upon what in this country would be deemed a very simple case, where, however, our Courts of justice would not proceed upon any grounds that are not common to the jurisprudence of Scotland in this matter.

I must first advert to the notion that seems to have been entertained by some of the learned Judges of the Court below, that the language of this power required an execution *uno flatu* once for all. Some of them appear to have imagined that the language required an entire apportionment, and that it did not admit of appointments from time to time. My Lords, that would be to put an interpretation on the words utterly at variance with the objects of the power, and utterly subversive of any useful application to be made of the power. No appointment could be made to a child settled in life or married until all the other children had also become of such an age that their future destination could be ascertained and fixed. It is quite clear that the reason of the thing demands that the power given to the parents, in one instance to the father, in the other instance to both parents, to apportion at any time, must be interpreted so as to warrant the appointment being made from time to time, and so in truth it appears to have been conceded at the bar, because it was admitted that after the appointment to Mrs. Cuninghame and to Mrs. Mercer further appointments might have been made.

The next difficulty that was felt by the learned Judges in the Court below was on the words which have been denominated a "release in the appointment to Mrs. Cuninghame and in the settlement of Mrs. Mercer," and various effects have been ascribed to these alleged words of release. Some learned Judges appear to have imagined that they operated as an assignment by contract to the father or the donee of the power of the whole extent of the portion which in an equal division of the entire fund might have been attributed to the objects of the power. Now, it is quite clear that that would destroy the very foundation upon which the powers given to the parents are rested. If it were possible to admit any contract between a father and a child as the reason for the exercise of the power, fraudulent transactions might be introduced destructive of the interests of the child, and giving to the father that which he ought not to obtain ; it is clear, therefore, that in accordance with the settled principles of equity it is impossible to hold that the father could gain any benefit to himself in the residue of the trust-fund by having made an appointment of one part of it as to one of the children. Well, but then some of the Judges imagine that the release might inure to the benefit of the two other sisters, who were the objects of the power. Sometimes it was imagined that the release of Mrs. Mercer's settlement might inure to the remaining sister. It is utterly impossible to find in either settlement any contract to that effect, or that the words contained in the settlement should receive that interpretation even if it were possible that such a transaction should have force given to it as consistent with an honest exercise of the power. The truth is, that what are called the words of release amount to no more than this, that the sum appointed to the child shall be taken as part of the settlement provision, in which the child under the trust-settlement had an interest. The whole case, therefore, assumes a very simple aspect as soon as the ordinary suggestions of common sense are applied to the interpretation of the words, and to the effect which, their having regard to the intention of the power, ought to be attributed to it.

Now, that being the state of the case, the relative position of the children is [56] perfectly clear. They stand on an equality with regard to the undistributed and unappointed parts of the funds. The father's right to determine the quantity is thereby acknowledged, so far as he has exercised that right. He thought proper to appoint £5000 to Mrs. Cuninghame, reserving of course the right of making a further appointment. In like manner, he has given £5000 to Mrs. Mercer, and in like manner he has given to Miss Lucy £20,000. But, supposing these sums not to exhaust the fund, the residue falls under the disposition contained in the settlement, and will be divisible equally among the three sisters. The conclusions, therefore, are perfectly plain. I am only anxious that it should not be considered that the form of the account to be directed is now finally concluded upon, and I should

be glad if an opportunity could be given to counsel to see the form of this account, not for the purpose of argument, but in order that any suggestions that might occur to counsel might be handed into the House as to the form of the account before the final order is made.

With these prefatory observations I will read what I have written, and the conclusions at which I have arrived, and which have been sanctioned by what has fallen from the noble and learned Lords who have preceded me. I consider that the settlements of Mrs. Cuninghame and Mrs. Mercer are respectively appointments, and under the power contained in the settlement of 1828. I prefer the word "appointment," because the word "apportionment" seems to imply a dealing with the entirety of the fund. But the alleged release contained in each of the settlements does not amount to or affect any bar to the right of participation in any portion of the property subject to the power of appointment which may not be appointed under the power. Neither does the release give to the third child or operate by implication as an appointment to the third child, of the residue of the funds which were subject to or comprised within the power. The gift made by the trust-settlement of 1866 (that is, Mr. Anstruther's will) of £20,000 to the third child, Lucy, is, in my opinion, an appointment to Lucy under the power, and which it was fully competent to the donee of the power to make. But if (as in this case) the two sums of £5000 and the £20,000 do not together equal the aggregate amount of the funds brought in by Mrs. Anstruther under the settlement of 1828, and of the funds of Mrs. Marian Anstruther, also brought into that settlement, the balance of these funds (after deducting £5000, £5000, and £20,000 = £30,000) is unappointed property, and is distributable under the trusts of the settlement of 1828 among the three children in equal shares, for I do not think the children are bound in this division of the surplus to bring into hotch-pot the sums appointed to them respectively. The right of the children to the provisions brought in by Mr. and Mrs. Anstruther under the settlement of 1828 was not defeated by the provisions for the second Mrs. Anstruther under the settlement of 1866. On the death of Mrs. Marian Anstruther her surviving husband became fiar in trust of all the property brought in by Marian, and could not defeat the interests of the children.

Therefore the interlocutor of 11th July 1870 was totally wrong; the judgment in Mrs. Mercer's case is wholly inconsistent with it, inasmuch as it finds that Mrs. Mercer was entitled to share with her sister Lucy in the estate and effects of their mother, so far as not settled and appropriated by their father and mother jointly, or by their father after their mother's death. It will be observed that my observations would give the surplus to the three sisters. The difference of the decision in Mrs. Cuninghame's case from that in Mrs. Mercer's case cannot be supported by any difference in the wording of the alleged release in the two settlements, for they are identical; and it is evident that the question as to the fee of the settlement funds is wholly immaterial, it being admitted that the power of apportionment remained unaffected, and that, subject to that power, the effect of the settlement of 1828 was to give the whole of the settlement estate to three children as substitutes to their parents, in equal shares.

There is no question with any creditor or aliener for value of Mrs. Anstruther.

I think it expedient that the order of the House shall be made in both appeals, and cover the whole of the subject-matter, subject to any alteration in the language of the order that my noble and learned friends may hereafter suggest. I will read what I should propose as the form of the order, for the information [56] of the counsel at the bar at present. It may be as follows:—"Reverse the interlocutor of the 11th July 1870: Reverse such parts of the other interlocutors appealed from in either appeal as are inconsistent or at variance with the declarations and findings hereinafter expressed: And this House doth declare and find that the marriage-settlement of Mrs. Cuninghame, and the marriage-settlement of Mrs. Mercer, were respectively valid appointments of the two sums of £5000, in exercise of the power contained in the settlement of 1828; but that such appointments do not exclude Mrs. Cuninghame or Mrs. Mercer from participating in so much of the funds or property comprised in the deed of 1828 as have not been appointed under the power or powers therein contained: Declare and find that the trust-disposition and settlement of Mr. Anstruther, of 8th October 1866, was a good appointment under the power in the deed of 1828, to Lucy Anstruther, of the sum of £20,000, part of the

funds comprised in the deed of 1828; but that she is not thereby debarred from participating equally with Mrs. Cuninghame and Mrs. Mercer in the residue of the settlement funds of 1828 (if any) remaining unappointed or unexhausted by the said three appointments: Declare and find that, according to the true construction of the powers contained in the settlement of 1828, the same admitted of being validly exercised from time to time by several appointments: Declare and find that the estate of Mr. Anstruther is entitled to have credit in the account hereinafter directed for the two sums of £5000 paid by him to the trustees of Mrs. Cuninghame and Mrs. Mercer's settlements, and for any sum received by Miss Lucy Anstruther on account of the sum of £20,000.

"Declare and direct that a reference be made to such person as the Court of Session shall appoint under the remit hereby made to take the following accounts.

"An account of all the funds, monies, and properties that were comprised in or became subject to the trusts or dispositions expressed or made in and by the said settlement of 1828, and of the manner in which the same have been from time to time invested, and what were the particulars, value, or amount of all such funds and property at the death of the said James Anstruther, and to ascertain and state what, if anything, was, at the time of his decease, due from the said James Anstruther (subject as aforesaid) in respect of any trust property or principal trust moneys received by him, and applied to his own use, and to ascertain and state the balance due from the estate of the said James Anstruther to the settlement of 1828, and, if necessary, an account to be taken of all the estate of the said James Anstruther not comprised in or subject to the trusts of the settlement of 1828."

This may not be necessary. It is only to ascertain what free general personal estate of James Anstruther there now is to answer what will be the demand against him under the provisions of the settlement of 1828, and with the receipts and payments of his trustees for or representatives in respect of such estate not subject as aforesaid, and to ascertain what estate of the said James Anstruther is applicable to the payment of the balance that may be found due from him to the settlement of 1828 as aforesaid.

There is, then, a point which I must submit to your Lordships' attention, and that is the question, how the enormous amount of the costs that have been incurred in this unfortunate litigation are to be met. Now, considering how the decisions in this case have varied, the wanderings of the parties themselves may in some degree be excused, and I should therefore humbly submit to your Lordships that the costs of all the parties should be paid out of the free estate of Mr. Anstruther.

I am desirous that, if possible, we should dispose of this matter in such a way as not to leave any door ajar that may be pushed open in the Court below, so as to admit of further litigation in this matter; whether we can do that or not may be very problematical. I understand that your Lordships wish to reserve to yourselves the power of considering the exact form of your order. I am not at all sure that the words I have now read comprehend the whole of the matter, but in case any alteration therein should be desirable, perhaps your Lordships will approve of the form of account being given, before the order is made, to the [57] counsel on either side, not to afford an opportunity at the bar, but that they may be at liberty to send in such amendments in the form of account as they may think desirable in this case.

With these declarations, findings, and directions, I would submit to your Lordships to remit the causes to the Court of Session.

LORD CHANCELLOR.—My Lords, with reference to the last remark that my noble and learned friend has made regarding the expense of this litigation, I should go so far with him as to think that, ultimately, Mr. Anstruther's property (he being really the cause of the mode in which these instruments were executed, and therefore the source of the vexation and intricacy that have subsequently occurred in solving the various questions which have arisen) might be charged with that expense, but one does not know how the course of events may turn out with reference to the proportion of property in the several estates, as between the three sisters. I apprehend that all costs should come equally if they are obliged to have recourse to their own funds, out of that free fund which is left after the apportionment, but having recourse to the father's estate in the event of that estate being sufficient to answer them, in order to recoup the diminution of the fund. The father's estate, therefore,

will pay the costs in the first instance, if sufficient to do so. If not, the costs will necessarily have to come out of the fund to be divided.

LORD WESTBURY.—I have not the least objection to that.

LORD CHANCELLOR.—Then the question will be that the interlocutors complained of, so far as they are inconsistent with the declaration afterwards to be contained in your Lordships' order, be reversed. We will postpone the exact form of the declaration, though I believe we agree in substance with the proposal of the noble and learned Lord; and as to the expenses, that they be borne in the manner prescribed in the form of order as it will be finally drawn up.

The following judgments were pronounced in the two actions:—

"*9th August* 1872.—After hearing counsel . . . upon the original petition and appeal of Mrs. Maria Anstruther or Smith Cuninghame," &c. "complaining of an interlocutor of the Lords of Session in Scotland, of the First Division, of the 18th (signed 20th) of March 1869, in so far as the same finds that under the contract of marriage, dated 24th and 26th March 1828, the fee of the sum of £4000 was vested in James Anstruther, and that under the said contract of marriage the fee of the means and estate therein mentioned as provided by Mrs. Marian Anstruther was vested in her, and in so far as the same does not find that under the said contract of marriage the children of the marriage became respectively absolutely entitled to a share of the provision of £4000 by Mr. Anstruther, and to a share of the provision therein contained of the whole means and estate of Mrs. Anstruther, subject only to a power of apportionment among them by Mr. and Mrs. Anstruther, or the survivor of them; and also of an interlocutor of the said Lords of Session there, of the First Division and three Judges of the Second Division, of the 11th (signed 14th) of July 1870, and praying their Lordships to reverse, vary, or alter the said interlocutors to the extent complained of, or to give the petitioners such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet; as also upon the joint and several answer of Mrs. Anabella Agnes Anderson or Anstruther," &c., "trustees of the said deceased James Anstruther; . . . and also of the said Mrs. Anabella Agnes Anderson or Anstruther, and Miss Lucy Sarah Anstruther, as individuals, put into the said original appeal (and which said appeal was by an order of this House, of the 21st [58] of April 1871, ordered to be heard *ex parte* as to Mrs. Annie Catherine Anstruther or Mercer and John Henry Mercer, as her administrator-in-law and for his own right and interest, they not having answered the said appeal, though peremptorily ordered so to do); as also upon the petition and cross appeal of the said Mrs. Anabella Agnes Anderson or Anstruther," &c. "trustees of the said deceased James Anstruther, . . . and also of the said Mrs. Anabella Agnes Anderson or Anstruther, and Miss Lucy Sarah Anstruther, as individuals, complaining of an interlocutor of the Lords of Session in Scotland, of the First Division, of the 18th (signed 20th) of March 1869, in so far as the same finds that under the contract of marriage of the deceased James Anstruther and Mrs. Marian Anstruther, dated 24th and 26th March 1828, the children of the marriage had in regard to the sum of £4000 therein mentioned as provided by Mr. Anstruther, a right of succession which could not be gratuitously defeated, and in so far as it finds that under the said contract of marriage the fee of the means and estate therein mentioned as provided by Mrs. Anstruther was vested in her, the said Marian Anstruther, subject to a right of liferent by the said James Anstruther in the event of his surviving his said wife, and that the children of the marriage had, in regard to the said means and estate of Mrs. Anstruther, a right of succession which could not be gratuitously defeated; and in so far as it finds that neither by the said James Anstruther and Marian Anstruther jointly, nor by him as the survivor, was any deed executed purporting in terms to be a deed of division and apportionment amongst the whole of the children, either of the said sum of £4000, or of the means and estate of Mrs. Anstruther aforesaid, and praying their Lordships to reverse, vary, or alter the said interlocutor to the extent complained of, or that the petitioners, might have such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet; as also upon the joint and several answer of Mrs. Maria Anstruther or Smith Cuninghame . . . put in to the said cross appeal, and due consideration had, as well on Thursday the 25th of April last as this day, of what was offered on either side in this cause,—It is ordered and adjudged . . . that the said interlocutor of the 11th (signed 14th) of July 1870, complained of in the said original appeal, be, and the same is hereby reversed,

and that such parts of the said interlocutor of the 18th (signed 28th) of March 1869 (in part complained of in the said original and cross appeals) as are inconsistent or at variance with the findings and declarations and order hereinafter expressed, be, and the same are hereby also reversed; and this House doth find and declare that the marriage-settlement of Mrs. Cuninghame and the marriage-settlement of Mrs. Mercer, in the proceedings mentioned, were respectively valid appointments of the two sums of £5000, in exercise of the power contained in the settlement of 1828, also in the said proceedings mentioned, but that such appointments did not exclude Mrs. Cuninghame or Mrs. Mercer from participating in so much of the funds or property comprised in the said deed of 1828 as have not been appointed under the powers therein contained: And this House doth further find and declare that the trust-disposition and settlement of Mr. Anstruther, of 8th October 1866, in the proceedings mentioned, was a good appointment under the power in the said deed of 1828 to Lucy Anstruther of the sum of £20,000, part of [59] the funds comprised in the said deed of 1828, but that she is not thereby debarred from participating equally with Mrs. Cuninghame and Mrs. Mercer in the residue of the settlement funds of 1828 (if any) remaining unappointed or unexhausted by the said three appointments: And this House doth further find and declare that, according to the true construction of the powers contained in the said settlement of 1828, the same admitted of being validly exercised from time to time by several appointments: And this House doth further find and declare that the estate of Mr. Anstruther is entitled to have credit in the account hereinafter directed for the two sums of £5000 paid by him to the trustees of Mrs. Cuninghame's and Mrs. Mercer's settlements, and for any sum received by Miss Lucy Anstruther on account of the sum of £20,000: And this House doth further declare and direct that a reference be made to such person as the Court of Session shall appoint under the remit hereby made to take the following accounts:—1. An account of all the funds, moneys, and property that were comprised in or became subject to the trusts or dispositions expressed or made in and by the said settlement of 1828, and of the manner in which the same have been from time to time invested, and what were the particulars, value, or amount of all such funds, moneys, and property at the death of the said James Anstruther, and to ascertain and state what, if anything, was at the time of his decease due from the said James Anstruther (subject as aforesaid) in respect of any trust-property or principal trust-moneys received by him and applied to his own use, and to ascertain and state the balance due from the estate of the said James Anstruther to the trust-estate under the said settlement of 1828, and, if necessary, to take an account of all the estate of the said James Anstruther not comprised in or subject to the trusts of the said settlement of 1828 and of the receipts and payments of his trustees or representatives in respect of such estate (not subject as aforesaid), and to ascertain what estate of the said James Anstruther is applicable to the payment of the balance that may be found due from him to the trust-estate under the said settlement of 1828 as aforesaid: And it is further ordered that the expenses of all parties in the Court of Session being taxed under the direction of the said Court, and the cost of all parties in respect of this appeal, the amount thereof being certified by the Clerk of the Parliaments, be paid as follows, namely, the costs and expenses of the trustees of the said James Anstruther shall be paid out of the free estate of the said James Anstruther; and if any balance of the said free estate shall remain after such payment, the costs and expenses of the several other parties shall be paid out of the said balance; and if the same be deficient, then the last-mentioned costs and expenses, or any balance thereof, shall be paid out of the residue of the said settlement funds remaining unappointed or unexhausted as aforesaid: And it is also further ordered that the cause be remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with these declarations, findings, and directions, and this judgment."

"*9th August* 1872.—After hearing counsel . . . upon the original petition and appeal of Mrs. Anabella Agnes Anderson or Anstruther, widow of the deceased James Anstruther," &c., "trustees of the said deceased James Anstruther, . . . and also of the said Mrs. Anabella Agnes Anderson or Anstruther, and Miss [60] Lucy Sarah Anstruther, as individuals, complaining of an interlocutor of the Lords of Session in Scotland, of the First Division, of the 18th (signed 20th) of March 1869, in so far as the same finds that under the contract of marriage of the deceased James Anstruther and Mrs. Marian Anstruther, dated 24th and 26th March 1828, the children

of the marriage had, in regard to the sum of £4000 therein mentioned as provided by Mr. Anstruther, a right of succession which could nto be gratuitously defeated; and in so far as it finds that under the said contract of marriage the fee of the means and estate therein mentioned as provided by Mrs. Anstruther was vested in her, the said Marian Anstruther, subject to a right of liferent by the said James Anstruther in the event of his surviving his said wife, and that the children of the marriage had, in regard to the said means and estate of Mrs. Anstruther, a right of succession which could not be gratuitously defeated; and in so far as it finds that neither by the said James Anstruther and Marian Anstruther jointly, nor by him as the survivor, was any deed executed purporting in terms to be a deed of division and apportionment among the whole of the children, either of the said sum of £4000, or of the means and estate of Mrs. Anstruther aforesaid; and in so far as it finds it not averred that, in regard to the pursuer, Mrs. Annie Catherine Anstruther or Mercer, individually, any other deed or apportionment was executed except what is alleged to be contained in her marriage-contract with Mr. Mercer, bearing date 10th December 1861; and in so far as it allows to the pursuers a proof of the averments in articles 16, 17, 18, 19, and 20 of their revised condescendence; and appoints the said proof to proceed before Lord Ardmillan on a day to be afterwards fixed by his Lordship; and also of an interlocutor of the said Lords of Session of the First Session, and three Judges of the Second Division, of the 6th (signed 7th) of March 1871, except in so far as it sustains the defences and assoilzies the defenders from the conclusions of the summons, in so far as they apply to and embrace the sum of £4000, provided by the deceased James Anstruther in his contract of marriage with his spouse, the now deceased Marian Anstruther, dated 24th and 26th March 1828, and decerns, and praying their Lordships to reverse, vary, or alter the said interlocutors to the extent complained of, or that the petitioners might have such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet; as also upon the answer of Mrs. Annie Catherine Anstruther or Mercer, John Henry Mercer, and Græme Reid Mercer, put in to the said original appeal; as also upon the petition and cross appeal of the said Mrs. Annie Catherine Anstruther or Mercer, spouse of John Henry Mercer, Esquire, secretary to the Ceylon Company, Port Louis, Mauritius, and presently residing there, and the said John Henry Mercer as administrator-in-law for his said wife and for his own right and interest, and Græme Reid Mercer, Esquire of Gorthy, in the county of Perth, their mandatory, complaining of an interlocutor of the Lords of Session in Scotland, of the First Division, of the 18th (signed 20th) of March 1869, in so far as the same finds that under the contract of marriage of the deceased James Anstruther and Mrs. Marian Anstruther, dated 24th and 26th March 1828, the fee of the sum of £4000, therein mentioned as provided by Mr. Anstruther, was vested in him, the said James Anstruther, and that under the said contract of marriage the fee of the means and [61] estate therein mentioned as provided by Mrs. Marian Anstruther was vested in her; and in so far as the said interlocutor does not give full effect to the first plea in law stated by the petitioners in the cause; and also of an interlocutor of the said Lords of Session there, of the First Division and three Judges of the Second Division, of the 6th (signed 7th) of March 1871, in so far as the same sustains the defences, and assoilzies the defenders from the conclusions of the summons, in so far as these conclusions apply to and embrace the said sum of £4000 provided by the said deceased James Anstruther in the said contract of marriage with his spouse the deceased Marian Anstruther, and in so far as the said last-mentioned interlocutor finds that of the estate and effects of the said deceased Marian Anstruther the sum of £20,000 settled on the defender, Lucy Sarah Anstruther, by the trust-disposition and settlement of her father, James Anstruther, dated 8th October 1866, must, in the circumstances of the case, for the purpose of fixing the principle of division of the unappropriated balance of the said Marian Anstruther's estate between her children, be held and taken to have been settled and apportioned as therein stated, and praying their Lordships to reverse, vary, or alter the said interlocutors to the extent complained of, or give the petitioners such relief in the premises as to this House, in their Lordships' great wisdom, should seem meet; as also upon the joint and several answer of Mrs. Anabella Agnes Anderson or Anstruther," &c., "trustees of the said deceased James Anstruther, . . . and also of the said Mrs. Anabella Agnes Anderson or Anstruther, and Miss Lucy Sarah Anstruther, as individuals, put into the said cross appeal; and which said cross

appeal was, in pursuance of an order of this House of the 20th February last heard *ex parte* as to Mrs. Maria Anstruther or Smith Cuninghame, and William Cathcart Smith Cuninghame as her administrator-in-law and for his own right and interest, they not having answered the said appeal, though peremptorily ordered so to do; and due consideration had, as well on Thursday the 25th of April last as this day, of what was offered on either side in this cause,—It is ordered and adjudged, by the Lords spiritual and temporal, in Parliament assembled, that such parts of the said interlocutors of the 18th (signed 20th) of March 1869, and 6th (signed 7th) of March 1871 (in part complained of in the said original and cross appeals) as are inconsistent or at variance with the findings and declarations and order hereinafter expressed, be, and the same are hereby reversed; and this House doth find and declare that the marriage-settlement of Mrs. Cuninghame, and the marriage-settlement of Mrs. Mercer, in the proceedings mentioned, were respectively valid appointments of the two sums of £5000, in exercise of the power contained in the settlement of 1828, also in the said proceedings mentioned; but that such appointments did not exclude Mrs. Cuninghame or Mr. Mercer from participating in so much of the funds or property comprised in the said deed of 1828 as have not been appointed under the powers therein contained: And this House doth further find and declare that the trust-disposition and settlement of Mr. Anstruther, of 8th October 1866, in the proceedings mentioned, was a good appointment under the power in the said deed of 1828 to Lucy Anstruther of the sum of £20,000 part of the funds comprised in the said deed of 1828, but that she is not thereby debarred from participating equally with Mrs. Cuninghame and Mrs. Mercer in the residue [62] of the settlement funds of 1828 (if any) remaining unappointed or unexhausted by the said three appointments: And this House doth further find and declare that, according to the true construction of the powers contained in the said settlement of 1828, the same admitted of being validly exercised from time to time by several appointments: And this House doth further find and declare that the estate of Mr. Anstruther is entitled to have credit in the account hereinafter directed for the two sums of £5000 paid by him to the trustees of Mrs. Cuninghame's and Mrs. Mercer's settlements, and for any sum received by Miss Lucy Anstruther on account of the sum of £20,000. And this House doth further declare and direct that a reference be made to such person as the Court of Session shall appoint under the remit hereby made to take the following accounts:—(1) An account of all the funds," &c. The conclusion of this interlocutor was in same terms as that of the preceding.

First Appeal—GRAHAME & WARDLAW, Westminster—HAMILTON, KINNEAR, & BEATSON, W.S.—LOCH & MACLAURIN, Westminster—A. & A. CAMPBELL, W.S.

Second Appeal—LOCH & MACLAURIN, Westminster—A. & A. CAMPBELL, W.S.—GRAHAM & WARDLAW, Westminster—HAMILTON, KINNEAR, & BEATSON, W.S.

[*Referred to,* Gray *v.* Binny, 1879, 7 R. 332; Mackie *v.* Mackie's Trs., 1885, 12 R. 1230.]

No. 6. X. MACPHERSON H.L. 62. 2 May 1872. House of Lords.—Lord Westbury; Lord Colonsay; Lord Cairns.

HER MAJESTY'S ADVOCATE, for Her Majesty's interest (Defender), Appellant.—*Lord-Adv. Young—A. C. Sellar.*

THE EXECUTORS OF THE LATE THOMAS CAMPBELL HAGART (Pursuers), Respondents.—*Sir R. Palmer—Anderson, Q.C.*

Stamp-Duties—Inventory-Duty—Debt—Statute 5 *&* 6 *Vict. cap.* 79, *sec.* 23—*Marriage-Contract Provision.*—By antenuptial contract of marriage a person bound himself, his heirs, executors, and successors whomsoever, to pay to his spouse, in case she should survive him, an annuity of £800, and to invest a capital sum sufficient for that purpose, taking the rights and titles thereof to himself and spouse in conjunct fee and liferent, for her liferent use allenarly, in case she should survive him, and to the children of the marriage, whom failing, to himself, his heirs and assignees whomsoever, in fee, with power of apportionment among the children. This obligation

was not implemented, but the husband, by his settlement, bequeathed to one of his sons £10,000, which, by a codicil, was expressly declared to be in lieu and in full of any share he might be entitled to claim of the capital sum foresaid. *Held*, in a question between the father's executors and the Crown, that the £10,000 was a debt "due and owing from the deceased," in the sense of the 23d section of the Act 5 & 6 Vict. cap. 79, which therefore fell to be deducted from the gross amount of his personal estate in ascertaining whether the executors were entitled to a return of inventory-duty.

(In the Court of Session, Dec. 24, 1870, *ante*, vol. ix. p. 358.)

This was an action at the instance of the executors of the late Mr. Thomas Campbell Hagart of Bantaskine against the Lord Advocate on behalf of Her Majesty, for repayment of part of the stamp-duty paid by them upon the gross amount of the personal estate of the deceased, as stated in the inventory thereof recorded by the pursuers.

The circumstances out of which the question arose were these :—

In 1813 Mr. Thomas Campbell Hagart was married to Miss Elizabeth Stewart, and an antenuptial contract of marriage, dated 20th August 1813, was entered into between them, to which their fathers, Mr. Charles Hagart and Mr. Thomas Stewart, were made parties.

The contract contained an obligation on the part of Mr. Stewart to settle upon his daughter and her children a sum of £10,000, and then proceeded as follows :— "For which causes, and on the other part, the said Thomas Campbell Hagart and the said Charles Hagart, Esq., bind and oblige themselves, their heirs, executors, and successors whomsoever, to make payment to the said Elizabeth Stewart during all the days of her [63] lifetime, in case she shall survive the said Thomas Campbell Hagart, of a free liferent annuity of £800, payable at two terms in the year; . . . and the said Thomas Campbell Hagart and the said Charles Hagart hereby bind and oblige themselves and their foresaids to lay out such capital sum on good and sufficient security, or in the purchase of lands, as will secure to the said Elizabeth Stewart the foresaid free liferent annuity of £800, which shall be paid to her as aforesaid, free of all taxes or deductions whatever, and to take the rights and titles thereof to the said Thomas Campbell Hagart and the said Elizabeth Stewart in conjunct fee and liferent, for her liferent use allenarly, in case she shall happen to survive him, and to the children to be procreated between them, whom failing, to the said Thomas Campbell Hagart, his heirs and assignees whomsoever, in fee," &c. A power of apportionment was then conferred on the husband.

No capital sum was ever laid out in implement of the obligation above narrated.

Mr. Hagart died on 24th September 1868, and was survived by his said wife, who died on 11th October 1869; by two sons, Major-General Charles Hagart and Lieutenant-Colonel James M'Caul Hagart; and by two daughters, Miss Ann Elizabeth Molineux Hagart, and Mrs. Eliza Stewart Hagart or Spiers, afterwards Ellice, wife of Edward Ellice, Esq. of Invergarry.

By his settlement, dated 25th August 1858, Mr. Hagart conveyed his whole property to his wife, and to the pursuers, as trustees and executors for payment, in the first place, of his debts. The sixth purpose of the trust was in these terms: —"I hereby direct and appoint my trustees to make payment to the said James M'Caul Hagart, my second son, of the sum of £10,000," &c.

To his said settlement the deceased added the following codicil dated 10th August 1868 :—"I, Thomas Campbell Hagart, Esq. of Bantaskine, considering that by the antenuptial contract of marriage between me and Mrs. Elizabeth Stewart or Hagart, my wife, dated 20th August 1813, I bound and obliged myself," &c. The provisions in the marriage-contract in favour of his wife and children were then narrated. "And farther, considering that by the contract of marriage between Alexander Spiers, Esq. of Elderslie, now deceased, and Eliza Stewart Hagart my daughter, now wife of Edward Ellice, Esq. of Invergarry, I bound myself to pay certain sums of money as a marriage provision to my said daughter, which sums of money were understood and intended to be in lieu and in full of her share of the capital sum referred to in my contract of marriage above mentioned: Therefore I hereby declare and appoint that the said Eliza Stewart Ellice, or any parties in her right, shall have no claim against me, or my heirs or successors, for any part or share of the foresaid capital

sum, provided under my own contract of marriage, beyond the sums provided to her by me under her contract of marriage with the said deceased Alexander Spiers, which sums so provided to her I hereby divide and proportion as her share of the foresaid capital sum referred to in my contract of marriage: And farther, I hereby declare and appoint that the bequests and sums of money provided to James M'Caul Hagart, my second son, and Ann Elizabeth Molineux Hagart, my second daughter, under my trust-disposition and settlement and relative codicil, shall be in lieu and in full of any share which they, or either of them, might be entitled to claim in respect of the capital sum provided under my own contract of marriage aforesaid; and I declare that the provisions to my said son and daughter, under my said trust-disposition and settlement and codicil, shall be held and taken as an exercise by me of the said reserved power of division of the capital sum provided under my own contract of marriage aforesaid; and in further exercise of the said reserved power, I [64] hereby divide and proportion the remainder of the said capital sum to Charles Hagart, my eldest son, as his share thereof.—In witness whereof," &c.

The pursuers, as Mr. Hagart's executors, paid to James M'Caul Hagart the legacy or provision of £10,000.

Upon the death of Mr. Thomas Campbell Hagart the pursuers, as his executors, gave up an inventory, in which they stated—

I. Personal property— . . .

Total amount of personal estate in United Kingdom,				£73,142	5 8
II. Money secured on heritage in Scotland—					
1. Bond in security of bill for £9000 included in Branch I.	£0	0	0		
2. Real burden on lands for sum in personal bond of £7922, 3s. included in Branch I.	0	0	0		
3. Debt secured on heritage, . .	3571	0	0		
4. Do. do. . . .	1530	10	0		
				5,101	10 0
Total . . .				£78,243	15 8

The duty paid by the pursuers was £1050, which is the duty exigible in terms of the schedule, part second, appended to the statute 55 Geo. III. cap. 184, where the value of the estate exceeds £70,000, but is less than £80,000.

Thereafter the pursuers, with the view of availing themselves of the provisions of the 23d section of the Act 5 & 6 Vict. cap. 79, lodged a claim with the Solicitor of Inland Revenue for return of £300 of the inventory-duty paid by them, in respect (1) that the £10,000 paid to James M'Caul Hagart was a debt "due and owing from the deceased," to be deducted, in terms of the statute, from the gross amount of the personal estate; and (2) that the personalty from which debts fell to be deducted ought to include two of the sums heritably secured, viz., the debt of £9000, which was originally due under a promissory-note by Sir John M'Donald to the Central Bank of Scotland, and indorsed to the deceased; and the debt of £7922, 3s., which was originally due under a personal bond by the trustees of the late Archibald Spiers to his widow, afterwards assigned to the deceased.

The Solicitor of Inland Revenue maintained (1) that the amount of debts was only £4999, 14s. 6d., which, when deducted from the gross value of the estate, did not reduce the same to a sum in respect of which a lower stamp-duty was exigible, or authorise any abatement of the duty paid by the pursuers; and (2) that the effect of treating the £10,000 paid to James M'Caul Hagart as a debt, did not entitle the pursuers to an abatement of more than £150, when deducted along with the admitted debts, either from the gross amount of the personal estate and money heritably secured, or from the gross amount of the personal estate alone, leaving the heritable bonds to be charged separately.

The pursuers pleaded;—(1) The various sums, amounting to £14,999, paid by the pursuers in manner condescended on, were debts due and owing from the deceased Thomas Campbell Hagart, and payable by law out of his personal estate. (2) The said debts having been paid by the pursuers as executors of the said deceased Thomas Campbell Hagart, they are entitled to a return of inventory-duty in respect thereof. (3) The two sums of £9000 and £7922, 3s., due respectively under the promissory-

note by Sir John M'Donald and the personal bond by Mr. Spiers's trustee, were properly included in the inventory of Mr. Hagart's personal [65] estate, and must be taken into account in ascertaining the return of inventory-duty to which the pursuers are entitled.

The defender pleaded;—(1) The sum of £10,000 paid by the pursuers to James M'Caul Hagart is not a debt in respect whereof the pursuers are entitled to any return of inventory-duty. (2) The pursuers are not entitled to any return of inventory-duty, in respect that the amount of the debts paid by them out of the personal estate of the deceased was not such as, when deducted therefrom, would occasion a less stamp-duty to be paid on an inventory of the personal estate than was actually payable thereon.

The Lord Ordinary (Ormidale), on 24th November 1870, held (1) that the £10,000 fell to be included among the deceased's debts, but (2) that the amount of the debts (£14,999, 15s. 5d.) only entitled the pursuer to a return of £150, and not of £300. His Lordship found the pursuers entitled to one-half of the expenses of process incurred by them.

Against this interlocutor the Lord Advocate reclaimed.

On 24th December 1870 the Second Division adhered to the Lord Ordinary's view upon the first point, but differed from him on the second point, and gave decree against the Crown for £300, with expenses.

The Lord Advocate appealed.

LORD WESTBURY.—My Lords, this case has been argued on the part of the Crown with great ingenuity and great subtlety, but I think your Lordships will agree with me that there is no substance whatever in the case contended for. The first thing to be determined with a view to the solution of the case really is the question, what in the eye of the law constitutes a debt. I believe that we have invariably been in the habit of considering that a debt is an obligation arising from contract,—and, if you like, though that may not be always needful, a contract for consideration.

Now, what is the obligation that we have here to consider, and upon which, in the first place, we must put the denomination and the legal quality of debt. In a marriage-settlement made antecedent to the marriage the intended husband contracts and binds himself to make a certain provision for the wife, and then that a sum of money, equivalent to the capital for raising the annuity given to the wife, shall be destined to the children of the marriage. The considerations for the obligations in that marriage-settlement are, first, the marriage itself, and then the provisions which are made by the friends of the intended wife. There can be no doubt, therefore, that for that engagement made by the husband there was good and valuable consideration in law. Well, now, the engagement by the husband is to find, raise, and provide this sum of £10,000. The difficulty which has occurred to the Crown upon the matter is, that inasmuch as the £10,000, or the obligation itself, if you regard that as matter of property, is subject in law to the peculiar description of ownership, namely, that during the life of the husband he has the powers of spending or of selling, and pledging or alienating, the property which would be required to answer the obligation, in any mode that he may think proper, provided that he does it for onerous cause.

Then it is said on the part of the Crown that, according to the view of Scotch law, the money is raised, and that the contract for the purpose of raising it is regarded as a subject of property, with respect to the ownership of which the husband, that is, the contracting party in the eye of the law, is fiar, and the parties who are to have the benefit of the contract after his death have during his life no more than a *spes successionis*, and then, fastening upon the children a denomination of *hæredes* or heirs, the counsel for the Crown desire to carry out the idea of heirship throughout the whole of the existence of the contract, and even up to the time of its fulfilment, and to bind the rights of the children by the notions involved in that word *hæredes*, so as to give to their title the quality of succession or descent, and not the quality of a claim by contract.

This is an ingenious subtlety, because it is perfectly clear that, even if you [66] regard the father as having a right of alienation,—that is, a right of discharging his own contract by alienation for value, or a right of disposing of the property when raised in his lifetime by virtue of that contract by alienation for value—if you regard him as a person having these rights, you are in the present case required to consider

what is the character of the ownership at the time when the contract came to be fulfilled at the death of the father, and then the right to the fulfilment is not an heritable right by virtue of a succession (that is, a title given by law, but it is right by the act and pact of the parties. It is a title given by virtue of the contract contained in the marriage-settlement, which then has to be fulfilled. The *hæres* represents a right or title given by law, the creditor represents a right or title given by contract, and here are persons who at the death of the father claim, not by virtue of inheritance—for a title by inheritance would be quite inapplicable—but they claim by virtue of the distinct contract of the father contained in the marriage-settlements. There can be no doubt, therefore, that they claim by a title which gives them a right wholly independent of any law of inheritance or law of distribution, and that right can be none but the right which is founded upon the engagement contained in the marriage-settlement. They are therefore entitled by a contract for value to receive a certain sum of money. These facts contain within them all the elements that are necessary to constitute that which in law we denominate debt.

That being so, we come to the fact that this sum of money being, by the process I have gone through, that which in law is to be regarded as and entitled a debt, has been paid out of the estate. Then the executor comes and says, in the language of the statute, I have paid a debt out of the estate, let me have a return of the duty. When we come to look at the language of the statute we find that that language gives the right to a return in the event of debts paid by the executor out of the moveable estate that were due and owing by the deceased. I think the proper interpretation of that language is, that the return is given in respect of a debt of the deceased paid by the executor, which was due and owing at the time of the payment.

Then I fall back upon the analysis of the case, and of the rules of law applicable to it, and we have only to ask, was this £10,000, in respect of which the children were entitled at the death of the father to have it raised and paid out of the estate —was that a debt due and owing at the time when the executors paid it? The answer to that is clear. Without fatiguing your Lordships by going through the whole of the authorities—whether you look to the passage from Erskine,* whether you look to the judgment pronounced by Lord Fullerton,† or whether you look to the other decisions, particularly the case of Wilson's Trustees,‡ which have been gone through again and again—there can be no possibility of doubt that all the Judges have concurred in the expression, that the children at the death of the father are not to be regarded as heirs, and entitled by legal rules of succession, but are to be regarded as persons claiming by contract,—therefore creditors of the deceased.

For these reasons, my Lords, without repeating what has been said, and very well said, on both sides, or fatiguing your Lordships by reading again the decisions which have been referred to, I think there can be no possibility of doubt that this £10,000 constituted a debt in the proper sense of the word, and was attended with all the qualities and characteristics which, in the eye of the law, are required to constitute a debt, and therefore, having been paid out of the personal estate, was a proper subject of a deduction from the duty under the statute.

Well, but then comes that peculiar circumstance about which the parties, I think, puzzled themselves, and puzzled their advocates, and, I must confess, for a long period of time, I think I may even say puzzled your Lordships, and I am even now puzzled to find out how such a point could ever have entered into the [67] imagination, and how it ever came to pass that this curious and obscure thing was dealt with in the manner in which it has been dealt with. If we were successful in at all diving into the depths of the thought of the learned counsel at the bar, and pulling up from those depths what they intended to say, it appears to be this—it was said that the statute giving the right of deduction out of moveable and personal estate having been passed before the statute which made heritable securities moveable estate for purposes of duty, was attended with this result, that if you deducted the debts out of the pure personal estate, refusing to include therein the money due on the heritable security, you would thereby reduce the sum that was liable to duty to a sum of money that would bear only a duty of £750. And then it was contended (though why I have not the least notion), that having by that operation reduced

* Instit. 3, 8, 38. † Advocate-General *v.* Trotter, 10 D. 56. ‡ 18 D. 1096.

the pure personalty down to a sum of money amounting, I think, to £56,000 or thereabouts, the £56,000 alone became the subject to be assessed with duty, and the money due on the real securities (the heritable securities) was to be laid aside altogether, and never brought into computation for the assessment of duty. My Lords, that could not for a moment be sustained. It is perfectly clear that after you have reduced the pure personalty to the sum mentioned, then, for the purpose of duty, you must add to that amount the money due upon the heritable securities. It appears, however, that by reason of some mistake in the pleadings, or some misapprehension of the figures, the Court below gave the party entitled as pursuers a reduction of £300, whereas they ought not to have given them a reduction of more than £150, and the Crown therefore, by the accident of that blunder, succeeds in recovering a sum of £150.

The result therefore is, that the Crown, though failing altogether upon that which was the principal object of the appeal, does go away £150 richer than before. Under these circumstances, your Lordships have some difficulty how to deal with the costs of the appeal. If the Crown thinks it worth while to say that there must be some moderation of the costs, I submit to your Lordships that it will be right to give to the respondents a moiety only of the costs of the appeal. If the Crown assents to that, we will limit the costs, on the dismissal of the appeal of the Crown, to one-half only of the costs of the respondents. The order, then, that I shall suggest to your Lordships will be to dismiss the appeal on the part of the Crown, and to direct the Crown to pay one-half the costs of the respondents.

LORD CAIRNS.—Does the Crown desire that?

Lord Advocate.—I should desire to place the matter entirely in the hands of the House with respect to the costs. I should not like to ask any costs which the House thought ought not to be asked.

LORD COLONSAY.—My Lords, with respect to the merits of the case itself I have not the least doubt that this must, under the statute, be regarded as a debt. I think that is very clear; and as there does not arise before us any question between this class of debt and other classes of onerous debts, competing as might happen in the case of a bankrupt's estate, we are relieved from the difficulty of deciding what might be a large question. With reference to the claim of the Crown arising under these statutes, I have no doubt at all that this is a debt, and that the Crown is not to be regarded as in the position of a creditor, such as other creditors might be who have obtained documents of debt from the parties, or other onerous creditors, but that it has a right under the statutes, and only under the statutes, and that under those statutes this is a debt which ought to be deducted.

LORD CAIRNS.—My Lords, I quite concur in the opinions which have been expressed by my noble and learned friends, and I do not propose to add anything on the merits of the case. On the subject of costs, I think your Lordships understand from the Lord Advocate that the Crown brought this matter before your Lordships for the purpose of having the question of principle decided. It is a question which obviously would arise in many cases; and if that were not so, the Crown would hardly have brought a case involving only £150 for consideration before your Lordships. Under these circumstances,—the Lord [68] Advocate saying very properly that he puts the question of costs into your Lordships' hands,—I venture to think that it would be more satisfactory that the appeal should be dismissed in the usual way, with costs, without making any distinction in consequence of the minor—I might almost say accidental—part of the case, which seems to have arisen more from an error in calculation than anything else.

Lord Advocate.—I merely wish to say, with reference to the carrying out of your Lordships' judgment, that the interlocutor of the Lord Ordinary, except only upon the matter of costs, is the correct judgment; and I apprehend that the judgment of the House would be to affirm the interlocutor of the Lord Ordinary.

LORD CAIRNS.—I think your Lordships probably would not alter the interlocutor of the Lord Ordinary as to costs. It was very proper, in the case before him, to divide the costs as he has done.

Lord Advocate.—An affirmance of the interlocutor of the Lord Ordinary would be the form the judgment of this House would take, disposing of the costs otherwise as your Lordships may think fit.

LORD WESTBURY.—In reality we shall be altering the interlocutor of the Court

below to the extent of £150. I propose therefore to put the question to your Lordships in this form—to declare that the respondents are entitled to a return of £150 of surplus duty paid by them; reverse as much of the interlocutor of the Court below as is inconsistent with that finding; and direct that the costs of the respondents in the present appeal be paid to them by the appellant.

Judgment was given accordingly.

W. H. MELVILL—SOLICITOR OF INLAND REVENUE—LOCH & MACLAURIN, Westminster —H. G. & S. DICKSON, W.S.

[*Distinguished*, Moir's Trs. *v.* Lord Advocate, 1874, 1 R. 345; Marshall's Exors. *v.* Lord Advocate, 1874, 1 R. 847.]

No. 7. X. MACPHERSON H.L. 68. 11 June 1872. House of Lords.—Lord Chancellor (Hatherley); Lord Colonsay; Lord Cairns.

JAMES OGILVIE TOD FORSTER (Defender), Appellant.—*Sir Roundell Palmer, Q.C.—Chisholm Batten.*

JESSIE GRIGOR OR FORSTER (Pursuer), Respondent.—*Anderson, Q.C.—Shiress Will.*

Husband and Wife—Process—Proof.—After a concluded proof in an action of declarator of marriage in which the defender (the alleged husband) adduced no evidence the Lord Ordinary pronounced judgment against him chiefly in respect of a written acknowledgment proved to be in his handwriting. The defender reclaimed, and on 25th May 1869, before the case was put out for hearing, moved the First Division for leave to adduce evidence to show that the acknowledgment founded on by the pursuer was not in the defender's handwriting. The Court refused the motion. *Judgment affirmed.*

Husband and Wife—Proof.—A writing bearing to be a mutual *de præsenti* declaration of marriage between a man and woman being proved to be in the handwriting of the former and bearing his signature and the name of the latter, *held* to instruct marriage, though the signature of the latter was not directly proved, there being evidence to shew that she had by her actions indirectly acknowledged it as her signature.

(In the Court of Session 25th May 1869, *ante*, vol. vii. p. 797.)

This was an action of declarator of marriage at the instance of Jessie Grigor or Forster against James Ogilvie Tod Forster. The pursuer founded on a writing containing a mutual declaration of marriage by the parties, and alleged to be holograph of the defender and to bear the signatures of both parties.

After a proof, at which the defender led no evidence, the Lord Ordinary, on 5th January 1869, pronounced an interlocutor finding the marriage proved.

[69] The defender reclaimed, and, on 25th May 1869, before the reclaiming note was put out for hearing in the Inner-House, moved the First Division for leave to lead evidence to prove that the document founded on by the pursuer was not in the defender's handwriting.

The Court refused the motion, and subsequently adhered to the Lord Ordinary's interlocutor on the merits.

The defender appealed.

Lord CHANCELLOR.—In this case, it is to be regretted that this young man, so early in life, should have married, as he appears to have done, a woman in a position inferior to his own. The only question, however, for us to consider is, whether that marriage (prudent or imprudent) has been established by the evidence produced before the Court, in which the subject-matter was whether a case was made out for a declarator of marriage, or whether or not the fact of the marriage was established.

The case was brought in the ordinary mode. The case was heard, like every other cause, upon the pleadings, and upon the evidence entered into on behalf of

the pursuer, when there was an opportunity for the defender to support his case, which he had alleged in several condescendences and his pleadings. He had counsel to cross-examine the witnesses produced on the part of the pursuer. But he chose to go abroad at the very time when the case was pending, and, it is said, did not leave those whom he instructed to protect his interests sufficient materials at their command adequately to defend them. It does not appear that when the evidence was being taken any evidence was produced by him with respect to the handwriting of the document which has been produced. It was only afterwards that an application was made to the Court on his behalf to allow him to give further evidence, with reference especially to the plea which he has raised as to the handwriting. He denies that he wrote the instrument on which the question in this case must turn, or that it is a genuine document. Now, it appears to me that it would be impossible, in that state of circumstances, to allow a person who chose to conduct his case in the manner I have described afterwards to say that there had been a surprise, or that any hardship was imposed on him by his not having an opportunity of making out such a case as he might have been advised to make. Certainly one would expect, if any such case could be made out at all, that we should have had some trace in the previous proceeding of his anxiety to do so. But I cannot find, in the whole course of the proceedings, that anything is suggested which appears to demand further inquiry except that question of handwriting.

Now, I think the case is beyond all doubt as to his being the author of the memorandum written in the Bible, which, I also think it clear beyond all doubt, he presented to the pursuer in this case. The circumstances of the case are briefly these. Two young women, this pursuer and a young woman of the name of Helen Chisholm, about the same time entered as fellow-servants into this family. The father of the family appears not to have been in a condition to watch anything that was going on in the household. The mother of the family was absent; there was only the grandmother remaining in the house; and this young man found himself there, apparently, with only a groom as his ordinary attendant while he was at home about the house, and he appears to have made more of a friend of the groom than probably he would otherwise have done had there been other persons to superintend his conduct and proceedings at the age that he had then arrived at, about twenty-one. Perhaps it was not altogether an unnatural thing that this young man, in these circumstances, shortly after the arrival of these two young women, appears to have paid attention to one of them. That those attentions involved the ordinary courtship between persons equal in position, in whatever station in life, namely, with that degree of modesty and decorum which one would expect in ordinary courtship, nobody can say upon the evidence before us. The course of the courtship appears to have been of a somewhat coarse character, not such as would be usual between persons in an equal position in life. The circumstances deposed to of the courtship taking place in the kitchen are of a description which it is unpleasing to contemplate; [70] but it does not appear that there was anything going beyond that degree of familiarity, and it is not likely that there should have been, because the kitchen appears to have been a place open to all the household. Helen Chisholm, who was there, saw things going on between her young master and her fellow-servant which induced her to withdraw. Atkinson, the groom, does not appear to have had the same delicacy. He appears to have witnessed the scene. I do not think that it is established by any means in evidence that anything beyond those familiarities took place before the 2d of September. The 2d of September is the date of this document in the Bible, which unquestionably is produced by the pursuer, and has been in her hands from that time till now. The defender, in his answer in the case, simply says that she obtained this Bible he does not know how. And that is all the account which he gives of it, beyond denying that he wrote the document which is to be found in this Bible. It is not necessary to read the whole memorandum through, because the first part is enough—"I, James Ogilvy Tod Forster, take thee, Jessie Grigor, to be my wedded wife from this day henceforth until death us do part, and thus do I plight thee my troth." Then follow words exactly in the same form on the part of the pursuer, and the document professes to be signed by Forster, the appellant, and by the present respondent, who was the pursuer in the action.

Now, a good deal has been said about there being no adequate evidence to support the genuineness of this document. But the first thing that occurs to one is to notice

the course which he took when he knew that the pursuer had raised this question. He has not thought fit to have any witnesses called in support of this plea of its not being in his handwriting; nor has he thought fit, through the medium of his counsel, to cross-examine any of the witnesses, who spoke to having seen this book, on the subject of his handwriting. On the other hand, documents are produced in considerable abundance by the witness Jane Bain, letters in his handwriting, which, as far as we can judge by a superficial inspection, appear certainly not in any way to contravene (I do not put it higher than that) the other evidence upon the subject. I am very unwilling to give an opinion upon a comparison of handwriting, but, at all events, there is nothing in the comparison of the two handwritings which leads me to entertain any degree of doubt upon the question whether or not it is the same handwriting.

But, then, it is said that the signature of the pursuer is not proved. Certainly it is a somewhat singular circumstance that no direct evidence was given of her signature, considering that she called witnesses who might have been able to prove it, especially her mother, who would have been able to say at once, That is my daughter's handwriting. But on the other hand it is proved (and I see no reason to doubt what the witnesses state) that she shewed it to Helen Chisholm "between August and September." That would be about the end of August or the beginning of September, but she did not pledge herself to the precise date. Helen Chisholm says it was shewn to her and read to her by her fellow-servant; and it was therefore adopted in every respect by her fellow-servant as being a genuine document. And the purpose for which it was shewn to her is obvious, because she, the pursuer, at that time was following a not very delicate course of proceeding, even supposing this marriage to have taken place, for while habitually sleeping in the same room with her fellow-servant, the witness, she from time to time admitted the appellant to her bedroom on occasions when her fellow-servant was in the room. There was therefore nothing more natural than that conduct like that should require any explanation that the pursuer would be able to give, and that the latter should shew this document to her fellow-servant. I do not think there is any distinct proof of her going into the other room anterior to that period, because, although there is evidence by Helen Chisholm, who speaks of her fellow-servant being in the passage in the month of August, we must couple that with her statement I have read regarding the exhibition of the writing in the Bible, "I cannot distinctly remember dates—it was between August and September"; and therefore there is no distinct reason to conclude that up to that time she had shewn this document written in the book. Now, I cannot help observing that when Helen Chisholm was there as a witness, and had this document shewn to her, if there is any doubt about the [71] genuineness of the signature, one cannot understand why the counsel in cross-examination should not ask a single question upon the subject if any doubt existed upon it. I do not think it is a sufficient answer to say that the burden was upon the pursuer to prove her own signature. In the first place, I apprehend that the signature of the appellant to the document, if genuine, is a plain distinct acknowledgment *per verba de præsenti* that he has taken the respondent to be his wife, and it is by no means made clear to me by the cases which have been cited with respect to the law of Scotland, that it would be necessary in that position of things for the woman who took that instrument, made as it is, to make out that she had herself signed the document so handed and delivered to her. If she took it and kept it by her, and shewed it to her fellow-servants, to whom she was interested in shewing it for the reason I have assigned, then I apprehend that even if the signature was not manually hers, but was acknowledged by her as hers by producing it to others, that is a clear and distinct recognition and acknowledgment of the contract entered into by virtue of the instrument by both parties; for I agree with the learned Judges in the Court below that the instrument is most plainly and clearly expressed as an immediate contract *de præsenti* and not a contract as to the future, and if it be a contract *de præsenti* it would not be necessary for her to sign it at all if she admits the document, and it had been followed by the consequences of such a contract which of itself would establish the validity of the contract *de facto* entered into between the parties. But I think we are entitled to say that when it was alleged that she shewed this book and this writing, first to Helen Chisholm, and afterwards to her mother (and I think there is a third person to whom she shewed it, Atkinson, the groom) —but when she shewed it at least to those two persons, treating it as a genuine document in all respects, it was the duty of those who wished to shake the allegations

as to the contract being a distinct engagement between herself and the defender to cross-examine the persons who alleged they had seen it as to whether the signature was really genuine or not.

Now, what followed upon this document? I think it is perfectly plain that intercourse took place between the parties, although this gentleman, the appellant, has upon oath denied it in his answer to the condescendence. There cannot be any question, as it appears to me, as to the circumstances proved by the evidence of the groom, and Helen Chisholm, and Jane Bain. About the identity of the writing I see no reason to doubt the evidence of the witnesses. I see no reason whatever to doubt Jane Bain's evidence of his conversation while speaking of it, telling her at one time, when I wrote this it was all a jest; and at another time, it was all to satisfy her. That acknowledgment of the document by him places beyond doubt that which the internal evidence of the instrument itself satisfies to have been the intent and meaning of the document. And I think we have further corroboration from circumstances which occurred both before and afterwards. It appears that the grandmother, having ascertained what had been going on, and being dissatisfied with what had taken place, sent both Helen Chisholm and this young woman away. And then the young woman, very soon after that, goes to her mother's; and there again, having to satisfy her mother as to the marriage, she shews the document to her mother.

Then it is said that the question is not merely whether such a writing exists, but under what circumstances the writing was given. It appears to me to be established satisfactorily that by the law of Scotland it is not enough to prove that this instrument might have been obtained in any manner without any serious intent, but that the question is, whether it was meant by both parties to be a serious document. I apprehend that the evidence is abundant in that respect; because there is no distinct evidence of his having become possessed of her person anterior to the date of this document. But it appears that they lived together for a time after the signing of that document. Comments have been made upon the evidence for the purpose of shewing this document to have reference to something *in futuro*, and not to any actual engagement. But the facts proved appear to me to amount to no more than this—that her mother wished her to be married by a public marriage before she left the country with this gentleman, and she expressed her intention to be married, but her expressing [72] that intention to have a public marriage, instead of remaining satisfied with this private document, cannot do away with the force of this document, which is express and clear in its language.

Then it is said that there is no probability in the reason assigned by her for the appellant wishing and expressing to her his wish that the marriage should be kept secret; because it is said that so far from its being kept secret, the servants were made acquainted with it, that Atkinson, the groom, was made acquainted with it, and that Helen Chisholm was made acquainted with it. But they were just the people from whom it could not be concealed. It is very likely that the appellant expressed that wish. What was desired on his part was that it should not be divulged to the world generally that he was married. He may possibly have had even then an intention of doing away with the effect of this engagement which he had entered into. But he could not conceal it from the groom—he could not conceal if from Helen Chisholm, who had seen too much for him to conceal it from her—he could not conceal it from his grandmother, Mrs. Tod, or from the members of the family. Of course, the object of concealment was that publicity should not be given to the world lest it should affect the interests of the family by its becoming known that he, the representative of that family, had formed this very imprudent alliance.

Therefore, my Lords, I do not think there is anything to throw the slightest degree of suspicion on the document in question. I do not see that anything has been suggested that is likely to shake its validity, beyond the suggestion of its not being his handwriting. But if the case founded upon that suggestion were real and true, it might easily have been much more effectually prosecuted than it was in the course of the cross-examination by the counsel who had acted for him. And I think we should be taking a course which is admitted on all hands to be an extremely unusual course upon grounds of the most slender description, and a course which we should certainly not be warranted in taking if we were now to allow the introduction of new evidence, after this person had every opportunity, and lost it by his own deliberate choice, of conducting the case in the ordinary manner, and bringing it to an issue upon such terms as he thought most conformable to his own interests. I think,

therefore, that in this case no further indulgence should be shewn in order to enable the appellant to establish his case by further evidence. The only result will be that his appeal must be dismissed. As he appears as a pauper, it cannot be dismissed with costs.

Anderson.—Your Lordships will dispauper the appellant, because he has ample means.

LORD CHANCELLOR.—It arose in this way—you had obtained an inhibition affecting his whole property. Therefore he had not the means of defence, and he said, if you choose to do that, I will appear as a pauper, and we must treat him as a pauper.

Anderson.—It would signify very little, because if this is a marriage, as your Lordships declare it is, he is liable for his wife's debts.

LORD CHANCELLOR.—He may be dispaupered. On the present occasion we have him here as a pauper. We must leave that for another application. I think that the order need not be drawn up immediately, so that you may have time to make any application that you may think fit.

LORD COLONSAY.—My Lords, I concur in the judgment that has been suggested by my noble and learned friend. The first point that was presented to us was, whether there ought not to be a further allowance of proof. It is said that the Court below improperly refused to allow further evidence. I see no ground at all for complaint on that subject. The record was made up in the usual manner, and the case went to proof. There was no hurry. There were two days of the examination of witnesses. The judge then took it into consideration from the 21st of November to the 5th of January, and then pronounced [73] his judgment. Neither at the time of leading the proof, nor at the conclusion, not in the interval between the conclusion of the proof and the pronouncing of the judgment, was any complaint made of surprise, or any application made to be allowed to produce further evidence.

Then the case was appealed to the Inner-House, and that must be done within a limited time after the judgment is pronounced—I think now it is limited to ten days; and it was not till the month of May following, when the cause was nearly at the top of the roll for hearing, that application was made to be allowed to produce further evidence. The Court was not moved by anything said then, and I have heard nothing to-day to lead me to think that any wrong was then done which your Lordships are called upon to correct.

Then we have to deal with the case upon the evidence before us. In my humble opinion that evidence is conclusive against the appellant. I think that the document which is produced here is sufficiently proved to be in the handwriting of the defender. There are several witnesses who know his handwriting, and have spoken to that effect. It is difficult for any one, comparing the document thus acknowledged with those proved writings of his which are produced, to have any doubt upon the subject, and, as far as the evidence of the experts may go (though I confess it is not a kind of evidence that I have any partiality for), it is at least confirmatory of the other evidence. The defender denies that it is his writing, but I think it is sufficiently established that it is. That is not a favourable aspect of the matter for him. He also denies that other part of the case, which I think also equally established, as to the connection between the parties after the date of the document.

Then, looking at the document itself, the great plea that is urged against it is that the pursuer has not proved her own signature. That is the main stay of the defence. Now, I think, under the circumstances in which this document is presented to us, that it is to be presumed to be her signature. In the first place, it is proved that the whole of this document, unless it be that name "Jessie Grigor," is in the handwriting of the pursuer. I say the whole of it, for the doubt simply refers to her signature. Now, looking at the date, if you notice the position in which it is with reference to the signature of the defender, it is very clear that that date must have been affixed after the signature of Jessie Grigor was put upon this paper, and this goes to confirm her statement that she then and there adhibited her signature. I think also, looking at the two signatures, that they are not in the same handwriting. No one says that they are. The witnesses, most of them, excepted the signature "Jessie Grigor" from their opinion as to the document being in his handwriting. Now, looking to the pursuer's possession of the document, this book, which is a book that did confessedly belong to the appellant, which he is proved to have admitted to have given to her, and which she retained and used in the manner she did—I think we cannot avoid coming to the conclusion that this document is a declaration made

by both parties, being a *de præsenti* declaration of their marriage. That being so, it might not be necessary to go further; but that view of the document is evidently to my mind strengthened by the other features of the case. One observation that was made by Sir Roundell Palmer was, that it did not appear that this declaration of marriage was followed up by intercourse afterwards, but that it was something that came in afterwards in the course of that intercourse, and was merely in the nature of a promise *de futuro*. But, as I read the evidence, it is not proved that anterior to the 2d of September there were any circumstances from which we can infer sexual intercourse. I see that the witness Atkinson states that it was a considerable time after the visit to Pluscarden Abbey that he first saw him going into her bedroom. She herself says that it was a day or two after the 2d of September that this intercourse took place. The frequent visits to the bedroom may have been between the 2d of September and the 8th of September, before Mrs. Forster returned, or even after she returned, and before the date of the dismissal, which did not take place till several days after her return. There is nothing, in short, to interfere with the statement of the pursuer, that the intercourse took place after the date of the instrument. I therefore think that the judgment of the Court below is right.

[74] LORD CAIRNS.—My Lords, I agree that this appeal ought to be dismissed, with costs.

LORD CHANCELLOR.—The appeal will be dismissed with costs only on the appellant ceasing to be a pauper. The order now to be made will be—That the appeal be dismissed. It will be for the respondent to make a further application.

Appeal dismissed.

E. H. BARLEE, London—HOLMES, ANTON, GREIG, & WHITE, London.

No. 8. X. MACPHERSON H.L. 74. 19 July 1872. House of Lords.—Lord Chancellor (Hatherley); Lord Chelmsford; Lord Colonsay; Lord Cairns.

COUSTON, THOMSON, AND COMPANY (Defenders), Appellants.—*Manisty, Q.C.* —*J. C. Smith.*

THOMAS CHAPMAN (Pursuer), Respondent.—*Lord-Adv. Young—Sol.-Gen. Jessel.*

Sale—Auction.—At a sale by auction the sale of each lot forms a separate transaction.

Sale—Sample—Auction—Timeous Rejection.—Several lots of wine were purchased by sample at a public sale by auction on the 19th of March, and were delivered to the buyer by the 7th of April following. On the 6th of May the buyer, without specifically objecting to any particular lot, complained that some of the wine was unsound, and the exposer offered to take back the whole. This proposal was declined, and on the 31st of May the buyer specified three lots as disconform to sample, and claimed compensation, but did not make any offer to return the objectionable lots until the 14th of June, after the seller had raised an action for the price. During all this time the wine had been in the custody of the purchaser, and several dozens had been opened and tested by him. *Held* (*aff.* judgment of the Court of Session) that the purchaser had not timeously intimated to the seller his rejection of the lots complained of, and was therefore barred from withholding the price thereof, although these lots were proved to be disconform to sample.

Sale—Delivery—Rejection.—Observations per Lord Chelmsford on the difference between the law of England and the law of Scotland as regards the right of a purchaser to return the subject sold on the ground of its being disconform to sample or warranty.

(In the Court of Session, March 10, 1871, *ante*, vol. ix. p. 675.)

On 19th March 1870 a quantity of wine belonging to Messrs. Aitken, Campbell, and Turnbull was exposed for sale by auction in the premises of Mr. Thomas Chapman, auctioneer, Edinburgh, and eleven lots were purchased, by sample, by Messrs. Couston,

Thomson, and Co., wine-merchants in Leith. The wine was delivered to Couston Thomson, and Co. on the 7th of April, when they wrote to Messrs. Aitken, Campbell, and Turnbull in these terms :—" Leith, April 7, 1870.—Dear Sirs,—For lot 19 you have sent us down wine differently sealed. One portion is sealed 1864, the other has no year upon it.

" The wines are quite different ; so you must have made some mistake. You will have to get back the latter portion, and replace it with the wine sealed 1864 as per samples."

On receipt of this letter Mr. Turnbull went to Leith, where he saw Mr. Couston, and offered to take back lot 19, but Mr. Couston said that he would keep the wine, and try to sell it, and if he could not do so would return it.

On 6th May 1870 Mr. Couston called on Mr. Chapman, the auctioneer, and complained that the wine was unsound, but did not specifically object to any particular lot.

A correspondence followed between the parties. The following were the only letters of importance.

[75] On the 7th of May Mr. Chapman wrote to Messrs. Couston, Thomson, and Co. in these terms :—" Dear Sirs,—Referring to my conversation yesterday with your Mr. Couston, I have to say that I am sorry if any of the wine bought at Aitken, Campbell, and Turnbull's sale is faulty, and shall be quite willing to take back all your purchases at that sale. I can only do this, or receive payment of the purchase-money as per account, and shall be glad to know your decision by Tuesday next."

On 26th May Mr. Chapman, in answer to a letter from Mr. T. M'Laren, S.S.C., agent for Couston, Thomson, and Co., wrote, saying,—" I told Mr. Couston that I did not know of what he complained, as he had never yet stated a complaint ; and if he would say of what he complained I would show it to my employers. I have offered, and again offer, to take all Mr. Couston's purchases back if he is not satisfied ; but till he does this, or pays for his purchases I decline to receive any communications through an agent."

Upon 31st May Mr. M'Laren wrote to Mr. Chapman the following letter :— " Messrs. Couston, Thomson, and Co. have now gone over the wines which they purchased from you at your sale on the 19th of March last, and they find the following is defective, or not according to sample from which they bought, viz. :—1. Lot 19—46 dozen out of 60 dozen ; and 2, the whole of lots Nos. 24 and 51.

" They are agreeable to retain the rest of the goods purchased at the sale, and pay for them, and also to pay for the above lots, provided you supply them with the goods which they bought according to the sample and description. Failing your being able to do this, they think that they are entitled to the difference between the price at which they purchased them and the price at which they can be bought in the market, and which they estimate as follows, viz. :—" &c.

" *P.S.*—If you wish, Messrs. C., T., and Co. would prefer to return the whole of the fine clarets, as, looking to the condition of a portion of them, they would prefer not to offer them to their customers."

To this letter Mr. Chapman replied :—" Dear Sir—I am in receipt of your letter of yesterday's date, and beg to say that Messrs. Couston, Thomson, and Co.'s propositions cannot be entertained. I refer you to my former offers as to the mode of settlement."

Some further correspondence ensued, in the course of which a proposal on the part of Couston, Thomson, and Company to refer the matter to arbitration was declined by Mr. Chapman, who thereafter raised this action against them, concluding for payment of £699, 16s. 5d., with interest from the 14th of May, as the amount due for the whole of the wine which they had purchased, after deducting £622, 2s. 8d. due by him to the defenders on a separate account.

The summons was signeted on June 13, and on June 14 the defenders accepted service.

On 14th June, after receiving the signeted summons, the defenders' agent wrote to the pursuer's agent in these terms :—" I have now seen my clients, and, without prejudice to the questions between them and Mr. Chapman, I have to state that they are agreeable to pay for the whole of their purchases, with the exception of lots 24 and 51, which they are willing to return without any claim for deterioration on value.

This proposal was not entertained by the pursuer.

The defenders pleaded ;—(2) The said wines being of different kinds and qualities, and sold in different lots to all comers in the course of competition, the sale of each lot is a separate transaction, and the defenders were entitled to reject the lots not conform to contract, and retain the other lots. (4) The defenders having rejected the said lots 19, 24, and [76] 51, and timeously offered to return the same, are not liable for the price at which they were sold.

After a proof, the Lord Ordinary (Gifford) pronounced an interlocutor in favour of the pursuer.

On March 10, 1871, the First Division pronounced the following interlocutor :— " Recall the interlocutor : Find that the defenders bought from the pursuer, at an auction sale in the pursuer's premises, on 19th March 1870, eleven lots of wines and liqueurs, conform to sample, at various prices : Find that the whole of the said lots were delivered to the defenders on or before the 7th of April 1870 : Find that on the 6th of May 1870 the defenders objected that the wines so delivered were not conform to sample, and then intimated that they would not pay the price of the said wine, but did not state any objection to any particular lot or part of a lot : Find that no objection to any particular lot or part of a lot was stated till the 31st of May, when the defenders' agent stated in a letter certain objections to lots 19, 24, and 51 : Find that neither on the 31st of May, nor on any previous occasion, did the defenders return, or offer or propose to return, either the whole wines bought on the 19th of March or the particular lots objected to : Find that no return or offer of return of the said wines, or any part of them, was made before the institution of the present action, and that the said wines have all along remained in the custody and under the control of the defenders, and that they have at various times and at their own hand, opened and used, for the purpose of trial and experiment, portions of the wines of which the defenders refuse to pay the price to the extent in all of four or five dozen bottles : Find in point of law that, in these circumstances, the defenders are now barred from withholding payment of the price, of lots 19, 24, and 51, on the ground that these lots were disconform to sample, or not conformable to the contract of sale : Therefore decern against the defenders in terms of the conclusions of the summons : Find the pursuer entitled to expenses up to the date of the interlocutor reclaimed against, to the extent of three fourth parts of the taxed amount thereof : Find the pursuer entitled to full expenses since the date of said interlocutor ; allow accounts," &c.

The defenders appealed.

LORD CHANCELLOR.—My Lords, in this case it is much to be regretted that a dispute of this character, for an amount small compared to that at stake in many cases which are brought to your Lordships' House, should have gone through so long a course of litigation. However, the matter which comes before us to be determined is this, whether or not the interlocutors of the Court of Session, upon a summons which was brought on the part of the pursuer, the present respondent, against the defenders, the present appellants, are erroneous. The summons was in an action for recovering the price of certain wines sold by auction in Edinburgh. The wines were sold in lots, and with regard to three of the lots which were purchased by the defenders, the present appellants, questions arose. With regard to certain other lots of the same purchase, four or five in number, no question arose.

The first point for consideration which appears to have suggested itself in the course of the argument in the Court below was as to how far there was or was not a distinct contract with respect to each lot. Upon that there can be no doubt or dispute whatever, and it cannot be said now to be involved in the case brought before your Lordships' bar. There can be no question whatever that the purchase of each lot was a separate and distinct contract, and that it was perfectly competent to the defenders to object to the completion of the purchase with respect to the three lots they object to, if they had good grounds for so doing, irrespective wholly of the view which they might take of the other purchases which they made, and with which they are content.

My Lords, one singular circumstance in the case (although it has no special weight upon the conclusion which ought properly to be come to) is this, that [77] the defenders, insisting, as they have a right, I think, to insist, that the contracts were several, nevertheless did not pay for the lots they had bought, and which were good,

nor does it appear from what is said by the learned Judges in the Court below that up to the time of the action (it is true they did so in the course of the action) they had paid for the lots to which they did not object. The reason may not be difficult to discover; but with regard to three of the lots, namely, Nos. 19, 24, and 51, an objection arose. No. 19 may be passed by, because that question is now disposed of, and no argument has arisen upon it, either in the Court below or in your Lordships' House. The question, therefore, is reduced to lots 24 and 51.

The contest raised by the defenders when pressed to pay for these lots was that the sale was a sale by sample, and that these lots were not in all their parts conformable to the sample. The sale of these wines took place on the 19th March, and the delivery was to have been immediate; but some little discussion and dispute arose about it, and by some arrangement (which it is unnecessary to enter into) between the parties, the lots were not delivered until early in April. When they were so delivered in April, the lots in question being lots that were sold as claret of fine quality and sufficiently high price, and being sold by sample, it occurred to these gentlemen, the appellants, that they might send some samples of the wine to England for sale, and they accordingly sent them to a Mr. Cooper of Reading, who, upon examining the sample sent him (which appears, as far as we can see, to have been one of the actual bottles purchased, and not a sample produced by being decanted or poured out from some other sample, but the actual thing itself), returned it, with the statement that the wine was wholly unfit to be offered to customers. This seems to have led to inquiry, and we may take it as an established point of time in the case that the 6th May is a time at which certainly the defenders were perfectly well informed that there was a serious variation in several parts of lots 24 and 51. In a portion of each of those lots there was a considerable difference between the wine which had been delivered to them in April and the wine of which a sample had been produced in order to lead to the sale.

Accordingly, this having been discovered on the 6th May, certain correspondence takes place, in which questions are raised about the wine not being conformable to the sample, and there is some discrepancy in the evidence as to whether or not the objections which were raised pointed distinctly to these two lots, or pointed in general terms to the clarets which had been purchased. I do not think that anything material will turn upon that point, and it is not necessary to notice it further, although it was dealt with at considerable length by the learned counsel in his argument. The learned counsel for the appellants, in their argument, stated that there was a distinct objection raised to these particular lots, and not a general objection to the wine as being inferior to the sample. They say that they dispensed altogether with giving any proof of that, because, in one of the condescendences in the course of the proceedings, it is distinctly stated by the present pursuer in the action that the 19th of May was the time when the objections were made to lots 19, 24, and 51; and the condescendence goes on to state, that what was done by the appellants was simply to make an offer to retain that which was pursuant to sample, and to pay only for that, not paying for the part which was not conformable to sample.

But, as I have said, all this, I think, seems to come to nothing with reference to the course of proceedings between the parties, because the ultimate course of proceeding between the parties is perfectly clear. There was no offer whatever to return the lots at any period throughout the whole of this correspondence, which has been opened to your Lordships on the part of the defenders, before the 14th June, which was the day the matter was brought into litigation, the proceedings having commenced on the 13th. But the question does not rest here, upon whether or not there was that offer, because it seems to me beyond dispute, as far as any of the authorities which have been cited before us go; and the question has been very fully and ably discussed by the learned counsel, but that discussion has not thrown any new light upon that part of the case which was considered by the Court of Session in Scotland.

[78] There is no reason for questioning the law of Scotland at least to be this, that it is not competent to a person, on receiving articles which he has purchased, and which are not found to be conformable to the description or the sample which he received of them in the course of the sale, to retain the articles, and at the same time to raise any question about the payment of the money. According to the law of Scotland he appears to have only two courses open to him. The one is that of

retaining the article and paying for it, subject to any question which may arise (and which it is not necessary for your Lordships at the present moment to determine) as to what his position and rights may be with reference to any difference between that which had been sold to him and the actual value of the article purchased by him, or at once, not necessarily to offer to return it, but at least to notify immediately, or at all events within a reasonable time, to the person from whom he has purchased the article, that he rejects it, that the contract is at an end between him and the vendor in respect of that article, and that the article itself is at the disposal of the vendor and at the risk of the vendor, and that he, the purchaser, not only will have no more to do with it, but declines in any way retaining possession of it.

A good deal of argument has arisen on the part of counsel with reference to this point. A correspondence took place, beginning on the 6th May, and it went on at considerable length nearly down to the 14th June, the date which I before referred to as that at which the purchaser offered to return the wine. On the other hand, both parties (as the learned Judges said in the Court below) were uncertain as to their rights, or were willing to treat independently of their strict rights, whatever the true view of their strict legal rights in the case might be; because the vendor said, Return us all the lots you bought. We are quite willing to take them all back again—conceiving, I suppose, that some lots might have been bought very cheap, although there might have been some miscarriage as regards the particular lots that were complained of. And the purchaser says from time to time, I am willing to keep that which is worth keeping, and which is answerable to the sample, which is a considerable quantity of each lot, and I am willing to pay for that; but with respect to the rest, I will not pay for it. That was clearly not, according to the law of Scotland, the right on either side to which either party was entitled. And in the pleas in law which are raised between the parties the matter seems to be put in its true light, because the pleas in law raise these questions—first, was there a sale? secondly, was there a delivery? Both these points are undisputed. Then the question is raised by a plea in law of the pursuer in the action (intending to meet thereby, no doubt, an objection upon the part of the defender), in which he says that there was not a timeous objection raised to the quality of the lots. There may be a question as to whether the objection was timeous or not; but as at present advised I think there was no loss of time in making the objection. The objection was made as soon as it was known through the objection of Mr. Cooper what the quality of the wine was. There was no great delay in making the objection. On the other hand, the defenders raise this point, that they timeously offered to return the lots in question. Those were the three questions which were raised.

Now, as regards these three questions, there is no doubt that the wine was delivered, and there is no doubt that the wine was not according to sample. We have not heard the counsel for the respondent, but it seems to me (and I rather differ from what the learned Judges say upon this point) that there is scarcely any reasonable doubt that a portion of the wine was not according to sample. But there is one matter which it was undoubtedly thrown upon the defenders to prove, viz., the timeous rejection and return of the thing bought. The question is whether that has been clearly made out and established to your Lordships' satisfaction. However unfortunate it may be for these gentlemen, I apprehend that the only conclusion to which we can properly come is that this was not done. The defenders really very much trusted to what is stated in the condescendence with respect to the 6th May. Now, if you take that at all, you must take it as there stated; and if all that is there stated is true, it does not amount to any defence to the action, because there is nothing there said about [79] any return or notice, or statement of intention to return the lots complained of to the vendor. Therefore you must go on from the 6th May and look at the correspondence. And the correspondence is weaker than the averments in the condescendence, and therefore I think it need not be further commented upon. Then you come to the letter of the 31st May, which, coupled with the postcript, the appellants insist upon as a virtual notice. They call it an offer to return the lots. But, as I said before, the question will more properly be whether it was a notice that the lots were rejected, and were held at the disposal of the vendor. But if you look at the letter of the 31st May, including the postcript, it only comes to be another link in the series of negotiations or disputes—(whether they are viewed in the one light or the other is not very material)—between the two parties, in which they dis-

cussed their various rights, neither of them appearing to hit upon that which was the precise point of law to be determined between the parties, and the postcript only coming to an offer on the part of these gentlemen with reference to all the clarets which had been purchased, there being another lot purchased besides the lots as to which there was a dispute. They make a proposal about the whole of the clarets which had been purchased. It is clear that you cannot regard that as any definite proposition with regard to the lots in dispute, lots 24 and 51. It is only a portion of a correspondence which was going on between the parties without their ever coming to any clear or distinct view of the legal position of either party, and that state of things continued until after the 31st of May. Now, it is to be observed that these gentlemen had really only one thing to do on the 6th of May, or rather one of two things to do, viz., either to take the lots and pay for them, trusting to what they might recover in a subsequent action, or to reject them at once, and notify to the vendor that they held them at the risk and the disposition of the vendor, and that they utterly abnegated all liability and all responsibility in respect of those wines. I say on the 6th of May they might have done that, but nothing whatever is done until the 13th of June, when the action is brought.

Now, my Lords, in that state of things, regard being had to the nature and condition of the article which had been bought, regard being had to the full notice which had been arrived at, so long ago as the 6th of May, of what the condition of the article was and what the right and the position of the defenders was, one can understand why it is that the Lord Advocate in the course of the argument of the learned counsel for the appellants stated that he was willing to waive all questions of nicety as to what seemed to be a very nice point indeed, viz., the exact *punctum temporis* at which two letters were written, the one being an offer to return the wines, and the other a letter which was neither enclosed in the same envelope nor written about the same time on the same day on which the service of the process was accepted, which alone constituted the origination of the suit. I say, without reference to that nice point, the Court is safe in coming to the same conclusion which, if the case had been before a jury, I apprehend the Court would have been entitled to come to, viz., that there had not been such a clear and distinct notification of the breaking off of the contract up to at least the 13th of June (whatever there may have been on the 14th of June) as would justify these gentlemen in retaining, as they did, the goods which had been sold to them, without paying the price for them.

The findings of the Court below may possibly be open to some cavil or dispute as regards the finding that nothing was done up to the 13th of June, looking to the statements in the condescendence about the 6th of May. But I apprehend the reasonable construction of these findings would be that nothing was done which the law required to be done, by which a person could say that he was absolved from the contract and that he had put an end to it, and had thus put himself in a position in which he is entitled to say that he is not any longer liable for the price under the contract, whatever that may be. I apprehend that it is not necessary for your Lordships to enter minutely into the finding, which is itself only a step in the progress of the evidence, as to what was or what was not done by those gentlemen at any point of time with regard to the proposals which they did make, and that in substance up to that time—which [80] was a very considerable interval of time, regard being had to the subject-matter, viz., up to the 13th of June from the 6th of May—they had not done that which it was incumbent upon them to do, if they wished to escape from the payment of the price.

Therefore, without its being necessary to say (as I think it is not necessary to say) with reference to the expression of one of the learned Judges, that the door was finally closed by the letter of the 14th of June accepting the service of process, and constituting therefore the institution of the suit, I apprehend that your Lordships will be of opinion that the finding of the learned Judges below was right, in which they found that as there was not a return made of the goods, but the goods remained up to that very time, as they did, in the possession of the defenders, the defenders have not put themselves in a position in which they can claim a right to be excused from the payment of the money, whatever their rights may be (with respect to which it is not necessary to express any opinion) in respect of the quality of goods furnished to them. I do not think that in substance that point has ever been much pressed upon us. It was suggested in argument—and it ought to be noticed, although the

point could hardly be pressed with any reasonable hope of success—that in effect there was no contract between the parties as to the quality of the articles. A case was cited to support that proposition. If a case had not been cited, I should not have noticed this point at all. That was a case in which a person engaged not to sell a definite thing *in esse*, but to supply certain quantities of yarn according to sample. He might supply the yarn from whencesoever he pleased, there might not be a single hank of it *in esse* at the time beyond the sample of it, and he furnished some jute instead of flax.

There the very contract was for flax not for jute, a thing different in *rerum natura*. But here the contract is for certain specified wines sent over by a certain firm, Gordon & Co., and lying in certain specified cellars. The parties are both of them acting *bona fide*. Both the vendor and the vendee thought that it was wine of the quality represented by the sample. Both thought so up to the very moment of the return of the goods from Reading by Mr. Cooper, and the complaint that was then made. Of course it is impossible to say that a contract is not made because each and every individual article in the things sold is not equal to the sample produced. If that were so I apprehend that nine-tenths of the bargains which are taking place from time to time in a vast mercantile community like this might be set aside because by a mere accident there might be three or four of the articles not conformable to the samples. A contract was made and entered into. These gentlemen found that when they received the goods the articles supplied were not what they conceived that they ought to be. They had it in their power either to accept them and pay for them, reserving all their rights, or to reject them, and notify the rejection. It appears to me that they have not done either the one or the other, and the consequence is that they are now liable for the price which they have contracted to pay for these articles.

I think therefore, my Lords, that all that we can do is to affirm the interlocutors of the Court of Session, and to dismiss the appeal, with costs.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friend on the woolsack as to this case. There can be no doubt that the purchase of the lots in question constituted a separate contract as to each lot. The sale was by sample. It turned out that very large quantities of the wine in both of the lots did not correspond with the sample, and undoubtedly the purchaser had a right without delay to return the wines and rescind or abandon the contract.

Reference has been made to the difference between the law of England and the law of Scotland as to the right of a purchaser to rescind a contract, and therefore I will say a few words upon that difference. In England, if goods are sold by sample, and they are delivered and accepted by the purchaser, the purchaser cannot return them; but if he has not completely accepted them, that is, if he has taken the delivery conditionally, he has a right to keep the goods for a sufficient time to enable him to give them a fair trial, and then, if they are [81] found not to correspond with the sample, he is entitled to return them. As I understand the law of Scotland, although the goods have been accepted by the purchaser, yet, if he finds that they do not correspond with the sample, he has an absolute right to return them.

Now, let us take the case of goods sold upon a warranty, and by way of illustration I will take the case of a sale of a horse with a warranty of soundness. Some of the cases which have been referred to apply to that subject. If a horse is sold with a warranty of soundness and it turns out to be unsound, in England the purchaser cannot return the horse unless there is a stipulation in the agreement that if the horse does not answer to the warranty he shall be at liberty to return it, but that all he can do is to offer to return the horse to the seller, and if the seller refuses to receive back, then he may sell the horse, and recover from the seller the difference in price between a sound and an unsound horse,—that is to say, the difference between the price which the horse realised upon the sale and the price which he had paid. In Scotland, as I understand, there is an absolute right to return the horse upon the discovery of its unsoundness, without there being any stipulation to that effect in the agreement between the parties.

In this case the action being brought for the price of the wines in these different lots, the defenders (the appellants) by way of defence state in their pleas in law that the wine was not conform to contract, and that they rejected the lots and timeously offered to return them. I was rather astonished to hear it stated at the bar that

upon these pleas in law it was incumbent upon the pursuer to shew that there had not been an offer to return the wines without delay, that is, that it was the incumbent duty of the pursuer to prove that which it would have been almost impossible for him to prove, viz., a negative in this case, that there had not been an offer to return. We were also warned that if we decided otherwise we should change the law of Scotland in this respect. I do not think that the law of Scotland is so unreasonable as to require a party to prove a negative by way of anticipation to an affirmative defence. The defenders assumed, and as it appears to me properly assumed, the defence by their pleas in law; and by the Act of 6 Geo. IV. cap. 120, their plea in law is to be held to be the sole ground of their defence, and therefore I apprehend that the onus of proving that the goods had been returned, or that there had been an offer to return them, lay upon the defenders.

Now, the questions which arose between the parties upon the pleas in law were these—First, Did the wine correspond with the sample? Secondly, Was there any improper delay in discovering the defective quality of the wines? And, thirdly, was there any improper delay in the offer to return them?

Now, with regard to the wine not corresponding to the sample, there can be no doubt whatever that large quantities of the wine in both lots were utterly bad, and could in no way whatever be said to be conform to the sample. And therefore, upon the discovery of that fact there is no doubt whatever that the defenders had a right, not, as appeared to be contended in the course of the argument, to retain the good wine and return the bad, but to rescind the contracts for those lots altogether. The contract being entire for each lot, the only way in which the defenders could discharge themselves from their obligation to pay for the wine was by returning or offering to return the whole of the lots.

Now, was there delay in ascertaining the defective quality of the wine? I think upon that subject there can be no doubt. It appears upon the evidence that at least the muddy unpleasant state of the wine, which has been described in very strong terms, might have been discovered in the course of a week perhaps at the most, merely by holding it up to a gaslight or other light. And therefore I think that the time which was taken by the defenders before they discovered these defects in the quality of the wine was an unnecessary delay, and therefore upon that point probably they might be considered to be without defence.

But with regard to the offer to return, I think the case is so perfectly clear against the defenders that I should be content to rest my opinion in this case entirely upon that question. I apprehend that where a party desires to rescind a purchase upon the ground that the quality of the article sold does not correspond with that which it professes to be, or with the sample upon which it [82] was sold, it is his duty to make a clear and distinct offer to return, or in fact to return the goods, by stating to the vendor that the goods are at his risk, that they no longer belong to the purchaser, that he rejects them, that he throws them back upon the vendor's hands, and that the contract is thereby rescinded.

Now, was there any such distinct offer made on the part of the defenders in this case? It is quite clear that until the 14th of June 1870 it is hardly possible for the defenders to contend successfully that there was any such offer. Stress has been laid upon the letter of the 31st of May. It appears to me that that letter is anything but a distinct offer, or any offer at all, to return these goods, because the only important part of it is this, that, with the exception of part of lot 19, and the whole of lots 24 and 51, "they are agreeable to retain the rest of the goods purchased at the sale and pay for them, and also to pay for the above lots, provided you supply them with the goods which they bought according to the sample and description. Failing your being able to do this," they think that they are entitled to the difference between the price at which they purchased them and the price at which they can be bought in the market. That was anything but an offer to return the goods. It was an offer to retain them, and to receive the difference in price.

But then it is said that the postscript to that letter is most important here, and that it shews that there was an offer made to return the goods. Now, what is that postscript? "If you wish, Messrs. C., T., & Co., would prefer to return the whole of the fine clarets, as, looking to the condition of a portion of them, they would prefer not to offer them to their customers." This is merely a suggestion that if the sellers wish they would prefer to return the whole of the fine clarets, that is, when they have

ascertained what the sellers' wishes are upon the subject, then they would prefer to return them. That is not an offer to return them. But besides that, it is not an offer to return these particular lots and to rescind the contract; but a statement that they would prefer to return the whole of the fine clarets, there being another lot of clarets besides these particular lots, Nos. 19, 24, and 51.

Then the only other possible way in which the defenders can say that they made an offer to return these wines is in the letter of the 14th June 1870. Now, that letter was sent after the summons had been sent to the agent of the appellants, by a letter of the 13th June 1870, and a copy of the summons was sent in that letter. There were two letters written on the 14th June, and sent by hand at the same time, one of them beginning thus,—"I have received your's of yesterday, with the signeted summons and copy therein referred to." The other being,—"I return principal summons, with certificate appended thereto, holding it served against my clients." Now, there was a question whether the offer to return, which is said to be contained in this letter of the 14th June, was sent before the summons had been accepted, until which it is said the suit was not commenced. Really, I do not trouble myself to consider whether that is correct or not. It seems to me to be perfectly immaterial, because I am sure that upon considering this letter of the 14th June it never can be regarded as such an offer to return the wines as is necessary in order to abandon, or throw up, or rescind the contract, whatever word you choose to apply to it.

Now, it is to be observed that the parties had been negotiating for an arrangement of this dispute which had arisen between them, and that there had been an offer to refer the matter, which offer was declined on the 13th June, on which day the summons was sent. Then, in the letter of the 14th June, the agent for the purchasers says,—"I have now seen my clients, and, without prejudice to the questions between them and Mr. Chapman, I have to state that they are agreeable to pay for the whole of their purchases, with the exception of lots 24 and 51, which they are willing to return without any claim for deterioration or value." Now, I confess it appears to me it is impossible to say that that was a distinct offer to return, or a notice that the wines were in the possession of the appellants, but at the risk and as the property of the sellers. It appears to me more like a continuation of the negotiation between the parties with the hope that still there might be a settlement between them upon these terms which are suggested in the letter. But whatever construction may be put upon it in [83] the way I have suggested I am quite clear that there never has been from first to last any such distinct notice or offer to return the goods as was required to enable the purchaser to throw up the contract, and so to relieve himself from the liability of paying the price of these goods; and, therefore, I think with my noble and learned friend, that the interlocutor ought to be affirmed.

LORD COLONSAY.—My Lords, I have come to the same conclusion in this case. A question was raised in the beginning of the argument submitted by Mr. Smith, in which he contended that it was not a case made by the pursuer upon the record that the goods had not been returned in due time, and that the onus was upon the pursuer to make out that part of the case. My Lords, I think the matter is fully raised upon this record. In the first place, the plea of the pursuer is that the defenders, not having objected to the state and to the quality of the wines purchased by them, were debarred from objecting to the same now; and then the defenders plead, that they having rejected the lots Nos. 19, 24, and 51, and timeously offered to return the goods comprised in those lots, are not liable to pay for them. Therefore, the parties were brought face to face upon that point, and it appears from the evidence that both parties have joined issue upon that, and questions were asked upon it, and both parties put in correspondence in order to support their case.

Therefore the whole question was raised, and the point we have now to determine is, whether the defenders did in due time "timeously," as it is expressed here, offer to return the goods, or rather, I would say, did reject the goods; because rejection implies all that was necessary upon their part as purchasers of the goods when they found that they did not accord with the samples. Rejection implies notice that they were not good, and the statement that they were returned, or that they offered to return them, or that they were lying at the risk of the sellers in a place stated. Now, my Lords, I think it appears pretty clear upon the evidence that is before us, and from the documents, that neither was there a timeous notice I would say of the goods being disconform to sample, nor was there throughout until the 14th of June (and

I doubt if even then), an offer or a proposal to return them, or a doing of that which was necessary to the rejection of the goods.

It appears that very soon after the sale the defenders obtained samples of the goods, and it appears that early in April they obtained additional samples of the goods, with a view, as one of the defenders says, to testing them, and seeing whether they were according to sample. They got six bottles of each kind. They called in a skilled person to assist in examining them, and being satisfied, they sent for and obtained the goods. So far there was a fair opportunity of examining the goods. A month elapsed before they did anything. According to any statement we have here even by the defenders themselves it was not till the 6th May that any positive objection was made to the particular lots. Now, I do think that after the defenders had had an opportunity of examining the goods, had taken persons to assist them in examining them, after they had had several samples opened, it being then a month after the sale, it was then too late for them to make objection.

But the case does not end there. The matter went on in this way,—certain objections were taken; a correspondence went on pro and con, but never at any stage, certainly not until the 14th of June, does it appear that they rejected, in the proper and legal mode of doing so, those particular parcels of goods. They did not state that they returned them, or that they were at the risk of the seller, and, in short, they did not fulfil that which by law is incumbent upon a purchaser to do, if he does not choose to retain the goods. They retained the goods, and refused to pay the price for them. They contested the quality of the goods, and now, after the lapse of so much time, they propose, in bringing this question here, to return the goods, and they refuse to pay the price. It does appear that in some respects both parties were wrong in their views of the law in the early part of these proceedings. It appears that the pursuer was of opinion that all the purchases made at that sale were to be regarded as one transaction, and that it was not competent to the defenders to take an objection to any particular lots [84] of the purchase. It appears that the defenders were under that impression too, because in their letters in the correspondence they seem to deal with the matter upon that footing. But when the parties came into Court, and after the matter came to be discussed, at the first step of the proceedings, the first judgment pronounced by the Lord Ordinary at an early stage of the case, was, that that contention of the pursuer's was wrong, and that each lot was to be dealt with as a separate purchase. We find that there was no rejection of the goods. No proposal to send them back, in short, nothing was done which satisfied the requirements of the law.

As to the matters of the particular *punctum temporis* we have to deal with, I am not at all of opinion that the true date is the date of the service of the summons. However long the serving of the summons and the raising of the action may be delayed, it is not always up to that date open to a purchaser to return the goods. That would be a very strange thing, and quite contrary to the law. He must do it forthwith when he has had an opportunity of seeing and examining the goods, especially if he has availed himself of that opportunity and examined the goods. But you find that that was not done here. The service of the summons has no solemnity in this matter at all. Some of the Judges used the expression, that after the service of the summons it was too late,—as one of them stated, the door was closed. No doubt it was, and the letter from the one agent to the other shews it. The sending of the summons to the agent of the defenders requesting him to accept the service for his clients, and his acceptance, is the strongest possible intimation that he no longer considered that he had any right to rescind the contract.

Therefore, I see here nothing that can support the case of the defenders. They have all along retained the wines—they have retained the goods, and they are now just trying, upon an action of this kind, to maintain that if they had sent the goods back in time, and paid the price demanded, they might have had redress by bringing an action for damages. But that is not the case we have to deal with here. The case we have to deal with here is as to the payment for the wines. We are told that there is an action for damages in dependence raised by the defenders. I shall say nothing with regard to the actual *quantum temporis*, or the right to claim damages. I shall say nothing that can be supposed to have a bearing upon the other case that may be in dependence. I shall only say that the cases which have been referred to as impeaching the doctrine laid down by the Judges in this case are not at all in

point, particularly the case of Jaffe *v.* Ritchie,* is wholly away from this. There there was a purchase of flax yarn, and it turned out when the bleacher came to examine the goods that a large portion of this flax yarn, which the contractor had been bound to supply, was not flax, but jute. It was held there that the party was not bound to take jute instead of flax. It is a different article, and therefore it is not the same case at all as this. It was only bleaching that brought out the quality, but certainly it is not the same case as this, upon two grounds, first, it was not a contract for specific goods; secondly, it was a different article that was delivered. The cases are all of them away from the present.

LORD CAIRNS.—My Lords, I entirely agree with the judgment now proposed to be pronounced.

Interlocutors of the First Division of the Court of Session appealed from affirmed, and appeal dismissed, with costs.

R. M. GLOAG, Westminster—LEBURN, HENDERSON, & WILSON, W.S.—SIMSON & WAKEFORD, Westminster—MILLAR, ALLARDICE, & ROBSON, W.S.

[*Distinguished*, M'Carter *v.* Stewart & Mackenzie, 1877, 4 R. 890. *Referred to*, Electric Construction Co. Ltd. *v.* Hurry & Young, 1897, 24 R. 312.]

* Dec. 21, 1860, 23 D. 242.

CASES

DECIDED IN

THE COURT OF SESSION, ETC.

1871-72.

WINTER SESSION.

No. 1. X. MACPHERSON, 1. 23 Oct. 1871. Registration Appeal Court.—B.

SAMUEL PATON, Appellant.—*Muirhead.*
WILLIAM MORISON, Objector and Respondent.—*Sol.-Gen. Clark.*

Franchise—Parish Schoolmaster—24 & 25 Vict. c. 107 (*Parochial and Burgh Schools (Scotland) Act*) *sec.* 18.—By sec. 18 of the above Act it is enacted that "nothing in this Act shall be held to interfere with any arrangement which may have been concluded between the heritors and schoolmaster of any parish for the retirement of such schoolmaster except as regards the house and garden and premises attached thereto, which shall in every case be made over at the term of Whitsunday next after the passing of this Act to the person actually discharging the duties of schoolmaster." *Held* (1) that the provision was not limited to arrangements made prior to the Act; and (2) (*diss.* Lord Ormidale) that where heritors had subsequent to the Act arranged that a retiring schoolmaster should retain the school-house, &c., he was not entitled to be enrolled as a voter in virtue of his possession.

Opinion (*per* Lord Ormidale) that the condition as to retaining possession being invalid, the whole arrangement as to the schoolmaster's retirement fell to the ground, and he must be considered as still the parish schoolmaster, and entitled as such to the possession of the school-house.

Samuel Paton stood on the roll as a voter for the county of Lanark as schoolmaster of the united parishes of Lamington and Wandel. Morison objected that Paton, having ceased to perform the duties of parochial schoolmaster, had lost his right to the dwelling-house and garden on which he was registered, and that the person who was appointed by the heritors to discharge and was actually discharging these duties had, in virtue of the 18th and 20th sections of 24 & 25 Vict. c. 107,* the sole right to the dwelling-house and garden.

* By the Parochial and Burgh Schools (Scotland) Act, 24 & 25 Vict. c. 107, sec 18, it is enacted that "nothing in this Act shall be held to interfere with any arrangement which may have been concluded between the heritors and schoolmaster of any parish for the retirement of such schoolmaster, except as regards the house and garden and premises attached thereto, which shall in every [2] case be made over at the term of Whitsunday next after the passing of this Act to the person actually discharging the duties of schoolmaster."

Sec. 19, that the heritors and minister may permit or require a schoolmaster to

[2] Paton produced excerpt minute of the heritors, dated 9th January 1871, from which it appeared that he was to retain possession of the school-house and garden, with £40 of an allowance. Morison produced a minute of the heritors appointing another schoolmaster to perform the duties of schoolmaster.

Paton argued that it was *jus tertii* in the objector to maintain that he was bound to cede possession of the subjects, and that in the absence of a divesting deed there was no valid ground for expunging his name. Farther, the 18th section of the Schoolmasters Act only applied to arrangements at the date of the Act.

The Sheriff-substitute (Dyce) sustained the objection, and expunged Paton's name from the roll.

Paton appealed.

The special case set forth the facts above narrated, and stated the question of law for the decision of the Court to be, "Whether the voter, in respect of the arrangement between himself and the heritors, as detailed in said minutes, and since carried into effect, has ceased to be the schoolmaster of the united parishes of Lamington and Wandel, and has no longer right to the retention of the dwelling-house on which he is registered.

Paton argued that the 18th section of the Parochial and Burgh Schools Act only applied to arrangements existing at the date of the Act.

LORD BENHOLME.—The important and interesting question in this case is, whether the provision in section 18 refers merely to what passed before the Act, or was intended to affect all future arrangements. My view is, that it was intended to affect arrangements in all time to come; and that it is a most salutary provision to prevent the heritors from disconnecting the occupation of the school-house with the performance of the active duties of the office of schoolmaster.

If that is so, there was an attempt on the part of the heritors here to do otherwise, which ought not to be countenanced.

LORD ARDMILLAN concurred.

LORD ORMIDALE.—I agree with your Lordships in thinking that under the statute a schoolmaster is not entitled to retain the school-house after he has legally ceased to be schoolmaster, and to perform the duties of his office; but I arrive at this conclusion on grounds different from those which have influenced your Lordships.

The important clauses of the Schoolmasters Act in question are the 18th, 19th, and 20th. By the two latter it appears to me that it is only competent for a schoolmaster to be relieved from his office on a retired allowance, provided the forms and order of procedure therein prescribed are followed out. One of the great objects of the Act was to prevent the important office of schoolmaster being dealt with by way of private arrangement between him and the heritors. Keeping this in view, and that the arrangement whereby the schoolmaster here is said to have lost his office, and has ceased to perform his duties, is entirely a private one, entered into between him and the heritors, irrespective altogether of the statutory forms and order of procedure, which have not been observed, I cannot hold in law that he has ceased to be schoolmaster, or has lost his right to the school-[3]-master's dwelling-house, which is the subject of his qualification as a voter on the roll. Indeed, according to the terms of the private arrangement itself, on which the objection we are now dealing with is founded, the voter still retains his status as schoolmaster, and also his right to the schoolmaster's dwelling-house.

So far, then, the objection to the voter being continued on the roll must be held to fail.

But then the 18th section of the Act was strongly founded on to the effect that no one could be held to have right to the schoolmaster's house except the person who performs the duties of schoolmaster; and it was argued that, as the voter in the present instance has confessedly for some time back ceased *de facto* to perform the duties of schoolmaster, he must be held to have lost his qualification. To this, however, I am disposed to think the answer which has been made by the counsel for the voter sufficient, viz., that the 18th section, looking to its peculiar terms, and reading it along with sections 19 and 20, must be held to relate to arrangements which had been entered

---

resign, granting him an allowance not less than two-thirds of his salary; and, sec. 20, that in addition to his allowance they may grant him a yearly sum equal in amount to the annual value of any dwelling-house and garden to which he may be entitled as schoolmaster, as the same shall be valued by the assessor for the county.

into prior to the passing of the Act, and is therefore inapplicable to the present case, which, as well as all cases occurring subsequent to the passing of the Act, must be regulated by sections 19 and 20. To hold that the private arrangement in question is null and inoperative to the effect merely of depriving the voter of his house, although his retention of the house was one of the leading conditions of his entering into the arrangement, while good and effectual in all other respects, would be contrary alike to law and equity. If it is invalid *quoad* the house, it must be invalid altogether, and in this view the result necessarily follows that the voter's rights are in law exactly as they were before the arrangment was entered into.

These are the considerations which lead me to doubt the soundness of the judgment proposed by your Lordships, and to say that I must be held to dissent from it.

The Court affirmed the judgment of the Sheriff.

R. DENHOLME, S.S.C.—HAMILTON, KINNEAR, & BEATSON, W.S.—Agents.

[*Distinguished*, Home *v.* Paterson, 1872, 11 M. 1.]

No. 2. X. MACPHERSON, 3. 23 Oct. 1871. Registration Appeal Court.—B.

WILLIAM DUGUID HILL, Appellant.—*R. Vary Campbell.*
JOHN MARSHALL HILL, Objector and Respondent.—*Macdonald.*

Franchise—Faggot Vote—Nominal and Fictitious.—An estate was purchased *pro indiviso* by forty-three persons at the price of £15,005, of which £13,500 was allowed to remain as a burden on the estate, and the balance, or £35 a-piece, was paid by the alleged purchasers, it being expressly declared that they should incur no personal responsibility for the £13,500. The bondholder appointed a factor on the estate, the rents being applied to pay the interest, and the alleged purchasers receiving no part of them. *Held* that the sale was nominal and fictitious, and that the alleged purchasers were not entitled to the franchise.

Franchise—Adjudication.—Observed that an adjudication of lands for debt is, during the legal, only a *pignus prætorium*, and does not affect the reverser's right to the franchise.

The claimant, William Duguid Hill, claimed to be enrolled as a voter for the county of Stirling, as "co-proprietor or joint owner *pro indiviso* of the lands and estate of Bogside." From the year 1839 to the present year he had been enrolled as a voter, but his name was struck off by the assessor this year.

The facts as stated in the special case were as follows:—"In or about the beginning of the year 1839 the late Robert Stewart of Stewarthall purchased the estate of Bogside at the price of £13,500, and at the same time granted a bond for that sum over the same to the late Sir Gilbert Stirling of Larbert. It was specially agreed that neither the said Robert Stewart nor his heirs should be liable for the principal sum or interest, or [4] any penalty or expenses, and that the security should be limited and restricted to the lands and others conveyed. Mr. Stewart, at the same time, disponed the said lands and others to forty-three gentlemen, among whom was the claimant, in consideration of the price of £15,005, of which £13,500, being the amount of the said bond, was to remain a burden on the lands, and only the balance, or £1505, was paid in cash. The price paid by each of these gentlemen was £35, and they were infeft. A factory and commission was granted by them at the same time in favour of Mr. Kerr, writer in Stirling, to manage and let the lands, and under the terms of the factory so granted the factor was under obligation to hold just count and reckoning to them, or their heirs and assignees, for his whole intromissions, at all times when required, and after paying all legal burdens affecting the said lands, as also the interest due on the said bond of £13,500, to make payment to them of whatever balances should appear to be due by him. But while it was part of the arrangement that this factory should be granted by the forty-three co-proprietors, it appears to have been also arranged that the factor should be named by Sir Gilbert Stirling, and should account to him for the rents of

the lands to be uplifted and applied by him, that the forty-three co-proprietors should not be liable for the payment of either the principal sum or interest of the bond, or the penalties to both annexed; and, accordingly, although there was a surplus of small amount up to the year 1851, no accounting by the factor was ever called for by or made to the claimant and his co-partners, and they never received anything out of the rents of the land. From 1851 there was no surplus after paying interest on the bond, and by Martinmas 1857 the balance of accounts turned, and the factor was unable to pay the interest in full. In the meantime Sir Gilbert Stirling had died, and the bond for £13,500 over Bogside became vested in his trustees. They tried in various ways to realise the amount of the debt, and advertised the lands for sale at various upset prices, ranging from £18,000 to £13,500, but unsuccessfully. After various other unsuccessful attempts had been made to obtain a disposition, signed by all the co-proprietors, of their rights, in the year 1869, Alexander Mackenzie and others, trustees of the late Sir Gilbert Stirling, raised an action and obtained a decree of constitution and adjudication against Walter Buchanan and the other forty-two co-proprietors of Bogside, including the claimant, whereby the said lands, &c., are adjudged from the said Walter Buchanan and others, and are declared to pertain and belong to the pursuers of the said action for payment and satisfaction to them of their debt, with interest, &c., amounting in all to £14,838, 4s. 8d., with legal interest of the same during not redemption of the said lands, &c. On this decree the said Alexander Mackenzie and others have been infeft, conform to notarial instrument registered on 26th August 1869, and they subsequently disponed the said lands and others to Gilbert Stirling, Esq., of Larbert, and his heirs, who thereafter disponed them again to trustees, who are now in possession of the said lands, and on which last disposition they were infeft, conform to notarial instrument registered on 26th April 1871. In the valuation-roll of this year the said Alexander Mackenzie and others appear as proprietors in trust of the lands of Bogside, &c., and the claimant does not appear on that roll. He therefore has claimed of new.

"John Marshall Hill, a registered voter on the roll, objected to the claim, on the grounds,—1. That the claim was from the beginning nominal and fictitious; and 2. That whatever right the claimant may have had before was taken out of him by the decree of constitution and adjudication, followed by infeftment, and by the absolute conveyance by the adjudgers to Gilbert Stirling, and the conveyance and re-settlement by him on [5] trustees, who are now in possession as absolute proprietors. I rejected the claim, being of opinion that the interest of a reverser in adjudged lands is not one of property or ownership entitling him to be enrolled under the Representation of the People Act, and other Acts, as proprietor or owner of said lands—but is only a right of redemption. Whereupon the procurator for the said William Duguid Hill required from me a special case for the Court of Appeal, and in compliance therewith I have granted this case. The questions of law for the decision of the Court are,—1. Whether the claimant's alleged right of co-proprietor or joint owner of the lands in question ever afforded a proper qualification on which to be enrolled? 2. Whether the interest now remaining in him after the decree of adjudication and the subsequent proceedings affords the qualification on which he seeks now to be enrolled?"

The claimant appealed.

The objector at the discussion gave up the objection to the claim founded on the decree of adjudication.

LORD ARDMILLAN.—In the first place, I am of opinion that the counsel for the respondent showed great judgment in giving up the second point depending upon the adjudication. The right which an adjudger has during the legal, and before declarator, is not a right of property. The adjudication is not a transference of the property in the lands, but is only a *pignus prætorium*, and that cannot deprive the reverser of his vote.

The other question under this case is, I think, one of very great importance. The claimant is one of forty-three gentlemen, who, to acquire the franchise, entered into a transaction by which they attempted to attain the qualification necessary, at the cost of £35 a-piece. The true nature of this transaction is disclosed by the statements in this special case.

Sir Gilbert Stirling was holder of a heritable security over the lands; but he never was the creditor of this gentleman, who is carefully protected against all liability for principal or interest. In terms of express agreement, Sir Gilbert Stirling nominates

the factor, and directs that factor to account to him for the rents,—which are to go to the payment of interest, for which this gentleman, the claimant, never was liable.

This has been done throughout the whole period covered by this transaction. It has been urged that any surplus belonged to this gentleman and his co-purchasers; but there was a surplus for the space of twelve years, and not a shilling of it was ever paid to one of them; nor was it paid for their behoof: it was not paid to their creditor, or by their order. They hold a paper right, with no liability whatever attaching to them, and no profits or issues paid or payable to them; they get nothing—they have for many years got nothing; they have paid £35 each for the privilege of voting, but they have been liable to no burdens, and have received no other return.

The character of the transaction from beginning to end is unreal, and I think it is just and exceedingly salutary that the claim should be rejected.

LORD BENHOLME and LORD ORMIDALE concurred.

THE COURT affirmed the judgment of the Sheriff.

T. F. WEIR, S.S.C.—MACKENZIE & BLACK, W.S.—Agents.

No. 3. X. MACPHERSON, 5. 23 Oct. 1871. Registration Appeal Court.—B.

JOHN BETHUNE WALKER LEE, Claimant and Appellant.—*Rhind.*
JOHN MATHESON, Objector and Respondent.

County Franchise—Superior—Feu-Duties—2 & 3 *Wm. IV. c.* 85, *sec.* 7.—A superior is not entitled to the franchise as proprietor of the lands feued, but only as proprietor of the feu-duties.

County Franchise—Superior—Feu-Duties—Casualties.—In estimating the [6] value of feu-duties, as affording a qualification for the franchise, the value of casualties of superiority cannot be taken into account.

John B. W. Lee, S.S.C., Edinburgh, claimed to be enrolled as a voter for Dumbartonshire, as proprietor infeft in the estates of Auchinkilns, Thorn, &c., in the parish of Cumbernauld, under burden of the feu-rights, and stated his income to average £24 to £30, including the casualties. This claim was objected to by John Matheson, joiner, Renton.

The special case stated,—"The claimant is infeft in the superiorities claimed on, under disposition by the trustee on Lord Elphinstone's estate in his favour, recorded 30th September 1870, whereby, in consideration of the price of £250, the trustee sold and disponed to Mr. Lee the superiority of the said lands, with right to the feu and blench duties and casualties, from the term of Whitsunday 1870. The duties are to some extent payable in grain, and the yearly value of the feu-duties of Auchinkilns and Thorn is stated in the valuation-roll at £7, 4s. 1d., and of Wester Balloch at £1, 2s. 3d.,—together, £8, 6s. 4d. The rent or annual value of the lands of Auchinkilns, Thorn, and Wester Balloch, as appearing in the valuation-roll, is £669. The claimant contended that, along with the above sum of feu-duties, the casualties of the superiority ought to be taken into computation in ascertaining the yearly value of the subjects claimed on, and he founded on the 7th section of the Act 2 & 3 William IV. cap. 85, which provides, 'that where the whole profits and issues of any such subjects do not arise annually but at longer intervals, the worth and amount of such occasional profits shall be taken into computation in estimating the annual value.' It was objected to the claim, that the amount of casualties stated by the claimant has not been established by evidence. It is true that the valuation-roll shows the amount of the feu-duties to be £8, 6s. 4d., and the rent of the lands to be £669. But it has not been proved that any casualties exist, and, assuming their existence, it has not been proved that they have not been commuted by contract, and these points the claimant was bound to establish by competent evidence. And further, supposing the casualties to be as the claimant represents them, they do not afford any legal and competent ground, either taken alone or in combination with the feu-duties, for constituting the franchise.

"The Sheriff-substitute held that the existence of the feudal casualties is established

presumptione juris, to the extent of a year's rent, upon the entry of a singular successor, and a year's feu-duty on the entry of an heir, unless they are restricted and commuted by express contract. The presumption, therefore, being in favour of the claimant, he is not required to prove, and it lies with the objector to overturn the presumption by producing evidence of restriction, and such evidence is properly to be found in the vassal's title; and farther, he held that, in determining the value of property with reference to the franchise, the Reform Act of 1832, though it requires the deduction of feu-duties and ground-annuals from the vassal's subjects, does not require the deduction of casualties. That portion of the 7th section of the Act founded on by the claimant, as authorising the computation of occasional profits in estimating the annual value, has been construed not to include casualties—see the case of King (Midlothian) 1832, and Stevenson (Midlothian), 1836, Cay's Analysis of Reform Act, 1832, pp. 228 *et seq.*; and on the same principle it has been found that the arrears of feu-duty are not liable to deduction, nor interest on a part of the purchase money, even though it had been declared a real burden on the estate—see Nicolson's Law of Parliamentary Elections, 1865, pp. 48 and 49. In conformity with these views, the Valuation Act, 24 & 25 Vict. cap. 83, which requires (sec. 4) the assessor to enter [7] in his roll feu-duties and ground-annuals, makes no requirement of this kind in regard to casualties, and yet if it had been intended that these should form a subject for deduction, it may be fairly assumed that the assessor would have been instructed to compute and enter them in the roll. Indeed, as the provision is expressly limited to feu-duty, ground-annual, and other *yearly* consideration, it may be held to import an exclusion of casualties, for these can in no case be regarded as yearly consideration. Such being the state of the law, it appears to follow that, in estimating the yearly value of the superior's estate, the casualties cannot be included, because, as these are not deducted from the vassal's subjects, they cannot be added to those of the superior. It is obvious that, were such addition to be allowed, the superior would vote upon the value of the casualties, while the vassal, by not deducting them, would also vote upon their value. Two persons would thus hold the franchise upon the same identical profits and issues, which is, of course, incompetent. Upon these grounds the Sheriff-substitute rejected the claim made by the claimant, and refused to place his name upon the roll of voters.

"The questions of law are,—(1) Whether there is sufficient ground in this case for holding that the casualties exist in an unrestricted form? and, (2) Assuming this to be the case, whether these casualties can be taken into computation along with the feu-duties to constitute the claimant's right to the franchise?"

The claimant appealed, and cited Bell's Prin. sec. 690; Nicolson's Election Law, 1845, p. 44.

There was no appearance for the respondent.

LORD BENHOLME.—I must confess that this claim struck me at the outset as peculiar under the words of the Act which bestows the franchise on feu-duties. It is improper to claim on land where there is no property in the land but a mere superiority. The Act does not authorise a claim on land where the claimant only holds the superiority; the only substantial property in such a case is in the feu-duties. And where, as in this case, the feu-duties are admittedly of less value than would confer the franchise, the claimant cannot be allowed to increase their value by adding to it other contingent profits. Then there is another difficulty: the documents from which the nature and extent of the casualties here claimed on alone could be gathered are not produced, and we are quite in the dark concerning them.

There is also a greater difficulty still, that these casualties cannot be said to be due "at longer intervals" as required by the statute; they are not due at any definite stated periods unless by special compact, and we have no evidence of any such compact here. In the absence of such evidence, casualties cannot be held to fall due at stated intervals. All these difficulties would need to be got over before I could sustain this claim. The main ground, however, for rejecting this claim seems to me to be that the franchise is given to feu-duties as a separate right, and it is improper to base a claim upon land when it is evident that it is substantially a claim upon feu-duties.

LORD ARDMILLAN.—I understand that a superior has been allowed to claim as the proprietor of the lands, but the foundation of his claim can only be his right to feu-duties; for the bare superiority without the return of feu-duties will not qualify. That return must also be an annual return, or where not annually, but at "longer intervals," these are not casualties of superiority, but periodical payments.

Casualties, as distinguished from feu-duties, have never been recognised as affording or contributing to afford a qualification. This would be the case, even if we knew what was their amount, but here we have no information about them. I think that the Sheriff's remark at the close of the case is not merely ingenious, but sound and correct, when he says, that since casualties cannot be a deduction from the qualification of the vassal, which is admitted, they cannot be an aug-[8]-mentation to that of the superior; otherwise we might have two voters on the same qualification.

LORD ORMIDALE.—I concur very much with Lord Benholme. I think that to claim on land when your qualification consists of feu-duties is improper, and not according to the statute. The statute expressly particularises lands and houses, and then feu-duties as something different; and so where feu-duties are claimed on it should be clearly expressed.

But here the claim is not on feu-duties but superiorities, and that again is said to comprehend not only feu-duties but also casualties. But the statute says, claims may be made on lands, houses, feu-duties, or other heritable subjects, but casualties cannot be deemed a separate heritable subject; and this I think shows all the more clearly that the grounds your Lordships have suggested for holding that the claimant in this case has failed to support it are well founded.

THE COURT affirmed the judgment of the Sheriff.

PARTY—Agent.

No. 4. X. MACPHERSON, 8. 23 Oct. 1871. Registration Appeal Court.—B.

WILLIAM CRAIG, Objector and Appellant.—*Macdonald.*
JAMES BELL, Respondent.—*M'Kie.*

County Franchise—Long Lease—Proof.—Held that a long lease was not instructed by the production of receipts for "long tack-duty," which did not specify the endurance of the tack, and entries in the landlord's collection lists for forty-seven years, and that parole evidence was incompetent.

William Craig, solicitor, Dumfries, objected to the name of James Bell, Elizafield, being retained on the roll of voters.

The following were the facts, as stated by the Sheriff-substitute (Hope), in the special case:—"1. The said James Bell stands on the valuation-roll of the county as proprietor of houses and land at Elizafield, in the parish of Torthorwald, of the annual rent or value of £13, subject to an annual payment of £5 to Sir Alexander William Grierson, Bart. of Rockhall, in name of ground rent. 2. The said James Bell stands on the assessor's list of persons who have become entitled to vote in the election of members of parliament for the said county, as proprietor of house and land, Elizafield, Torthorwald. 3. No regular written title to the said subjects in favour of the said James Bell or his predecessor has been discovered or proved to have existed. The late John Bell, father of the said James Bell, possessed the said houses and land, from Whitsunday 1824 until his death, paying therefor to Sir Robert Grierson, the predecessor of the said Sir Alexander William Grierson, the sum of £2, 10s. half-yearly, in exchange for receipts bearing to be for 'rent of his possession under me.' 4. The said James Bell is the only son and heir of the said John Bell, and has possessed the said houses and land since his father's death, paying therefor to the factors of the said Sir Alexander William Grierson the sum of £2, 10s. half-yearly in exchange for receipts bearing to be for 'half-year's long tack-duty for possession at Elizafield.' 5. The name of 'John Bell's heirs' has, during the same period, been entered in the factor's accounts and collection lists of long tack-duties belonging to the estate of Rockhall, which lists include those payable under written long tacks. 6. The duration of all the 'long tacks' which have been granted in writing on the estate of Rockhall is ninety-nine years without breaks. The question of law raised was, Whether, in the absence of a written tack, it was competent, in deciding what was the duration of the tack, to take the oath of the landlord's factor along with the documents produced? I

allowed the factor to be examined, and in respect of his evidence, and of [9] the receipts and collection lists of long tack-duties produced, repelled the objection."

The objector appealed.*

LORD BENHOLME.—I think, in this case, the title is defective. I think a written title is required for long leases; and that for the proof of them, as distinguished from leases for a year, parole evidence is insufficient.

LORD ARDMILLAN.—I am rather sorry to be of the same opinion, for this looks as if it were a real and substantial qualification, but the statutory requirements have not been complied with. Therefore I concur.

This Court went as far as it could—some said too far—when it sustained, as sufficient evidence of a long lease, a regular entry in the landlord's rental-book, which contained not only the claimant's name as tenant, but minute particulars as to the commencement of possession, as to the duration of the lease, as to the amount of the rent, and so on, such entry being supported by receipts for rent, and parole proof of possession. But that is the utmost amount of relaxation of the strict rule which has ever been sanctioned; and here we have no rental-book, and no written evidence of a long lease of definite duration. Though I do not think that a formal written tack is always necessary, yet there must be written evidence as the foundation of the claimant's title, and there is too little here to form such foundation.

LORD ORMIDALE.—I concur with your Lordships, and have only to add, what, in my opinion, is enough of itself to enable us to decide this case, viz., that supposing the factor's parole testimony were competent, we do not know, and have no means of knowing, to what it amounted. The Sheriff should have stated its import, so as to have enabled us to judge of it. But we have nothing to show whether he gave evidence in support of the particular tack in question or about other tacks. In short, we have been left entirely in the dark as to what his evidence was.

THE COURT reversed the judgment of the Sheriff-substitute, and sustained the objection.

T. J. GORDON, W.S.—J. SOMERVILLE, S.S.C.—Agents.

No. 5. X. MACPHERSON, 9. 20 Oct. 1871. 1st Div.—Sheriff of Forfarshire, M.

JAMES SHEPHERD CHRISTIE, Pursuer and Appellant.—*Strachan.*
ALEXANDER MATHESON, Defender and Respondent.—*Innes.*

Interest—Loan.—In an action brought for repetition of a sum of money, sent by one brother to another, with a letter bearing "this and all other remittances which I may in future make I wish you to take full use of as if they were your own; when it becomes unnecessary, then dispose of it to the best advantage"; *held* that it was not the lender's intention to charge interest on the loan, and that no interest was due.

In September 1861 James S. Christie, then residing in California, wrote a letter to Alexander Matheson (his brother uterine), a draper in Dundee, stating that he felt himself able to give him a little assistance, and meant to send him a remittance, and saying, "all I have to say about it is that this and all other remittances which I may in future make I wish you to take your full use of, as if they were your own; when it becomes unnecessary (which, I hope, for your own good, it may), then dispose of it to the best advantage."

[10] Subsequently Christie made two other remittances to Matheson, amounting in all to £150.

In January 1871, by which time Matheson had repaid £140 of the loan, Christie brought an action against him in the Sheriff-court of Forfar, at Dundee, for £10 as the

* Gowans' Trs. *v.* Carstairs, July 18, 1862, 24 D. 1382; Ferguson *v.* M'Culloch, Dec. 2, 1865, *ante*, vol. iv. 120; Stewart v. Sutherland, Dec. 19, 1868, *ante*, vol. vii. 298; Cay's Analysis of Reform Act, pp. 290 and 362; Nicolson's Election Law, p. 60.

balance remaining due of the loan, and £53, 5s. 6d. of interest. The pursuer's claim for the £10 was subsequently abandoned, and only the claim for interest remained.

Liability for interest was denied by the defender.

The Sheriff-substitute (Cheyne) held the defender liable in £42, 18s. 9d. of interest.

The Sheriff (Heriot) recalled, and dismissed the summons, with expenses.

The pursuer appealed.*

LORD PRESIDENT.—I have no doubt that the judgment of the Sheriff is well founded. The Sheriff-substitute is quite right as to the general rule of law, but he has overlooked the significance of the letter of 21st September 1861. It appears to me that the passage in that letter on which the defender relies has but one meaning. The defender was in business in Dundee, and his brother, being aware that he was in great difficulties, says that he is able to give him a little assistance, and accordingly sends him £50, and adds, "all I have to say about it is that this and all other remittances which I may in future make I wish you to take your full use of, as if they were your own; when it becomes unnecessary (which, I hope, for your own good, it may), then dispose of it to the best advantage."

It appears to me that the meaning of that is, that the money thus sent, and whatever may be sent afterwards, was to be used by the defender in his business on terms very different from those which regulate the relation of debtor and creditor in the ordinary case. He was to have the full use of the money as his own, which is as near as possible to saying that he was to have the use of it without interest; and that is made still more clear from what follows, for the pursuer goes on to say that when the money becomes unnecessary for the defender's business, he is then to dispose of it to the best advantage, that is, for the lender, having previously disposed of it for the benefit of himself. No other inference can be drawn from these expressions than that the pursuer had no intention that any interest should be paid by the defender.

The other Judges concurred.

This interlocutor was pronounced:—"Recall the interlocutor of the Sheriff-substitute of 14th March 1871, and all the subsequent interlocutors in the inferior Court: Assoilzie the defender (respondent) from the conclusions of the summons, and decern: Find the defender entitled to expenses," &c.

DAVID MILNE, S.S.C.—LINDSAY & PATERSON, W.S.—Agents.

No. 6. X. MACPHERSON, 10. 21 Oct. 1871. Bill Chamber, 1st Div.—Lord Ormidale, B.

JAMES PARK AND MANDATORY, Complainers.—*Sol.-Gen. Clark—Burnet.*
GEORGE ROBSON (Lambie's Trustee), Respondent.—*Watson—Asher.*

Process — Bankruptcy — Bankruptcy (Scotland) Act, 1856, 19 *&* 20 *Vict. c.* 79—*Bankruptcy (England) Act*, 1869, 32 *&* 33 *Vict. c.* 72—*Jurisdiction.*—The English Bankruptcy Act, 1869, provides (sec. 74) that all the bankruptcy Courts in the United Kingdom "shall severally act in aid of, and be auxiliary to, each other, in all matters of bankruptcy, and an order of the Court seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by [11] such order, the like jurisdiction which the Court which made the request, as well as the Court to whom the request is made, could exercise in regard to similar matters within their respective jurisdiction." *Held*, under that section, that if a trustee in a Scotch sequestration desires to obtain information regarding the affairs of the bankrupt from any person residing in England or Ireland, he may apply to the Sheriff, who will, on his application, order the examination of such person, and request the Bankruptcy Court of England or Ireland (in whichever country such person resides), to aid in carrying out the order. *Bankrupt—Bankruptcy (Scotland) Act*, 1856, 19 *&* 20 *Vict. c.* 79, *sec.* 90—*Examin-*

* Forbes *v.* Forbes, Nov. 4, 1869, *ante*, vol. viii. p. 85.

ation.—Under section 90 of the Bankruptcy (Scotland) Act a trustee may apply for an order to examine any person whom he believes able to give information relative to the bankrupt estate, and need not condescend particularly on the information which he expects to obtain.

The estates of George Lambie, grocer and wine merchant, and ship-owner in Glasgow, were sequestrated by the Sheriff of Lanarkshire in March 1871, and George Robson was appointed trustee in the sequestration.

In June 1871 Robson presented a petition to the Sheriff of Lanarkshire, setting forth that he found it desirable that James Park, merchant, London, and certain other parties whom he named, who could give information relative to the bankrupt's estate, should be examined, and praying the Sheriff to "grant commission to any of the registrars of the London Court of Bankruptcy to take the evidence" of Park, &c.; "and farther to request the said London Court of Bankruptcy to act in aid of, and be auxiliary to your Lordship's Court, in regard to all the matters directed by your Lordship's deliverance to follow hereon."

The petition was founded on the English Bankruptcy Act, 1869, c. 72, sec. 74, which provides that "the London Bankruptcy Court, the Local Bankrupty Court, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of such Courts respectively, shall severally act in aid of, and be auxiliary to, each other in all matters of bankruptcy, and an order of the Court seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like jurisdiction which the Court which made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."

The Sheriff, on 10th June 1871, "having considered the foregoing petition, orders the examination of the therein-named James Park, . . . relative to the affairs of the said bankrupt, and that on the interrogation of the trustee, George Robson, or his agent, and requests the London Bankruptcy Court, within whose jurisdiction the said parties reside, to act in the aid of, and be auxiliary to, the Sheriff in carrying out the said order, all in terms of 'the Bankruptcy Act, 1869.'"

Thereafter a subpœna, dated 4th July 1871, was served upon Park, commanding him to appear before the Chief Judge of the London Bankruptcy Court on 7th July, and to produce certain papers relating to the sale by him, to a person of the name of Morrison, of a ship which had been mortgaged to him by one Liddell, "and to testify the truth according to your knowledge in the matter of a certain sequestration or bankruptcy of George Lambie of Glasgow, shipowner, &c., now pending before the Sheriff of Lanarkshire at Glasgow, and in our London Bankruptcy Court."

Park appeared before the London Bankruptcy Court, but objected to being examined about the said mortgage and sale, on the ground that he [12] was about to be attacked by the trustee about the mortgage transaction, and was not compellable to submit to examination. The Chief Judge held that Park was bound to go before the registrar for examination, "it being open to him in the course of the examination to refuse to answer any particular question relating to matters about which he was entitled to refuse to give information."

Park then, by his counsel, undertook to appear and be examined.

On 14th July Park presented this note of suspension and interdict against the trustee, craving the Court "to interdict, prohibit, and discharge the said respondent from following forth an interlocutor of the Sheriff of Lanarkshire, dated on or about 10th June 1871, ordering the examination of the complainer, James Park, relative to the affairs of the bankrupt, George Lambie, before designed, and a notice, dated the 4th day of July 1871, given by the respondent to the said complainer under said interlocutor, or either of them, and from examining the said complainer in the sequestration of the said George Lambie, relative to the affairs of the said George Lambie."

The complainer averred that the vessel above referred to had been mortgaged to him by Liddell in August 1870, and sold, under the powers in the mortgage, in March 1871, and that it now appeared that Lambie had bought the ship from Liddell, under burden of the complainer's mortgage; and that the trustee in Lambie's sequestration had given him notice that, in consequence of the facts disclosed in the bankrupt's

examination, he held him, the complainer, liable for the value of the vessel. The complainer farther averred—"He was not a relative of the bankrupt, nor his clerk, servant, agent, or partner; that he never had any transactions with him of any description, and, excepting that he communicated to the complainer that he had purchased the said ship under burden of the said mortgage, and that the complainer intimated to him that he intended to make the said sale, the complainer did not know him."

He pleaded;—(1) The complainer not being within the class of persons who are under the Bankrupt Acts compellable to give information in reference to the said bankrupt's affairs, he is entitled to suspension and interdict. (2) The complainer cannot be compelled to give information relative to a matter in which the respondent has given him notice that he holds him legally responsible. (3) The application to the Sheriff having contained no statement of any circumstances on which the complainer could give information relative to the bankrupt's affairs, it ought to have been refused by the Sheriff, and the complainer is therefore entitled to suspension. (5) The proceedings complained of being irregular, and incompetent, suspension and interdict should be granted as craved, as also interim interdict, with expenses.

The trustee pleaded;—(4) The said petition, and proceedings therein, and interlocutor following thereon, being in all respects competent and regular, and the complainer being bound to answer all lawful questions relating to the affairs of the bankrupt, he was not entitled to refuse to undergo examination, and the suspension should be refused, with expenses.

On 2d August 1871 the Lord Ordinary pronounced this interlocutor:—"Refuses the note of suspension and interdict: Finds the respondent entitled to expenses: Allows him to lodge an account thereof," &c.*

---

* "NOTE.—The complainer attempts in the present application to obstruct the proceedings, which the respondent, as trustee in the sequestration in question, has, in the discharge of his duty, thought it necessary to adopt. In making this attempt the complainer appears to the Lord Ordinary to have acted not very [13] fairly or consistently, for while, according to the shorthand writer's notes produced of what took place before the Chief Judge in Bankruptcy in London on the 17th of last month, he then, by his counsel, undertook to appear and be examined, he had three days previously, viz., on the 14th of July, presented the present note of suspension and interdict, and has since persisted in it.

"The respondent has objected to the competency of the note of suspension and interdict, on the ground chiefly that the order of the Sheriff for the complainer's examination was not appealed against, and that it is now final in terms of the 170th section of the Act. The Lord Ordinary doubts, however, whether this provision of the statute can be held to apply to such a case as the present, where the complainer had no notice of the respondent's intention to examine him, and in reality could not possibly have appealed within eight days after the date of the order for his examination as prescribed by the 170th section of the statute.

"The question therefore is, whether there is any sufficient ground for the note of suspension and interdict. The Lord Ordinary, being of opinion that there is not, has refused the note, with expenses.

"1. The plea of the complainer that he is not within the class of persons examinable under the statute appears to the Lord Ordinary to be clearly ill founded, having regard to the comprehensive terms of the 90th section of the Bankrupt Act, and the case of Burnet *v.* Calder, 14th June 1855, 17 D. 933.

"2. Nor does the Lord Ordinary think the plea of the complainer, to the effect that the application for his examination did not contain a statement of the circumstances upon which he can give information, can be sustained. The statute does not require this, and the Lord Ordinary can very well understand how it might be inexpedient that it should do so. Accordingly, in the case of Burnet *v.* Calder, already cited, the Court would appear to have disregarded a similar plea.

"3. The plea of the complainer, to the effect that he cannot be compelled to give information relative to the matters in which he says the respondent has given him notice that he is to be examined, appears to the Lord Ordinary not to be of any force at present, or as stated in support of the present note of suspension and interdict. If the respondent should attempt to get into any incompetent inquiry at the examination of the complainer, the latter can then object, and follow up his objection as he may be

[13] The complainer reclaimed, and argued;—The proceedings taken by the trustee for examination of the bankrupt were incompetent. In cases of [14] bankruptcy, only two modes of examination were sanctioned by the Bankruptcy Act. In the general case the examination must proceed before the Sheriff, and if the person to be examined could not attend, then the Sheriff was to grant a commission to take his examination.* It was incompetent to examine the complainer before an English Court, as the trustee proposed to do. Besides, the examination would evidently be on matters in which the complainer was not compellable to answer.†

The trustee argued;—The procedure was quite regular. Section 74 of the English Bankruptcy Act applied to the case. The examination being competent, it would be open to the complainer, when under examination, to raise the question of competency of certain questions. The complainer had agreed to submit to examination.

LORD PRESIDENT.—My Lords, the question raised by this suspension and interdict is new, and is of a somewhat delicate kind, as it affects the relations of the Scotch and English Bankruptcy Courts to one another, and is calculated to have some effect hereafter on the smooth working of the 73d, 74th, and 75th sections of the English Bankruptcy Act of 1869. Therefore, if I had had any difficulty in my own mind, I should have proposed to your Lordships to take some time for consideration; but I am of opinion that the procedure here has been quite regular and competent under the 90th section of the Bankruptcy (Scotland) Act, 1856. That section gives power to the Sheriff to order the examination of all persons, not only relations and partners of the bankrupt, but others, who can give information relative to his estate. Upon the application of the trustee the Sheriff has power to issue a warrant requiring such persons to appear; he may even issue a warrant for their apprehension, or, should they be unable to attend, he may grant a commission to take the examination. Now, it is

---

advised. Judging from the shorthand writer's notes of what has occurred in the Court of Bankruptcy in London, the complainer has no cause for apprehension on this point.

"4 Finally, the complainer has maintained that the whole proceedings in question, as directed against him, are unauthorised by the Bankruptcy, or any other Act, and are therefore illegal and incompetent. This plea is founded chiefly on the assumption that the Scotch Bankruptcy Act does not authorise such an order as that which was pronounced in the present case by the Sheriff, and that he could only, in terms of the 90th section of the Act, have granted a commission for the examination of the complainer. Now, the Lord Ordinary doubts very much whether it would have been competent at all for the Sheriff to have granted a commission for the examination of any person domiciled and resident out of Scotland. It rather appears that the 90th section of the Act has, in regard to the granting of a commission, reference to persons resident within Scotland, but who 'cannot attend.' The English Bankruptcy Act, 32 & 33 Vict. cap. 72, passed subsequent to the Scotch Act, here comes into operation, and supplies a defect in the latter. According to the Lord Ordinary's reading of sections 73 and 74 of the English Act, taken in connection with section 90 of the Scotch Act, it was competent for the Sheriff to order the examination of the complainer in the way he did, and for the respondent to carry out the order in England in the manner he was doing, when the present note of suspension and interdict was presented. By section 90th of the Scotch Act, power generally is conferred on the Sheriff to order an examination of persons who can [14] give information relative to the bankrupt's affairs; and by section 73 and 74 of the English Act authority is given for carrying into effect such order in the case, as here, of the person ordered to be examined being resident in England. Although, therefore, the point is a new one—raised now, so far as the Lord Ordinary is aware, for the first time, and not altogether unattended with difficulty, he thinks, for the reason he has indicated, that it has been rightly determined by him against the complainer. In arriving at this result, the Lord Ordinary could not forget that the object and policy generally of the bankruptcy enactments require that they should be interpreted or construed in the most beneficial manner for securing and promoting the ends contemplated by them."

* 19 & 20 Vict. c. 79, secs. 90, 92.

† A B *v.* Binny, June 4, 1858, 20 D. 1058; Paul *v.* Laing's Trustee, Feb. 21, 1855, 17 D. 457; Ridpath *v.* Forth Marine Insurance Company, July 20, 1844, 6 D. 1438; Burnet *v.* Calder, June 14, 1855, 17 D. 933.

most important to observe that this is not the taking of evidence; it is the procuring of information for the use of the trustee in the administration of the estate. This examination is so regarded throughout the whole statute, though the expression "evidence" has slipped by mistake into the 92d section; but with that exception the 90th, 91st, and 92d sections were framed for the sake of obtaining information for the management of the bankrupt's estate. It appears to me that none of the common law or statutory powers of a Sheriff or of the Court as to the citation of witnesses have any application here. In the case of witnesses, the Sheriff has power to issue a commission to take their evidence in England or Ireland, under statute 22 & 23 Vict. cap. 20; and under the Act of 1854 (17 & 18 Vict. cap. 34) there is power given to the Courts of England, Scotland, and Ireland respectively to summon witnesses to attend, although they may be beyond the jurisdiction of the Court; but none of these provisions can be made available to bring a person from England, Scotland, or Ireland to be examined in bankruptcy. I think, therefore, that the Sheriff, under the Scotch Bankruptcy Act, has no power to compel the examination of a person who is out of the jurisdiction of the Scotch Courts, and I think it was to remedy this [15] inconvenience that these three sections in the English Bankruptcy Act, 32 & 33 Vict. cap. 71, were framed. Section 73 treats of the enforcement of warrants and orders. Under it a warrant issued by a Bankruptcy Court in one part of the United Kingdom may be enforced in any other part, so as to be made effectual in a way which was impossible before the Act. But section 74 deals with more than the enforcement of warrants or orders; it provides that "the London Bankruptcy Court, the local Bankruptcy Court, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere, having jurisdiction in bankruptcy or insolvency, and the officers of such Courts respectively, shall severally act in aid of, and be auxiliary to each other, in all matters of bankruptcy, and an order from the Court seeking aid, together with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by such order, the like jurisdiction which the Court which made the request, as well as the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions." This is the exercise of jurisdiction, not the enforcement of orders, and I apprehend that the effect is this, that where a Court has no jurisdiction over a person, in consequence of his residing beyond its bounds, a request can be made to the Court which has jurisdiction over that person, to exercise that sort of jurisdiction which it was competent for the other Court to have exercised had he been subject to its jurisdiction. Now, in this case the trustee made an application to the Sheriff to issue an order for the examination by commission of certain persons out of his jurisdiction. I doubt if the trustee was quite right in the form of the application when he asked for the issue of a commission—I question whether that was competent. But the Sheriff did not do as he was asked; he did what appeared to him to be proper under the English Bankruptcy Act of 1869. He ordered the examination of the parties as craved, and so far was certainly acting in a regular and competent manner. But the parties being out of his jurisdiction, and within the jurisdiction of the London Bankruptcy Court, he adds, "and requests the London Bankruptcy Court, within whose jurisdiction the said parties reside, to act in aid of, and be auxiliary to, the Sheriff in carrying out the said order, all in terms of the 'Bankruptcy Act, 1869.'"

Now, I think the Sheriff would have been wrong if he had requested the London Bankruptcy Court to act in any particular way, place, or time. All that section 74 says is, that all Bankruptcy Courts shall "act in aid of, and be auxiliary to, each other." They are allowed to act in the manner, place, and time which to each of them may seem proper. The complainer appeared before the London Bankruptcy Court, and allowed a day to be fixed upon which his examination should proceed. He now says that he is not bound to submit to examination in regard to the matters concerning which information is required, and asks us, in the exercise of our discretion, to find that he is not one of the class of persons compellable by the statute to give information; or if he be so, that it is more convenient that he should be examined before the Sheriff of Lanarkshire. This latter suggestion might perhaps have been listened to at an earlier stage of the proceedings; but now he has appeared in the London Bankruptcy Court, and a day has been fixed for his examination before the registrar. These are pending proceedings, and cannot be interfered with. Nothing irregular has been done.

The complainer pleads, moreover, that he will be subjected to hardship if these proceedings go on. This is purely imaginary. He says that the rules of examination in the Scotch statute are different from the rules in the English statute. Well, nobody proposes to examine him in any other way than that authorised by the Scotch Act. The learned Judge in England seems perfectly aware of these differences, and is prepared to see that they are attended to.

The complainer further says, that the point whether certain questions may be asked, or a certain line of examination is competent, will be settled by the London Bankruptcy Court, and not by the Sheriff, with a possible appeal here. That I look upon as an imaginary hardship also.

I cannot suppose that the Legislature did not look upon all the Bankruptcy [16] Courts as equally able to determine such questions. There can be no hardship in being subjected to one Court of Bankruptcy more than another.

The only other question is, whether this complainer is a proper person to be examined. After the decision in Burnet *v.* Calder I think there can be no doubt upon this point. The trustee has convinced the Sheriff of the expediency of issuing this order. It is not necessary that the party examined should stand in any particular relation to the bankrupt, nor is it necessary that the trustee should condescend particularly upon the nature of the information he requires.

On the whole matter, I think that the complainer here is clearly within the operation of the 90th section of the Act of 1856, and that the deliverance of the Sheriff should be confirmed, and the suspension refused.

The other Judges concurred.

This interlocutor was pronounced:—"The Lords," &c, "adhere to the said interlocutor, and refuse the reclaiming note: Find the respondent entitled to additional expenses," &c.

JOHN WALLS, S.S.C.—MILLAR, ALLARDICE, & ROBSON, W.S.—Agents.

No. 7. X. MACPHERSON, 16. 24 Oct. 1871. 1st Div.—B.

GEORGE LINDSAY AND OTHERS (Welsh's Trustees).—*D.-F. Gordon—Marshall.*
MRS. MARION DOUGLAS LINDSAY OR WELSH.—*Sol.-Gen. Clark—M'Laren.*

Trust—Mutual Settlement—Power to revoke.—A mutual settlement, executed by a husband and wife, nominated certain persons as trustees. The husband then conveyed to them his whole estate, giving a liferent to his widow during her widowhood, and the fee to the children of the marriage; and failing them, to certain persons, his own relations. The wife made similar provisions in favour of her husband and children, and certain persons, her own relations. Both spouses then accepted the liferent provisions as in full of their legal claims; and they reserved power, "during our joint lives, or to the longest liver of us, even on deathbed, to alter, innovate, or revoke these presents, in whole or in part, as we, or either of us, may see cause." *Held* that the widow was not entitled, under this clause of reservation, to recall the nomination of trustees contained in the mutual deed, and appoint new trustees on her husband's estate.

In 1865 James Welsh, surgeon, Bombay army, and his wife, executed a mutual trust-disposition and settlement. This deed set forth that they did thereby "nominate and appoint James Gray, banker in Dalkeith; George Lindsay, corn merchant in Edinburgh; William Douglas, merchant in Glasgow; Thomas Cockburn, druggist in Dalkeith; and Henry Moffat, Solicitor in the Supreme Courts of Scotland, Edinburgh, and the acceptors or acceptor, survivors and survivor of them, as trustees for the ends, uses, and purposes hereinafter written, and the heir of the last survivor, and such other person or persons as may hereafter be nominated by us, or the survivor of us, by any writing under our hands, or shall be assumed into the trust in virtue of the power hereinafter given, . . . but that in trust always, and for the ends, uses, and purposes after specified,—That is to say, I, the said James Welsh, do hereby give, grant, assign,

convey, dispone, and make over to and in favour of the said James Gray, George Lindsay, William Douglas, Thomas Cockburn, and Henry Moffat, and the acceptors or acceptor, survivors and survivor of them, and to their or his assignees and disponees, but in trust always as aftermentioned," the whole of Dr. Welsh's estate, heritable and moveable, in trust for certain purposes. Provision was then made for payment of Dr. Welsh's debts, and deathbed expenses. "*Second*, I direct and appoint my said trustees or trustee to give to Mrs. Marion Douglas Lindsay or Welsh, my said spouse, should [17] she survive me, and so long as she shall remain my widow, the liferent, for her liferent use allenarly, during all the days of her lifetime, and so long as she shall remain my widow, of the whole residue of my heritable and moveable estate and effects above conveyed, after payment of the said debts, and the expenses of executing and managing this trust: declaring always, as it is hereby specially provided and declared, that my said widow shall be burdened with the maintenance, education, and up-bringing of our children, if any, in a proper and suitable manner, until they shall be self-supporting, or able to be so, of all which my said trustees or trustee shall be the sole judges or judge." The deed then provided that, on the death or second marriage of Dr. Welsh's widow, his trustees should apply the income, or, if necessary, the capital of his estate, in the upbringing, maintenance, and education of the children, —and continued . . . "*Fourth*, Upon the death or second marriage of my said spouse, and so soon thereafter as all of my children shall have arrived at majority, I direct and appoint my said trustees or trustee to convey, pay, and make over the said residue of my said heritable and moveable estate and effects to and in favour of my children lawfully procreated, equally amongst them, share and share alike—declaring that the issue of such of said children as shall have predeceased said period of division shall be entitled to succeed, equally amongst them, to the share to which their deceased parent would have been entitled had he or she been then alive; and failing such issue, then the share of such predeceaser shall be divided equally amongst his or her surviving brothers and sisters. . . . And *lastly*, failing all lawful issue of my body, then I direct and appoint my said trustees or trustee to convey and make over the residue of my said heritable and moveable estate and effects (except as after-mentioned), to and in favour of" certain persons named, being relations of Dr. Welsh.

Then followed provisions by Mrs. Welsh similar in character to those made by Dr. Welsh (except that his liferent was not restricted in the case of his second marriage), the fee of her estate being destined, on failure of children of the marriage, to her own relations. This clause then followed:—"And we, the said James Welsh and Marion Douglas Lindsay or Welsh, hereby declare ourselves to be mutually satisfied with the liferent provisions above conceived in our favour respectively, and declare the same to be in full of all claim or demand which we or either of us could make against the said estates and effects, heritable and moveable, above conveyed, or against the goods in communion, at the decease of either of us, in any manner of way." And this other clause:—"And we reserve to ourselves, not only our own liferent of the heritable and moveable estates and effects above conveyed, but also full power to us during our joint lives, or to the longest liver of us, even on deathbed, to alter, innovate, or revoke these presents, in whole or in part, as we or either of us may see cause."

Dr. Welsh died in 1867, being survived by his widow and by one child. Three of the trustees named in the deed, George Lindsay, Thomas Cockburn, and Henry Moffat, accepted of the trust, made up a title to the deceased's estate, and proceeded with the administration of the same.

In 1870 Mrs. Welsh executed a deed of alteration, revocation, and appointment, whereby she revoked and recalled the nomination and appointment of the said George Lindsay, Thomas Cockburn, and Henry Moffat, as trustees under the said mutual trust-disposition and settlement, "and the dispositions and conveyances therein contained, in so far as these are conceived in their favour, and also in so far as I have power to do so, the nomination and appointment therein contained in their favour, as executors and tutors and curators aforesaid," and nominated and appointed [18] new trustees in their room and place. This deed was intimated to the trustees on 28th September 1870. Mrs. Welsh executed this deed in virtue of the clause of reservation in the mutual deed quoted above, and maintained that it gave her power to do so, while the trustees maintained that the clause of reservation only applied to each of the trusters' estates respectively, and did not give the survivor power to

recall the nomination of trustees who had accepted of the trust, and had completed their title to the heritable and moveable estate of Dr. Welsh. The trustees further maintained that Mrs. Welsh was not entitled to alter the destination of Dr. Welsh's estate.

Dr. Welsh's trustees and Mrs. Welsh now presented this special case, in which these questions were stated for opinion of the Court:—"(1) Has Mrs. Welsh (the second party), the power to recall the nomination of the said George Lindsay, Thomas Cockburn, and Henry Moffat, as trustees and executors under the said trust-disposition and settlement, and to appoint new trustees on the trust-estate of her deceased husband? (2) Is the second party entitled to revoke the nomination of the said George Lindsay, Thomas Cockburn, and Henry Moffat, as tutors and curators of her child? (3) Are the said first parties bound, upon the requisition of the new trustees and executors nominated and appointed by Mrs. Welsh in said deed of alteration, revocation, and appointment, to execute a conveyance of the whole heritable and moveable estate of Dr. Welsh now vested in them, in favour of the said new trustees and executors nominated and appointed by Mrs. Welsh under said deed of alteration, revocation, and appointment, upon the latter granting the former a full and absolute discharge of all their actings and intromissions with the estate, heritable and moveable, of Dr. Welsh?"

Argued for Dr. Welsh's trustees;—The intention of the mutual deed was plainly that the interest of the surviving spouse should be restricted to a liferent. If the construction contended for by the widow was sound, the result would be that she would have full power over the estate; and, in the event of the death of the child of the marriage, she would be able to dispose of the entire fee of the estate. The property of the husband's estate was now vested in the trustees originally named, and they could not be dispossessed. In no view could the widow interfere with the nomination of the original trustees as tutors and curators, that being a matter in the power of the father alone.

Argued for the widow;—There was nothing in the terms of the power of reservation limiting its effect to one part of the property conveyed. Power to name new trustees was already given, though that power would not entitle the new trustees to act contrary to the terms of the deed. At least the widow might appoint new trustees for her own share of the estate.

LORD PRESIDENT.—The deed which has been executed by Mrs. Welsh recalls the nomination of trustees appointed by herself and her husband, and appoints new trustees for the management, not only of her own estate, but also that of her husband. The question we have to consider is, whether that deed is effectual as regards the trust-administration of the husband's estate, to the effect expressed in the questions submitted for our opinion.

The power of Mrs. Welsh to execute this deed depends on a consideration of the mutual settlement, or postnuptial contract, whichever it may be called, and the general scope of that deed is of great importance. The husband settles his estate in this way: He gives his wife a liferent of his entire estate, for her liferent use allenarly, so long as she shall remain his widow. This liferent is a bare liferent, and may be determined either by the death of the widow, or by her second marriage. It is also burdened with the maintenance and upbringing of the [19] children of the marriage. The fee of the husband's estate is settled on the children of the marriage, and failing them, on persons named, who are his own relations. On the other hand, Mrs. Welsh conveys her entire estate to the same trustees, directing that it shall be liferented by her husband, the fee being destined to the children of the marriage, and failing them, to certain persons named, who are her relations. Then comes this very important clause:—"And we, the said James Welsh and Marion Douglas Lindsay or Welsh, hereby declare ourselves to be mutually satisfied with the liferent provisions above conceived in our favour respectively, and declare the same to be in full of all claim or demand which we, or either of us, could make against the said estates and effects, heritable and moveable, above conveyed, or against the goods in communion, at the decease of either of us, in any manner of way."

Now, without determining whether this deed was binding and irrevocable during the joint lives of the parties, it is plain that it became binding to some effect on the death of the first deceaser. The survivor of the spouses was effectually precluded from claiming his or her legal rights; the widow, if the survivor, could not claim her terce

or *jus relictæ*, and the legal rights of the husband, if he were the survivor, were as effectually cut off. The result is that neither can claim any part of the fee of the other's estate, and that, to my mind, was made matter of contract, which became irrevocable by the death of the first deceaser. It is plain, too, that the settlements of the fee of the estates on the children of the marriage were counterparts of each other. The husband settled his estate on the children of the marriage, in consideration of a similar settlement on the part of the wife. I think, therefore, though it is not necessary to determine that here, that on the death of the first deceaser the settlements on the children came into operation as matter of contract, and that the children of the marriage are indefeasibly entitled to the fee of the whole estates.

It is not new for us to find, in such a deed, part of it matter of contract, and part purely testamentary. It appears to me that parts of this deed are purely testamentary, but the parts I have spoken of are not of that character. Failing issue of the marriage, the estate of the husband is settled on his relations, and the estate of the wife is settled on her relations. That provision is testamentary, and in its own nature revocable by each spouse, and there is nothing in the deed to countenance the notion that either party might not alter that part which is not matter of contract, but is the ultimate destination of the estate, failing issue of the marriage.

Keeping the substance of the deed in view, there is not much difficulty in understanding the clause of reservation in conformity with the rights of the parties as thus settled. "We reserve to ourselves not only our own liferent of the heritable and moveable estates above conveyed,"—that is, each reserves to himself or herself the liferent of his or her own estate. The expression is joint, but the meaning is several. And so they reserve "full power to us, during our joint lives, or to the longest liver of us, even on deathbed, to alter, innovate, or revoke these presents, in whole or in part, as we, or either of us, may see cause." They might alter the whole by joint will during their joint lives; but if one died, then the deed has come into operation as matter of contract, as regards the liferent and the first destination of the estate to the children of the marriage, and they could reserve no power to alter inconsistent with that, and therefore the rational construction of this power of reservation is, that it gives power to revoke that part of the deed which, in regard to the survivor, is testamentary. But the wife, who is the survivor, has no power to interfere either with the destination or administration of her husband's estate.

A difficulty is suggested as arising out of the first clause of the deed, which contains a joint nomination of trustees to act for both spouses. It is a nomination of five gentlemen, "and the acceptors or acceptor, survivors and survivor of them, as trustees for the ends, uses, and purposes hereinafter written, and the heir of the last survivor, and such other person or persons as may hereafter be nominated by us, or the survivor of us, by any writing under our hands, or shall be assumed into the trust in virtue of the power hereinafter given."

Now, in the clauses of conveyance by the husband and wife respectively the [20] expression is not the same. The conveyance is to the parties named, "and the acceptors or acceptor, survivors and survivor of them, and to their or his assignees and disponees," but not to any other trustees to be hereafter named. It is said that the first clause shows that it was meant that the constitution of the trust might be varied by the survivor, and it is inferred that this deed by Mrs. Welsh is a legitimate exercise of that power by her, because what she has done is to sweep away the existing trust, and to substitute a new set of trustees. That does not by any means follow. The power to name additional trustees is not the same as to revoke the nomination of trustees already in office, and to substitute others. But I make that observation merely in passing, for I think what is meant by the first clause is, that if the spouses choose to name additional trustees during their joint lives they may do so, and the survivor may also do so, the effect, however, in that case, being limited to the survivor's own estate. The deed, therefore, is consistent throughout, and I have no difficulty in holding that this lady is not entitled to innovate on the settlement of her husband's estate, either as to administration or destination. It follows necessarily that all three questions must be answered in the negative.

The other Judges concurred.

THE COURT answered the questions in the negative.

G. & H. CAIRNS, W.S.—MILLAR, ALLARDICE, & ROBSON, W.S.—Agents.

[*Commented upon*, Malcolm *v.* Goldie, 1895, 22 R. 968.]

X. MACPHERSON, 20. 1st Div.—Lord Mure, M.

JOHN FOULIS, Pursuer.—*Scott—Grant.*
ALEXANDER DOWNIE and OTHERS, Defenders.—*Orphoot.*

Bankrupt—Trustee, Election of—19 & 20 *Vict. c.* 79, *sec.* 71—*Sheriff—Jurisdiction.*—Where each of two sets of creditors on a bankrupt estate reported to the Sheriff a separate minute of meeting of creditors, containing the nomination of a trustee, and the Sheriff gave judgment declaring the person named in one of the minutes to be duly elected trustee, *held* that review of the Sheriff's judgment was excluded by sec. 71 of the Bankruptcy Act, 1856.

On 15th December 1870 the estates of M'Cartney and Bairnsfather, oil manufacturers, Musselburgh, and of the individual partners of the firm, were sequestrated by interlocutor of the Lord Ordinary, and a meeting of creditors was appointed to take place in Dowell's Rooms, Edinburgh, on 26th December 1870, in terms of the statute. On the day named certain creditors and mandatories of creditors of the bankrupts met. After the meeting two different minutes of meeting were lodged with the Sheriff, one bearing that William Mackay had been elected trustee, and John Foulis commissioner on the bankrupt estate; and the other bearing that Alexander Downie had been elected trustee, and Alexander Edgar, William Elliot Armstrong, and William Nevay Masterton, commissioners on said estate.

The Sheriff (Hamilton), after hearing parties on the respective minutes, on 30th December 1870 declared Downie to have been duly elected trustee; and on the same day confirmed his election, and allowed an act and warrant to be extracted, in terms of the Bankrupt Act; and by a subsequent interlocutor he declared Edgar, Armstrong, and Masterton, commissioners on the estate.

On 6th January 1871 Foulis brought this action of reduction and declarator, for the purpose of setting aside the election of Downie and the three commissioners, and obtaining declarator that the true minute of meeting of creditors was that according to which Mackay was appointed trustee, and the pursuer commissioner on the estates of the bankrupts.

The allegations on which the action was founded were to the effect that at the meeting on 26th December 1870 Henry Kilgour, the pursuer's man-[21]-datory, having a majority in value, nominated himself preses, and Andrew Morrison clerk to the meeting, the other parties present making no opposition thereto by any counter motion, but leaving the meeting almost immediately in consequence of a dispute as to who was to write the minute; and that the meeting, of which Kilgour was preses, then duly nominated Mackay and Foulis as trustee and commissioner respectively.

The defenders alleged that as Kilgour, in opposition to a majority of the creditors, insisted on his alleged right, as preses, to nominate a clerk to write the minutes, the other creditors were compelled to leave the room, and hold the meeting in another apartment.

The pursuer pleaded;—(1) The said pretended minutes, setting forth that the defender, the said Alexander Downie, had been elected trustee on said sequestrated estates, and that the other defenders had been elected commissioners thereon, not having been the minutes of the meeting appointed to be held by said interlocutor or deliverance of 15th December 1870, and advertised in the *Edinburgh* and *London Gazettes* as aforesaid, they ought to be reduced. (2) The said interlocutors or deliverances of the Sheriff-substitute, declaring and confirming the defender, the said Alexander Downie, as said trustee, and the said act and warrant in his favour as such trustee, and the said interlocutor or deliverance, declaring the election of the said other defenders as said commissioners, having proceeded on said pretended minutes, they ought also to be reduced. (3) The said minutes setting forth, *inter alia*, that the said William Mackay was elected trustee, and that the said pursuer was elected commissioner on said sequestrated estates, having been the minutes written at the meeting appointed to be held by said interlocutor or deliverance of 15th December 1870, and advertised in the Gazettes as aforesaid, and having been also written in accordance with the terms of the statutes, they ought to be found and declared to be the minutes of said meeting.

The defender pleaded;—(1) The action is incompetent, in respect of the provisions of the "Bankruptcy (Scotland) Act, 1856," sections 71, 73, and 75.* (2) The action is irrelevant. (3) The allegations of the pursuer being groundless in fact, and untenable in law, the defender is entitled to absolvitor, with expenses.

On 3d June 1871 the Lord Ordinary pronounced this interlocutor:—"Finds that the action is excluded by the provisions of the Bankruptcy (Scotland) Act, 1856; therefore dismisses the action, and decerns: Finds the defender entitled to expenses," &c.†

[22] The pursuer reclaimed, and argued that the proceedings relating to the election of Downie were never properly before the Sheriff—that the only true meeting was that which elected Mackay—and that a proof of the facts should be allowed.

The defender argued;—Proof was incompetent. The judgment of the Sheriff was pronounced in the exercise of his statutory jurisdiction, and therefore the action was excluded.‡

At advising,—

LORD PRESIDENT.—The facts of this case, so far as necessary for judgment, are simple.

The estates of M'Cartney and Bairnsfather were sequestrated by the Lord Ordinary on 15th December 1870, and in his Lordship's deliverance there was in common form an appointment of a meeting of creditors to take place within Dowell's Rooms on Monday 26th December 1870. This interlocutor of the Lord Ordinary was pronounced under the authority of the Bankruptcy Statutes, and was perfectly competent and regular, and the case was remitted to the Sheriff, the consequence of which was, that the proceedings at the meeting of creditors required to be reported to him, in order that he might

---

* 19 & 20 Vict. c. 79, sec. 71, enacts—"The judgment of the Sheriff declaring the person or persons elected to be trustee, or trustees in succession, shall be given with the least possible delay; and such judgment shall be final, and in no case subject to review in any Court, or in any manner whatever."

† "NOTE.—During the debate, and when afterwards examining the record in this case, the Lord Ordinary was at first disposed to think that he would not be warranted in holding, without inquiry into the facts alleged in the record, that the Court of Session had not jurisdiction to entertain the present action, because *ex facie* of the pursuer's allegations, the proceedings tend to show that, on the occasion in question, the majority in number of the creditors present, by adjourning to another room than that in which they first assembled, succeeded at a meeting, from which the pursuer was excluded, in preventing him from exercising his vote as the alleged largest creditor in value.

"On further consideration, however, of the record and documents lodged to satisfy the production, the Lord Ordinary has come to the conclusion, that as what is sought to be established under the conclusions of the action amounts substantially to a review of the interlocutors of the Sheriff declaring and confirming the appointment of the trustee and commissioners in a sequestration, [22] which are expressly declared to be final, 'and in no case subject to review in any Court, or in any manner whatever,' the jurisdiction of the Court is excluded from dealing with the case.

"The matter in dispute between the parties, viz., which set of the minutes is the minute of the meeting appointed to be held in Dowell's Rooms for the election of trustee, was one which it was, in the opinion of the Lord Ordinary, competent for the Sheriff to deal with; and it appears, as well from the averments on record, as from the terms of the interlocutor of the Sheriff under reduction, that the question now raised was duly submitted to his consideration, and dealt with by him without objection, as one which he had jurisdiction to dispose of. In these circumstances the Lord Ordinary does not see how he can entertain the present action without disregarding the very clear and express provisions of the statute as to the finality of the Sheriff's judgment declaring the election of trustees, which have been inserted for the first time in the Act of 1856, and seem to proceed upon the footing that it is for the interest of all parties in such cases that the decision of the Sheriff in the matter of the election of trustee and commissioners should not, as in the Act of 2 & 3 Vict. cap. 41, be subject to review."

‡ Brown *v.* Lindsay, March 2, 1869, *ante*, vol. vii. 595; Rankine *v.* Douglas, July 19, 1871, *ante*, vol. ix. 1053; Buchan *v.* Bowes, June 13, 1863, *ante*, vol. i. 922.

determine who had been elected trustee at the meeting. The Sheriff, and the Sheriff only, was entitled to decide that question. On 30th December there came before the Sheriff Mr. A. Downie, C.A., Edinburgh, who produced what he alleged to be a minute of meeting of creditors, which bore that he had been unanimously elected trustee, and there came also before him at the same time Mr. Kilgour, mandatory for a creditor or alleged creditor, who produced another minute, which he said was the true minute of meeting of creditors under the authority of the Lord Ordinary's interlocutor. The Sheriff heard the two parties on the question which was in law the true minute of meeting, and determined that question in favour of the minute produced by Downie, and therefore he proceeded to declare Downie to have been duly elected trustee on the sequestrated estates, all in terms of the Bankruptcy Acts. Downie, as trustee elect, found caution, and then he came back to the Sheriff on 30th December 1870 and obtained the usual deliverance confirming his election as trustee; and thereafter the Sheriff issued his act and warrant in common form, which became the trustee's title to the entire estate of the bankrupt, and is declared by the statute to be receivable in evidence as such by all the Courts of the United Kingdom. Further, on a subsequent date, 15th February 1871, the Sheriff-substitute pronounced an interlocutor declaring cer-[23]-tain persons to be duly elected commissioners on the estates of the bankrupts. There was thus, so far as I can see, a complete sequestration in all its parts, in working order, and a trustee duly vested with the sequestrated estates.

But before this last interlocutor of 15th February the present action was raised on 6th January, and the proposal of the pursuer is to set aside all these deliverances of the Sheriff, and the grounds and warrants on which he proceeded, and the reason of reduction on which the action is founded is, that the minute of meeting of creditors electing a trustee, on which the Sheriff's deliverance of 30th December proceeded, was not in truth the minute of that meeting, the true minute being the one which was produced by Kilgour, and which the Sheriff rejected in favour of the minute produced by Downie. On these facts the question is raised, is this action maintainable, or is it excluded by the Bankruptcy Act. I am clearly of opinion, with the Lord Ordinary, that the action is incompetent.

The deliverance of the Sheriff declaring a party to be duly elected trustee is, by the 71st section of the Bankruptcy Act, made final in very strong terms—"such judgment shall be final, and in no case subject to review in any Court, or in any manner whatever." When, therefore, the Sheriff, acting under the statute, declares a person to be elected trustee, that is within his competency, and this Court cannot interfere. But it is said that it was not within his competency to pronounce this interlocutor, for there was no competition before him, and no question of personal disqualification, and the only points on which his deliverance is intended to be final are either competitions, where a scrutiny of votes is necessary, or cases of personal disqualification. There is nothing in the Act to sanction such a construction. The words of the Act seem to meet the very case before us, and in no such case can the Sheriff's judgment be submitted to review.

The question which was the true minute was quite within the Sheriff's competency to decide, and I do not see in what other way the point could be determined. He cannot declare any person to be elected trustee until he has the true minute before him, and therefore he must first satisfy himself which is the true minute. That being so, the 71st section precludes us from reviewing the Sheriff's judgment in any form, or to any effect.

The case is quite different where it can be alleged that the Sheriff has not acted in exercise of his statutory jurisdiction. But no such case is before us.

It may be added that this reduction comes in very questionable shape and time. The matter is allowed to go beyond the mere declaration of the election of this trustee. The Sheriff is allowed to go on to confirm him in his office, and so to vest in him a title to the whole estate. In these circumstances I think we cannot listen to the contention of the pursuer.

The other Judges concurred.

This interlocutor was pronounced:—"Adhere to the interlocutor reclaimed against, and refuse the reclaiming note: Find the defender entitled to additional expenses," &c.

JAMES BARTON, S.S.C.—JOHN AULD, W.S.—Agents.

No. 9. X. MACPHERSON, 23. 28 Oct. 1871. 2d Div.—Lord Mure, I.

MRS. AGNES TAYLOR, Pursuer.—*Fraser.*
ROBERT TAYLOR AND OTHERS, Defenders.—*Watson—Asher.*

Husband and Wife—Statute 24 *&* 25 *Vict. cap.* 86 (*Conjugal Rights Amendment Act*, 1861), *sec.* 16.—*Held* that a wife, the income from whose separate property, falling under her husband's *jus mariti*, amounted to £100 per annum, was entitled to £50 per annum, as a reasonable provision under the 16th section of the Conjugal Rights (Scotland) Amendment Act; and that she was not bound to sink a capital sum of £300 in an annuity to provide the income allowed.

Observed, that the fact of her having children dependent on her for support was a proper element to be taken into consideration.

[24] This was an action by a married woman against her husband and the trustees for his creditors, concluding for declarator that the revenue from her estate did not exceed a reasonable provision for her under the 16th section of the "Conjugal Rights (Scotland) Act, 1861." The annual income from Mrs. Taylor's separate estate falling under the *jus mariti* consisted of the rents of a property in Kirkwynd, Falkirk, and the interest of a bond for £300, amounting together to £100.

The defenders pleaded;—The provisions of the Conjugal Rights Act have no application to the present case, in respect (1) that the pursuer succeeded to the liferent of the subjects in question before the statute came into operation. (2) The right to the rent of the subjects during their joint lives had vested *jure mariti* in the husband of the pursuer, and was in his lawful possession within the meaning of the statute before the present claim was made by the pursuer.

The Lord Ordinary (Mure), after a proof, pronounced the following interlocutor:—"Finds that, in the circumstances of the present case, an annuity of £50 will be a reasonable provision for the maintenance and support of the pursuer; and that the defenders are bound to make a provision of that amount for the pursuer, as the condition of their being entitled to claim the rents and proceeds of her estate, as falling under the *jus mariti* of her husband: Therefore, and to that extent, repels the defences, and appoints the case to be enrolled, in order that parties may arrange as to the manner in which the annuity is to be secured, and reserves in the meantime all questions of expenses." *

The pursuer reclaimed.

The defenders argued that the pursuer was bound to sink the £300 contained in the bond in an annuity; that the annual income from the annuity should be taken into account in fixing the amount of the provision allowed; and that in any circumstances the amount allowed was excessive.

The pursuer denied that she was under an obligation to buy an annuity, and main-

---

* "NOTE.—In fixing the annuity in this case the Lord Ordinary has been guided by the rule which appears to have been laid down by the Second Division of the Court in the case of Somner, 2d March 1871, viz., that it is a provision to the wife alone which the statute authorises. And he does not think he would now be warranted, when fixing the amount of an annuity under the statute, in giving any material weight to the consideration that several of the pursuer's children are to some extent looking to her for support. He has, however, fixed the amount at a somewhat larger sum than that allowed in the case of Somner. Because it is in evidence that it will require at least £40 a-year to enable the pursuer alone to live as she has been accustomed to do. And having regard to the position which she has occupied since her mother's death, when she succeeded to the liferent of the property in question, and the way in which she has all along been allowed to administer the whole of the rents on her own behalf, and that of her family, the Lord Ordinary does not think that she can now be expected to maintain herself, in ordinary comfort, on a smaller annuity than £50. But he has left it to the parties, in the first instance, to arrange how that annuity is to be secured."

tained, that the Lord Ordinary ought to have taken into consideration the circumstance that she had several children dependent on her for support.*

LORD JUSTICE-CLERK.—This is an application under the 16th section of the [25] Conjugal Rights Act for the support and maintenance of a wife out of her property, the rents of which have been claimed by the creditors of the husband.

The Lord Ordinary has found that £50 is a reasonable provision, and I am of opinion that substantially he is right.

The pursuer, on the one hand, contended that she ought to have the whole income of her estate; while it was contended, on the other side, that if £50 per annum were awarded to her; the £300 which belongs to her would be sufficient to provide that if it were sunk in the purchase of an annuity.

Neither of these contentions is sound.

Her total income amounts to £100 a-year, and the Lord Ordinary has awarded one-half of that as the provision for the wife, and in that I think he has acted wisely.

There is a question whether the £300 in the bond really belongs to the pursuer or to her husband's creditors. That has not been entirely cleared up, and for the purposes of the present action we must hold that it belongs to her, but that the income of that sum, £12 per annum, can be seized by her husband's creditors.

But on that assumption I am clear that the wife is not bound to sink her capital of £300 in purchasing an annuity.

I also wish to add, that I do not think it can be left out of view that this lady has children dependent on her for support. No doubt, the statute contemplates aliment for the wife for her own support. But in fixing that, her whole circumstances should be taken into consideration. The fact that she has children is an important element.

LORD BENHOLME.—I am very much of the same opinion. I only make one additional observation. The allowance to the wife must cease whenever her husband dies. She then comes into possession of £100 a-year. But whilst her husband is alive she is to get £50. I consider that sum as due by the creditors, in consequence of their taking and retaining possession of the two other sums.

LORD NEAVES.—I quite concur. The wife is the central and proper person for consideration. But we must take into consideration all the circumstances in which she is placed; and in exercising our discretion we cannot throw out of view the fact that she has a family of young children dependent upon her. The creditors cannot compel her to sink this small sum, which belongs to her in fee, in order that she may get what may afterwards be a very temporary annuity. The Court would not compel such a step except in very peculiar circumstances.

LORD COWAN was absent.

The following interlocutor was pronounced:—"Alter the interlocutor of the Lord Ordinary reclaimed against: Find that the annual income falling under the husband's *jus mariti* from the pursuer's separate estate consists of the sum of £88, being the rents of the Kirkwynd property, and the sum of £12 annually, being the interest on the bond for £300: Find that the sum of £50 annually is a reasonable allowance to be made for the support and maintenance of the pursuer out of the said income: Find that the pursuer is under no obligation to invest the sum of £300 in an annuity, with a view to provide such annual allowance: Find that the pursuer has drawn the said interest, amounting to £12, to this date: Find the defenders liable in the sum of £38 annually from the 4th day of May 1870 till the date of the judgment, and in the sum of £38 yearly during the lifetime of her husband—the pursuer herself continuing to uplift the interest on the £300: Find the pursuer entitled to expenses, subject to modification; and remit," &c.

J. & A. PEDDIE, W.S.—WEBSTER & WILL, S.S.C.—Agents.

---

* Somner *v.* Anderson, March 2, 1871, *ante*, vol. ix. p. 594; Story on Equity Jurisprudence, sec. 1415; Marshall *v.* Fowler, 16 Beavan, p. 249; *in re* Cutler, 14 Beavan, p. 220; Duncombe *v.* Greenacre, 29 Beavan, p. 578; Newman *v.* Wilson, 31 Beavan, p. 34.

No. 10. X. MACPHERSON, 26. 1 Nov. 1871. 1st Div.—Lord Mackenzie, B.

GEORGE AULDJO JAMIESON (Potts's Judicial Factor), Petitioner.—*Shand—Brand.*

Judicial Factor—Trust—Audit.—In a petition by a judicial factor for interim audit of accounts, *held* that the factor was entitled to charge against the estate certain expenses incurred by him in obtaining advice as to the conduct of the factory, but not expenses incurred by him in an abortive attempt to obtain a private Act of Parliament for winding up the trust.

This was a petition by a judicial factor for interim audit of accounts, presented in the following circumstances:—

Mrs. Potts died in 1826, leaving a trust-disposition and settlement whereby she conveyed her whole property to trustees, in trust (after payment of debts and legacies), for the following purposes successively:—(1) For the liferent use of Mary Potts, wife of Thomas Redpath, and Jane Potts, wife of Thomas Potts, both now deceased. (2) For the liferent use of the children of the said Mary and Jane Potts, after their decease, and of Thomas and Isabella Potts, children of the deceased John Potts, a brother of the testator's husband. (3) For the liferent use of the heirs of the children of the said Mary and Jane Potts and of Thomas and Isabella Potts, so long as any of them should exist. (4) On the extinction of the heirs of the said Mary, Jane, and John Potts, then for the liferent use of Sir James Hall of Dunglas, Bart.; and failing him, of his children. (5) On the extinction of the heirs of the last-named parties, for the truster's own nearest heirs in fee.

In 1861, on the failure of the last surviving trustee, Mr. G. A. Jamieson, C.A., was appointed judicial factor on the trust-estate.

In the year 1869, in consequence of the difficulties in the management of the trust, arising from the gradually increasing numbers of the beneficiaries, and the very small amount of the shares of annual income payable to each, the judicial factor, by desire of some of the beneficiaries, instituted proceedings for obtaining an Act of Parliament, authorising the trust to be wound up and the funds divided. These proceedings fell through from the whole of the beneficiaries not consenting, or at least omitting to intimate their concurrence in the application as required by Parliament; but certain expenses were incurred, amounting to £81, 17s. 8d., which were now stated in the factor's accounts as a charge against capital.

The application to Parliament was made by the factor upon the advice of counsel, whose opinion had been taken as to the best method of getting the trust wound up.

In this petition for interim audit the Lord Ordinary disallowed the charge of £81, 17s. 8d.

The judicial factor reclaimed.

THE COURT pronounced the following interlocutor:—"Find that any expenses embraced in the sum of £81, 17s. 8d., disallowed by the Lord Ordinary, which were incurred by the factor in obtaining advice to guide him in the conduct of the factory, are proper charges against the factory estate, but that expenses incurred in attempting to go to Parliament to obtain a private Act are properly disallowed as charges against the factory estate: Remit to the accountant, Mr. William Moncrieff, to report of new in accordance with this finding."

TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 11. X. MACPHERSON, 27. 1 Nov. 1871. 2d Div.—Sheriff of Lanarkshire, I.

MATTHEW WHITELAW, Appellant.—*Watson—Asher.*
JAMES FULTON, Petitioner and Respondent.—*Shand—Keir.*

Landlord and Tenant—Repairs—Mora—Right to resile.—A person took a lease of certain premises on 7th June. He entered on possession and made certain alterations, but on 17th August intimated that he resiled, unless the landlord would make certain alterations to remove alleged damp. *Held* that he could not resile.

Landlord and Tenant.—A landlord presented a petition against his tenant, to have him ordained (1) to place sufficient furniture in a shop which had been let to him to cover a year's rent; (2) to open it and carry on his business in it; and (3) to keep proper fires in it, and air it so as to prevent damp. *Held* that the tenant was obliged to furnish it, keep fires in it, and air it, but not to open and carry on business in it.

James Fulton, pawnbroker, Wishaw, with consent of Lachlan Taylor, plumber, Wishaw, presented this petition on 9th November 1870 in the Sheriff-court of Lanarkshire against Matthew Whitelaw, pawnbroker, Wishaw, praying the Sheriff to ordain the respondent, "within such short space as your Lordship may appoint, to place sufficient furniture, goods, and plenishing within the said shop and other premises situated at No. 15 Glasgow Road, Wishaw, equal at least in value to the current year's rent thereof; as also to open the said shop and other premises, and carry on his business therein, and to keep proper fires lighted therein, and air the same in such manner as shall prevent deterioration from dampness."

The tenement 15 Glasgow Road, Wishaw, was taken by Taylor on behalf of the petitioner from a Mrs. Deans for five years, but this arrangement was never reduced to writing.

On 7th June 1870 Whitelaw wrote to Taylor in these terms:—"Sir,—I have your letter this morning. I accept the premises for five years at £24 sterling per annum, with deduction of £7 sterling for the first year, without any further recourse."

Whitelaw entered into possession and proceeded to make certain alterations, but on 17th August 1870 his agents wrote the following letter to Fulton:—"Mr. Whitelaw informs us that the premises in question are not in a fit state for occupation, and that unless considerable alterations and repairs are made thereon he will be under the necessity of resiling from the lease. We shall, therefore, thank you to let us know, on or before Saturday first, whether you are willing to make the necessary alterations. If you are willing to do so, Mr. Whitelaw must have a proper lease drawn up between Mrs. Deans and him."

Certain correspondence also took place between Whitelaw's agents and Mrs. Deans.

Whitelaw pleaded;—The shop and premises referred to were, at the time when the defender should have entered thereto, and have since been, uninhabitable and unusable in consequence of their not being in a proper state of repair. In particular, the walls were and are excessively damp, and goods could not be placed near or against them. The floor of the premises also requires to be renewed. The defender has all along been ready and willing to occupy and stock the premises if they were put into a proper state of repair.

After a proof the Sheriff-substitute (Spens) decerned against Whitelaw, in terms of the first craving of the petition, to place furniture in the shop of the value of a year's rent, and, *quoad ultra*, dismissed the petition.

On appeal the Sheriff (Glassford Bell) pronounced these findings:—"Finds that the defender is not entitled to shake off his obligation under the lease, and to keep the premises unplenished, so as to deprive the pur-[28]-suer of the security he is entitled to have at common law for his rent; but, on the contrary, is bound to place sufficient plenishing therein, in terms of the primary conclusion of the petition: Finds, as regards the other conclusions, that there is no authority for holding that the defender can be ordained to open the shop and other premises, and carry on his business therein, but he can be ordained to give the premises the customary firing and airing, seeing that the damage and deterioration which they would suffer from the want of these would

amount to an inversion of the proper state of possession, and a breach of the condition on which they were let: Therefore adheres to the interlocutor appealed against in so far as it refuses to give effect to the said second conclusion, but alters it as regards the third, and ordains the defender to keep proper fires lighted in the premises in question, and to air the same.

Whitelaw reclaimed, and argued;—(1) The petitioner had no title to sue, having no lease from Mrs. Deans. (2) The proper remedy was a claim for rent. (3) The premises were uninhabitable, and the appellant was entitled to resile from his bargain.

Fulton replied;—(1) A sub-tenant cannot challenge the title of the principal tenant from whom he derives his right. (3) The respondent's letters to Mrs. Deans, and her answers, show that a five years' lease was contemplated between her and the petitioner. (3) A claim for the half-year's rent could not be made until it was due. (4) Whitelaw having entered on possession, and made alterations in the premises, his objection was too late. (5) £7 was deducted from the first year's rent to enable him to make all repairs "without any further recourse" on the petitioner. And (6) the repairs were not so inherent or structural as not to be cured at some little cost.

Lord Cowan.—This is an application to the Sheriff, as Judge Ordinary, in its main conclusion, to compel a sub-tenant of a shop to place goods in the shop, and plenish it at least to an extent equal in value to the year's rent. That this was a competent application I cannot doubt. The respondent, indeed, says the true remedy was a demand for rent, but that could not have been made until the half-year's rent was due, which it was not at the date of the application. But it is said the petitioner had no title, inasmuch as he has not instructed his right as principal tenant by any lease from the proprietor. Irrespective of other answers it is sufficient to say that a sub-tenant cannot turn round on the principal tenant from whom he derives his own right and dispute his title any more than a tenant can in general dispute his landlord's title from whom he holds his land in lease.

Then, on the merits, what is the defence? It is that the shop was uninhabitable and untenantable for want of repairs. To this there are several insuperable answers:—(1) That objection comes too late. The respondent in May 1870 took possession of the premises, and made important alterations for the purpose of suiting the shop for his own business, and he does not say that it was uninhabitable until August. It is farther in evidence that previous to the agreement in May the respondent had inspected the premises, and made no objection on the ground of their not being inhabitable. But (2) the writings founded on in the argument were quite legitimately before the Sheriff for the purposes of this application; and they demonstrate that the communications between the parties to this application themselves, and between the respondent and the landlady, Mrs. Deans, had in view a lease of the premises for five years, the rent being fixed at £24 yearly, but the first year's rent being subject to a deduction of £7, "without any further recourse." These words are construed by the Sheriffs, and on the proof have, as I think, been rightly construed, to mean that in respect of such repairs as the premises might have required at the landlord's hands the respondent undertook to make them, along with the alterations he contemplated to suit his own business, in consideration of this allowance of £7. Accordingly [29] the rent for this first year is stated in the petition at £17, being the rent stipulated by the writing after deducting the above sum. It is not necessary to determine whether the respondent could compel the execution of a five years' lease in his favour under these writings. It is enough to meet the defence stated that they clearly show he had accepted the premises, and was to repair them himself.

This appeal should therefore be dismissed.

Lord Benholme.—I concur in the opinion which has just been expressed.

The prayer of the petition and the finding of the Sheriff are necessarily limited to a lease of one year's duration, and by our adhering to the interlocutor we merely affirm that what the Sheriff did was correct. There is no danger of the judgment being extended to other years.

In regard to the merits, I am of opinion, from the facts disclosed on the proof, and especially the fact that the defender does not resile from the acceptance, that a one year's lease has been made out.

Lord Neaves concurred.

The Lord Justice-Clerk was absent.

This interlocutor was pronounced:—"Find that at or about the term of Whitsunday

1870 the defender took from the pursuers a sub-lease of the premises in question, and that he entered into possession thereof, and proceeded to make various extensive alterations on the said premises to adapt them to his own purposes: Find that the defender did not make any complaint in reference to the state of the premises as being unfit for habitation until the month of August, long after their state must have been known to him: Find, further, that in the course of process it appeared that the sub-lease entered into between the pursuers and defender, or between the latter and the proprietor, was for five years, and that the defender had agreed to accept an abatement of rent during the first year of his possession in full of all the repairs which the proprietor or lessor was bound to make on the premises in question: Find, in these circumstances, that the defender was truly sub-tenant of the premises, and was bound duly to occupy and possess the said premises, and to plenish the same and keep them habitable: Therefore dismiss the appeal, and affirm the interlocutor appealed from, and decern: Find the respondent entitled to expenses," &c.

MILLAR, ALLARDICE, & ROBSON, W.S.—A. MORISON, S.S.C.—Agents.

No. 12. X. MACPHERSON, 29. 2 Nov. 1871. 1st Div.—Lord Gifford, B.

ALEXANDER BRODIE MACKINTOSH AND OTHERS, Pursuers.—*Lord-Adv. Young —Fraser—Hunter.*

JOHN M'ARTHUR MOIR, Defenders.—*Sol.-Gen. Clark—Crichton.*

Process—Expenses—Jury Trial.—In an action to vindicate an alleged public right of way a verdict was returned in favour of the pursuers, which was set aside, in respect that the evidence was legally insufficient to support it, and a second trial ensued, at which the pursuers materially strengthened their case, and again obtained a verdict, which the Court refused to disturb. *Held* (*diss.* Lord Deas) that the pursuers were entitled to the expenses of both trials.

Ante, vol. ix. p. 574.

This case was tried by the Lord Ordinary and a jury in January 1861 upon the following issue:—"Whether, for forty years, or for time immemorial, prior to 1844, there existed a public road or right of way for [30] horses, carts, and other conveyances, and also for foot-passengers, or for any and which of these purposes, leading from Hillfoot Street, Dunoon, through the lands of Milton and Gallowhill, to Argyle Street of Dunoon, in or near the direction shown by the red line on the plan No. 6 of process?"

The jury returned a verdict in favour of the pursuers, but the Court, on 28th February 1871, set aside the verdict, and granted a new trial, on the ground that the evidence was not of a kind sufficient in law to infer the existence of a public right of way.*

A second trial ensued before the Lord Ordinary and a special jury in May 1871. At this trial the pursuers materially strengthened their case, and again obtained a verdict in their favour. This verdict the Court eventually refused to disturb.

The pursuers now moved the Court to apply the verdict, and to find them entitled to expenses.

The motion for expenses was opposed by the defender, who argued that the first trial had proved abortive entirely through the fault of the pursuers, who had not adduced evidence of a character sufficient in law to establish their case. If the evidence which the pursuers laid before the jury at the second trial had been brought forward at the first, the first verdict would not have been set aside. There was nothing to have prevented the pursuers from adducing that evidence at the first trial, and they were therefore to blame for not having come properly prepared, and thus occasioning the expense of two trials.†

---

* *Ante*, vol. ix. p. 574.

† Miller *v.* Hunter, Nov. 24, 1865, *ante*, vol. iv. p. 78; Urquhart *v.* Bonnar, Nov. 21, 1866, *ante*, vol. v. p. 45; Stewart *v.* Caledonian Railway Co., Feb. 4, 1870, *ante*, vol. viii. p. 486.

Argued for the pursuers;—Except in the case of Miller *v.* Hunter, there is no instance in which a party who has obtained two verdicts in his favour has not been found entitled to the expenses of both trials. The case of Stewart *v.* The Caledonian Railway is only an apparent exception to this general rule, because in that case the first verdict, although nominally in favour of the pursuer, was really a verdict against him, and it was so treated by the Court. Then, the case of Miller *v.* Hunter is not in point, because there was there found to be a total miscarriage of justice at the first trial, for which both parties were equally responsible. Here no misconduct in the cause could be attributed to the pursuers. At the first trial they brought forward evidence which convinced the jury of the justice of their claim. The verdict returned at that trial was quite right, as the sequel of the case showed; and if it is only after two trials that the ends of justice have been attained, that is entirely through the fault of the defender, who ought never to have resisted the action.

At advising,—

LORD PRESIDENT.—The only question in regard to expenses in this case is whether the pursuers are entitled to have those of the first trial awarded to them. Now, the pursuers have been successful throughout, having obtained a verdict in their favour at both trials. No doubt we were dissatisfied with the first verdict, and set it aside, but that is just the condition of every such case; and although, no doubt, the evidence adduced by the pursuers at the second trial was somewhat stronger than what they had brought forward at the first, I do not think that is a sufficient specialty to warrant us in departing from the general rule. If evidence had been withheld at the first trial, that might have made a difference; but the fact that the pursuers afterwards made their case rather better is not, I think, enough to render this an exceptional case.

[31] LORD DEAS.—In my opinion the first verdict proved to be useless and abortive through the fault of the pursuers themselves, and if so, they are not entitled to the expenses of that trial. The opinions we gave in setting aside the first verdict were to the effect that it was not supported by legal evidence, and unless the pursuers had amended their case at the second trial, the verdict which they then obtained would have been set aside also. It now turns out that the pursuers had within their power evidence which, if adduced at the first trial, might have warranted a verdict in their favour. I am of opinion, therefore, that they ought only to get the expenses of the last trial.

LORD ARDMILLAN concurred with the Lord President.

LORD KINLOCH.—I agree with your Lordship in the chair. If it had appeared that some important point had not been proved by the pursuers at the first trial the case would have been different. But the circumstance that their evidence at the second trial was somewhat stronger than at the first, or rather I should say less weak—for I think both verdicts unsatisfactory—is not, in my opinion, a sufficient reason for refusing to award expenses.

The following interlocutor was pronounced:—"The Lords having heard counsel for the parties on the notice of motion for the pursuers, No. 147 of process, apply the verdict found by the jury in this cause: Of consent of both parties remit to Mr. James Peddie, civil engineer, Edinburgh, to visit the ground, and to report in what line the road ought to be laid down consistently with the verdict, and of what breadth the said road ought to be, and to lay down the said line on a plan to accompany his report: Find the pursuers entitled to the expenses hitherto incurred in the process; allow accounts," &c.

W. F. SKENE & PEACOCK, W.S.—DUNCAN, DEWAR, & BLACK, W.S.—Agents.

No. 13. X. MACPHERSON, 31. 2 Nov. 1871. 2nd Div.—Sheriff of Stirlingshire, I.

JAMES STARK, Pursuer and Appellant.—*Gloag.*
WILLIAM M'LAREN, Defender and Respondent.—*Watson—Jamieson.*

Reparation—Collaborateur—Culpa—Want of Skill.—The roof of part of a chemical work having fallen in, the proprietor instructed the manager of the chemical department to employ the labourers in the work to remove the broken roof and to clear away the rubbish. In an action of damages raised by one of the labourers, who had been injured by the fall of a gable during the operations, against his master, the latter pleaded in defence that the injuries had been sustained through the fault of the pursuer's fellow-servant, the manager, who directed the operations. *Held* that there was fault on the part of the defender in sending the labourers to work without ascertaining from persons skilled in building whether they were in safety to do so.

Observed, that the doctrine of *collaborateur* did not apply to the case.

James Stark, blackmiller, Falkirk, raised this action in the Sheriff-court of Stirlingshire against William M'Laren, chemical manufacturer, Grahamston, for damages for injuries received by the pursuer, when in defender's employment, through the fault of the defender or those for whom he was responsible.

The facts, as brought out on a proof, appear from the following interlocutor of the Sheriff-substitute (Bell):—"Finds in point of fact that on the 27th of February 1870 the roof of the cylinder-house in the defender's chemical works at Grahamston fell in, carrying along with it the greater part of the front wall and the upper part of the west gable: Finds that the defender instructed his son, Mr. Peter M'Laren, who has the entire management of the operative department of his chemical works in question, to employ the labourers next morning in clearing away the fallen [32] roof and rubbish: Finds that, accordingly, early on 28th February, a number of the workmen were so employed under the direction of Mr. Peter M'Laren, and about 9 A.M. of that day the defender came to the works and saw what was going on: Finds that in the course of the forenoon, while some of the workmen were employed inside the cylinder-house under Peter M'Laren's orders, in unscrewing and removing the rafters of the fallen roof, the pursuer, along with a fellow-workman, James Taylor, was ordered by the said Peter M'Laren to clear away the bricks and rubbish which had fallen from the west gable, and which were lying at its base outside; and while they were so engaged, a considerable portion of the gable fell upon the pursuer, who thereby sustained the serious injuries libelled: Finds that the said gable having been injured by the fall of the roof on the previous day, was in a dangerous condition when the operations above-mentioned were commenced on the 28th February: Finds that no sufficient examination was made by the defender, or on his behalf, of the condition of the gable, and no precautions were taken for the security of the pursuer and the other workmen while employed near it: Finds that the pursuer was thus unduly exposed to risk when he met with the accident libelled, and was in no manner to blame for what occurred: In these circumstances, finds in point of law that the defender, as his employer, is liable in reparation for the injuries sustained by the pursuer; therefore repels the defender's pleas, modifies the damages at the sum of £100 sterling, and decerns against the defender for that amount, under deduction of the sum of £26, which has been paid by the defender to the pursuer since the date of the accident."

The Sheriff (Blackburn) altered, and assoilzied the defender.*

* "NOTE.—The work on which the pursuer and all the other men, including Peter M'Laren, the foreman or manager, were employed by the defender on the day of the accident was, as the Sheriff thinks, undoubtedly one common work, namely, the removal of the fallen roof and debris; and looking to the judgment of the House of Lords in the case of Wilson *v.* Merry and Cunningham, and the opinions delivered in that case, the Sheriff thinks it now fixed law, that a foreman or manager is as much a fellow-workman of any workman employed in the same work as any other subordinate workman. If, therefore, the gable fell through fault of Peter M'Laren, it was the fault of one of the pursuer's fellow-workmen.

[33] The pursuer appealed, and argued;—An obligation clearly lay on the defender to take proper precautions.* M'Laren junior was not a *collaborateur*. He had no special skill in erecting or taking down buildings, his employment being that of foreman in the chemical department. The fall of the wall arose from the fault of the defender.†

The defender argued;—The fall of the wall was an accident. It arose from a latent defect. It was not proved that M'Laren junior had not sufficient skill. No special skill was required, only ordinary care. M'Laren junior, though a foreman, was a *collaborateur*.‡

LORD BENHOLME.—This is a somewhat singular case. It approaches very nearly to some cases with which we are familiar in the law of master and servant, but it has its own peculiar circumstances, which must be attended to.

The leading facts are that, on a Sunday in February 1870, in consequence of a heavy fall of snow, a brick building, with an iron roof, which covered in certain chemical engines belonging to the defender, was, to a great extent, injured, the front wall being thrown down, and the iron roof disengaged. Now, one portion of the building was a gable wall, which appears to have been built after the other parts of the building were erected, so that it was not so closely connected with them as is the case with gables in ordinary buildings. But it is clear that, in consequence of the injury to the other parts of the building, this gable was considerably affected. Some of the upper part of it was thrown down, and on the morning of the Monday it was altogether in a very shaky condition. Now, the defender, on the Monday morning,

---

"By the same judgment it is ruled that a master not personally superintending his work, but deputing that superintendence to another, is not responsible for injuries sustained by any of his workmen through the fault of their fellow-workmen, provided the master select proper and competent persons for the work.

"The question, therefore, here, is as to the fitness and competency of Peter M'Laren to superintend this work, for the Sheriff did not understand the pursuer to contend that any of his other fellow-workmen were incompetent for their work, and there is not a word in the proof to support such a contention.

"As regards Peter M'Laren, the pursuer has led no evidence to shew that he was unfit. No one of his witnesses says so. The thing required to be done was not in itself a work requiring any extraordinary or special skill, but ordinary prudence, care, and caution. It is not said that Peter M'Laren was deficient in these qualities. On the contrary, the defender's witnesses speak distinctly to his being a careful man, and fit for the work on hand; and Peter M'Laren himself says, in answer to the pursuer's question, that he had taken charge of similar work before. In this state of the proof the Sheriff thinks it impossible to hold that the selection of Peter M'Laren to superintend this work was a negligent act of the defender, inferring liability to the pursuer for the accident libelled.

"The proof does not satisfactorily disclose the exact cause of the fall of the portion of the gable which injured the pursuer. It may be doubted whether it arose from any fault of the workmen employed in removing the roof, and not [33] from some other and unascertained cause, and was not, so far as the parties to this action are concerned, purely accidental.

"Whatever the cause may have been, it is to be deplored that precautions had not been taken, which the event shews might usefully have been taken. But the same thing may be said in almost all accidents. If, however, as the pursuer's procurator argued, the circumstances plainly suggested in this case precaution against the fall of the gable, and M'Laren neglected to take obvious measures of precaution, that will not help the pursuer against the defender in this action; for the more obvious the precautions which ought to have been taken, the less reason had the defender to doubt the competency of Peter M'Laren as a careful and prudent man for the position assigned to him.

"On the whole, the Sheriff feels himself precluded from any other judgment in this case than one of absolvitor."

* Macaulay *v.* Buist, Dec. 9, 1846, 9 D. 245; Whitelaw v. Moffat, Dec. 27, 1849, 12 D. 434.

† Pollock *v.* Cassidy, Feb. 26, 1870, *ante*, vol. viii. p. 615.

‡ Wilson *v.* Merry and Cunningham, May 31, 1867, *ante*, vol. v. p. 807, and May 29, 1868, *ante*, vol. vi. (H. L.) 84.

when he visited the premises, must have seen that the gable was in this condition; but, without taking any precautions against the risk of its falling, he instructed his son, who was the foreman of the chemical works, but is not proved to have had any special skill in the removing of stone walls, to have the debris removed. It does not appear that he warned his son of the danger, or gave him any special instructions.

Now, the defender went away, and the son, finding that some of the bricks had been thrown down from the gable, and were lying in a roadway of some 8 feet of breadth, running between the gable and a canal, desired the pursuer to remove them.

Nothing which the pursuer did at that time could have brought down the gable. It is impossible that merely removing the bricks could have done so. The fall of the gable was occasioned by the injury which it had previously sustained.

By the fall of the wall upon him the pursuer was very severely injured, and the question is, was the defender liable as being in fault. In my view he was. When he arrived on the Monday he must have seen, or ought to have seen, that [34] the gable was in a dangerous state. Now, in the first place, a proprietor of a dangerous tenement abutting on a lane or roadway is responsible for injury to any passenger going along the roadway; and, in the second, a master employing workmen to perform a duty of danger must either superintend it himself, or employ some one to superintend specially skilled in the particular work.

The defender did not do so; he went away and left his son in charge; it is not proved that he had any special skill in the operation instrusted to him.

This is not a question of *collaborateur* at all. If a neighbour, passing along the lane, had been injured, the defender would have been liable. The case falls under the category of a building which has fallen into a dangerous state, and which the proprietor has not taken measures to put right.

I think the Sheriff's interlocutor should be altered, and the pursuer found entitled to damages.

LORD NEAVES concurred.

LORD COWAN.—This is a case of some nicety, not so much as regards the law, which is too clear for dispute, as with regard to the applicability of the legal principles on which the Sheriff's interlocutor proceeds to the facts, as these are to be gathered from the proof.

The doctrine of *collaborateur* does not, in my opinion, apply. The position of the son was that of foreman in the chemical department, and had the case related to an injury suffered from his fault in that part of the manufactory the case would have been different. But that is not the nature of the present action. The injury to the pursuer did not arise from any occurrence within the building, and in connection with the chemical department. On the day preceding the occurrence, the front wall had fallen down in consequence of the superincumbent weight of snow; and this again had shaken the gable wall so greatly as to leave it in a state of dangerous insecurity. This is clear on the proof; and on the morning of the day of the occurrence this was the condition of the gable. The defender saw this state of things, and the true question is, what was the duty incumbent on him before he allowed or ordered his men to remove the debris of the fallen building. He was bound to have taken precautions against the apparent danger, or at least to have had the gable wall inspected by some competent party who could have reported on what steps were necessary to guard against the danger of the wall tumbling down in its then frail state. He did not do so, and must be held to have taken on himself the responsibility of any accident that should occur through this default of duty. What the defender did was to desire his son to take the other workmen with him (and, among others, the pursuer), and clear away the rubbish. There is no room in such a case for holding him protected by the fact of his son being his foreman. He was not so in this matter, and even could the case be so viewed, it is not shown that the son had any skill in such matter at all; so that, as Lord Colonsay explained in his opinion in Merry and Cunningham, even the defence of *collaborateur* must have failed the defender, if it had been applicable, which it is not. Lord Colonsay said in that case:—"Culpable negligence in supervision, if the master takes the supervision on himself, or, where he devolves it on others, the heedless selection of unskilful or incompetent persons for the duty, or the failure to provide or supply the means of providing proper machinery or materials, may furnish grounds of liability, and there may be other duties, varying according to the nature of the employment, wherein, if the master fails, he may be responsible."

The next question is whether there was not a failure of duty on the part of the master. I think there clearly was; although the state in which the building was ought to have aroused his suspicion he took no precaution whatever. I cannot say in such circumstances that he was not guilty of fault and negligence.

Therefore, while I quite admit the doctrine in law founded on by the Sheriff, it appears to me that it does not apply to the facts we have here, and that consequently his interlocutor must be recalled.

The LORD JUSTICE-CLERK was absent.

[35] This interlocutor was pronounced:—"Find that in point of fact on the 27th of February 1870 the roof of a building in the defender's works fell in, carrying with it the greater part of the front wall and the upper part of the west gable: Find that in consequence of this occurrence the remainder of the said west gable came to be in an insecure and dangerous state, and that, in the circumstances, it was the duty of the defender to have inquired into the condition of the said west gable, and not to have employed, or caused or allowed to be employed any ordinary labourer, such as the pursuer was, to work at or near the said gable in removing the rubbish lying there, without having taken steps to ascertain if it was safe to do so, or having used precautions to secure the safety of the person so employed: Find that the defender took no such steps, and the pursuer, on the 28th of February, was employed by the defender's son, acting by the defender's orders, without any such precautions having been used: Find that while the pursuer was engaged in removing the said rubbish the said gable fell, and severely injured the pursuer in his person: Find that the injury thus suffered by the pursuer was caused by the fault and failure in duty of the defender as aforesaid: Therefore find the defender liable in reparation and damages: Recall the interlocutor appealed from; repel the defences; assess the damages due to the pursuer by the defender at the sum of £100," &c.

BURN & GLOAG, W.S.—WEBSTER & WILL, S.S.C.—Agents.

No. 14. X. MACPHERSON, 35. 2 Nov. 1871. 2d Div.—Sheriff of Aberdeenshire, I.

VERDIN BROTHERS, Pursuers and Appellants.—*Sol.-Gen. Clark—Asher.*
ALEXANDER ROBERTSON, Defender and Respondent.—*Shand.*

Telegram—Contract—Error—Public Officer—Post-Office.—On 1st September A. despatched from Peterhead this telegram to B. and Co. at Liverpool,—"Send on immediately fifteen twenty tons salt invoice in my name cash terms." Through the fault of the telegraph clerks the telegram delivered to B. and Co. was in the following terms:—"Send on rail immediately fifteen twenty tons salt Morice in morning name cash terms." On 2d and 5th September B. and Co. sent salt to Peterhead, addressed "Morice, Peterhead," and forwarded the invoices to the same address. On 15th September the invoices were returned through the dead letter office, and thereafter A. refused to take delivery of the salt. In an action for the price, *held* that no contract had been completed between parties, and that A. was not liable in payment thereof.

This action was brought in the Sheriff-court of Aberdeenshire by Verdin Brothers, rock and white salt proprietors, Liverpool, against Robertson, commission-agent, Peterhead, for the price of salt said to be supplied by the pursuers on the order of the defender.

The facts appear from the following findings in the interlocutor of the Sheriff (Guthrie Smith):—"Finds that on 1st September last the defender transmitted from Peterhead a telegram to the pursuers in the following terms:—'Send on immediately fifteen twenty tons salt invoice in my name cash terms;' that on the same day said telegram was received by the pursuers in Liverpool, but through a mistake of the officials of the Post-office was expressed as follows:—'Send on rail immediately fifteen twenty tons salt Morice in morning name cash terms;' that on said 1st September the pursuers wrote to the defender:—'We have received your message, with order for

fifteen twenty tons fishing salt; our price delivered at Peterhead is 36s. 6d. per ton nett. We shall push it forward [36] as soon as possible;' that in conformity with the telegram, as received, the pursuers, on the 2d September, despatched by rail to 'Morice, Peterhead,' 8 tons 18 cwt. salt, and on 5th September 9 tons 11 cwt. 2 qrs., and at the same time forwarded invoices thereof to the same address: Finds that as no such person as Morice, Peterhead, could be found, the said invoices were returned to the pursuers through the dead letter office on 15th September, and said salt was not delivered to the defender: Finds that the defender having thereafter refused delivery of the salt, in respect it was too late for the purpose required, it was sold under judicial warrant."

The Sheriff-Substitute (Comrie Thomson) pronounced an interlocutor, in which, after findings in fact, he found "as matter of law that in a question between the parties to this action the defender is liable to the pursuers for the loss which has arisen in consequence of the mistake in the telegram received by the pursuers; and with these findings, appoints the case to be enrolled."

The Sheriff pronounced an interlocutor, in which, after the findings in fact above quoted, he found "in point of law that as the Post-office authorities are only agents to transmit messages in the terms in which the senders deliver them, there was no contract between the pursuers and the defender for the purchase of the salt forwarded to the above address, and the defender is not indebted to the pursuers in the sums sued for: Therefore assoilzies the defender from the conclusions of action."*

The pursuers appealed. They argued;—The sender of a telegram [37] takes the risk of its correctness. There was no privity of contract between the receiver of the message and the telegraph authorities.

The defender argued;—There was no completed contract between the pursuers and the defender. The defender, if in doubt, could have repeated the message. The point was decided.

LORD COWAN.—This is a case of general importance. The view I take of it is precisely that of the Sheriff. In principle there is no ground for this claim; and in the English Courts there has been a corresponding case in which the claim has been refused.

---

* "NOTE.—The only question in this case is who is responsible for a mistake made by a telegraph clerk in the transmission of a message. A person is in general responsible for his messenger, because it is his own fault if he employs one who makes a mistake. But as regards telegraphic messages the public has now no choice, for by the Act 32 & 33 Vict. cap. 73, the Postmaster-General has the exclusive privilege of transmitting telegrams within the United Kingdom, and it is well settled that although he and his subordinates are each liable for their own personal negligence, he is not liable for the neglect or default of the officers employed in the department. That being so, on what principle should the risk of mistakes be thrown on the sender of the message—mistakes which he does nothing to occasion, and which apparently he can do nothing to prevent. The transmission of telegrams having ceased to become a matter of private enterprise, and being one of the duties performed by the State, the principle of the maxim *qui facit per alium facit per se* has no application, and as when the telegraph is used, both sender and receiver are equally cognisant of the risks incident to the medium of communication, there is nothing in the relation of the parties implying a warranty on the part of the sender that his message would be accurately transcribed and faithfully transmitted by the public official, who undertakes the duty, and over whom the sender cannot possibly exercise any control. It is, however, unnecessary to argue the question as one of principle, because in the recent case of Henkel *v.* Pape, 10th November 1870, L. R. C. Ex. 7, it was decided by the Court of Exchequer that the sender of a message incurs no responsibility for any mistakes which may be made in the passage from him to the receiver, and as the circumstances of that case were precisely analogous to the present, the Sheriff conceives that the precedent ought to be followed. The legal position of the parties then is this: The pursuers must prove their contract. The defender instructed the Post-office authorities to carry a message to Liverpool on certain terms, but that message was never delivered, and another was substituted in its place, which the defender never authorised. There is therefore no contract between the parties, such as the pursuers put forward in their summons, and consequently the defender must be assoilzied, with expenses."

This action is laid on the contract of sale; therefore the first question is, whether or not there has been a concluded contract between the parties. An attempt is made by the pursuer to make out this by the two telegraphic messages produced. The first of these is correct; and the second is incorrect. The correct message was handed in by the defender to the telegraph office, to be transmitted to the pursuer. But a mistake was made by the telegraph officials, which led to the message being delivered to the pursuer in a materially and essentially altered form. Now, can it be said that there was here *consensus in eundem contractum* between the parties in this transaction? Clearly not. The pursuer may have been willing enough to implement the order he received; but then the defender had not sent that order, and had not consented to it.

It is said by the pursuer that in the case of a message going wrong as this has done, the sender is responsible; and the reason he alleges for throwing the responsibility upon the sender is this, that the telegraph company is not responsible. That may be the case, but it by no means follows that a party who had committed no fault is to be subjected to the loss, and far less that, as under a contract of sale—for that is the ground of this claim in the summons and record—the pursuer is on that account to be held entitled to recover when there has been no sale. In conclusion, I may say that I cannot conceive a case more in point than the English decision referred to in the Sheriff's note, and founded on at the bar.

LORD BENHOLME.—This is a plain case. The summons concludes for a certain sum as the price of a quantity of salt. But there has been no such *consensus* between the parties as is requisite for the constitution of a contract.

Ill consequences may happen to either party by such a blunder. Could it be said that the sender would be entitled to damages from the party to whom a message was addressed, for non-implement of an order which he never received?

But if I had had any doubt upon the matter it would be dispelled by the judgment of the English Courts to which we have been referred.

LORD NEAVES.—I agree. This is a demand for a price, and the question is, was there a contract of sale. Sale is a consensual contract. Was there here a *consensus*? *Consensus* may be by the parties themselves or by their authorised agents. Here there was an apparent assent to the proposed sale, but no consent, unless the telegraph officers are to be considered as the authorised agents of the sender, to the effect of making him responsible for any blunder which they may commit. That seems to me an inadmissible proposition, and one certainly of a most serious character to the mercantile classes. To hold that a sender communicating through a telegraph clerk is equally bound as if he had sent the message by a clerk of his own is a proposition to which I cannot assent.

If the mistake here had been found out *tempestive*, and the sellers in Liverpool had at once said, we will now send you the salt, there might have been some right accruing to them, but the error occurred at a critical period of the season, and was not found out until the salt was of no use.

It appears to me, therefore, that there was no completed contract of sale between the parties.

The LORD JUSTICE-CLERK was absent.

[38] This interlocutor was pronounced:—"Dismiss the appeal, affirm the judgment appealed from, and decern," &c.

ALEX. MORISON, S.S.C.—MORTON, WHITEHEAD, & GREIG, W.S.—Agents.

No. 15. X. MACPHERSON, 38. 3 Nov. 1871. 1st Div.—B.

ROGER MILTON TRAPPES, Petitioner.—*Sol.-Gen. Clark—Balfour.*
CHARLES MEREDITH AND OTHERS, Respondents.—*D.-F. Gordon—Rhind.*

Spes successionis—Bankrupt—Discharge.—A *spes successionis* may be sold and assigned so as to give the purchaser a good title, in a question with the seller, to the subject when it comes to be vested in the seller, but a *spes successionis* is not attachable by the creditors of the person entitled to succeed; and in the event of his becoming bankrupt and obtaining his discharge before the right has vested in him, it will not be carried to the trustee in the sequestration.

Bankrupt—Discharge.—A discharge obtained by a bankrupt without composition or consent of creditors has not the effect of annulling the sequestration with respect to property then vested in the bankrupt, but not payable to him until after the date of his discharge.

Bankrupt—Trustee—Bankruptcy (*Scotland*) *Act*, 1856, *sec.* 103.—*Held* that the omission of a bankrupt to give notice to the trustee in his sequestration of a bequest of an annuity did not affect the validity of his discharge, because the terms of the will containing the bequest prevented the annuity from falling under the sequestration.

This was a case remitted by the Court of Chancery in England for opinion of the Court of Session.

The facts were these:—In May 1861 Mr. H. T. Graham, then residing in Scotland, was sequestrated on his own petition by the Court of Session, and Mr. Balgarnie was appointed trustee in the sequestration. Mr. Graham made up a statement of his affairs, in which he stated that he had no assets of any value, and that his debts amounted to more than £1500. The entire assets recovered by the trustee did not exceed £10, and debts to the extent of £1500 remained unsatisfied.

In June 1864 Mrs. Graham, wife of the bankrupt, died, leaving a will executed in 1863, at which time she was domiciled in England, whereby, after reciting that she "was enabled to appoint by will (subject to the life interests of her mother, Anna Maria Payne)," certain property, which she referred to in her will as "the trust-premises," she bequeathed and appointed the same to trustees, upon trust that the said trustees should, out of the trust-premises, pay certain legacies; and then the will proceeded as follows (being, for the convenience of reference, divided into clauses):—

Clause 1. "And upon further trust that my said trustees shall, out of the income of the said trust-premises, or if that shall be insufficient, then out of the principal thereof, pay to my husband an annuity of £100 during his life (but subject to the provisoes with respect to the said annuity hereinafter contained), the said annuity to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months after the decease of the survivor of me and my said mother."

Clause 2. "Provided always, and I hereby declare, that if my said husband shall become bankrupt, or shall assign, charge, or incumber, or attempt or affect to assign, charge, or incumber the said annuity of £100, or do or suffer any act whereby the same annuity, or any part thereof, would, if belonging absolutely to him, become vested in any other person or persons, then and in such case the said annuity shall not be payable, or shall cease to be payable, as the case may require, in the same manner as if my said husband were dead."

Clause 3. "Provided also, and I hereby further declare, that it shall be [39] lawful for my said trustees or trustee, if they or he shall, in their or his absolute discretion, think fit, and without assigning any reason for so doing, at any time or times, to refuse or discontinue the payment to my said husband of the said annuity of £100, or any part thereof, during the whole or any portion of his life, and in such case the said annuity, or such payment or payments thereof as my said trustees or trustee shall refuse to make to my said husband as aforesaid, shall sink into the income of the said trust-premises for the benefit of the person or persons for the time being entitled to such income, it being my wish and intention that the payment of the said annuity to my said husband shall be according to the discretion of my said trustees or trustee in all respects."

Mrs. Payne, the mother of the testatrix, on the expiration of six months after whose decease the first payment of the annuity was to become due, died on the 4th of April 1868. The first half-yearly payment of the annuity, therefore, became payable on the 4th of October 1868.

Mr. Graham never offered to his creditors any composition, in terms of secs. 137 and 139 of 19 & 20 Vict. c. 79, nor did he at any time notify to the trustee the fact of the bequest of the annuity.

In these circumstances, Mr. Graham, on the 29th day of August 1868, before the first payment of the annuity fell due, obtained his discharge without any consent of creditors, or composition, from the Sheriff of Edinburgh, in terms of secs. 146 and 147 of the Act, having previously, as required by sec. 147, made a declaration upon

oath before one of the Sheriff-substitutes of Edinburgh that he had made a full and fair surrender of his estate. On the 10th February 1869 Mr. Balgarnie, the trustee, believing that Mr. Graham had made a fair discovery and surrender of his estate as mentioned in the 146th section of the Act, and that there were no further assets, applied for and obtained his discharge as trustee. At the date of the proceedings in Chancery there was no trustee in the sequestration.

On these facts the opinion of the Court of Session was desired on the following questions:—"1. Whether the annuity given by clause 1 of the said will to Graham, assuming it to be by the English law an interest capable of legal alienation at and from the death of Mrs. Graham on the 21st June 1864, would, if clauses 2 and 3 had not been contained in the said will, have fallen under the sequestration; and whether, under the circumstances hereinbefore stated, supposing clauses 2 and 3 had not been contained in the will, the said annuity could now be claimed under the sequestration, regard being had to sections 102 and 103 of 19 & 20 Victoria, chapter 79, and the interpretation of the word 'estate' in section 4 of the same Act? 2. Assuming the first question to be answered in the affirmative, whether clause 3 has any effect by the law of Scotland in preventing the annuity from falling under the sequestration, the fact being that the trustees of the will had not prior to June 27, 1870, made, or refused to make, any payment to Graham in respect of the said annuity? 3. Whether the omission by Mr. Graham to give notice to Mr. Balgarnie, the trustee under the sequestration, of the fact of the bequest of the annuity having been made, would have ny and what effect upon the discharge obtained by Mr. Graham? 4. Has a discharge, obtained without consent of or composition with creditors, the effect of annulling the sequestration with respect to property vested in and disposable by a bankrupt before discharge, but not actually payable to him until after the date of the discharge?"

Argued for petitioner;—(1) A right having a tract of future time is distinguishable from the fruit of that right. These fruits vest termly, and [40] are arrestable after vesting, but before any vesting of the fruits the right itself is adjudgeable. Mr. Graham's right to the annuity vested in him at all events on the death of Mrs. Payne and was then attachable by adjudication. Mr. Graham could not claim payment until October 1868, but he could validly assign his right before that. (2) Clause 3d had no effect in preventing the annuity from falling under the sequestration. (3) Under section 103 of the Bankrupt Act Mr. Graham's omission to give notice to his trustee prevented him from taking benefit from the annuity. (4) Here there was no discharge or composition, and the sequestration therefore still subsisted notwithstanding the discharge of the bankrupt and trustee.*

Argued for respondent;—(1) Nothing was carried by the sequestration which did not vest in the bankrupt before his discharge,† and this annuity had not so vested. (2) The trustees had not done anything in regard to the annuity, and until they did the legacy was in suspense.‡ (3) Mr. Graham was absolutely disqualified by clause 2 of the will from claiming the annuity, and in any reduction of his discharge that clause would afford him a good defence.

The Court returned the following answer:—"The Lords of the First Division having considered the petition of Roger Milton Trappes, with case for opinion of this Court, and order by the Court of Chancery in England desiring the opinion of this Court on the questions of law therein propounded, and having heard counsel thereon for the petitioner, and also for Henry Charles Tempest Graham, respondent, make answer to the said questions as follows, viz.:—

"1. By the law of Scotland a right or estate in expectancy or *spes successionis* may be sold and assigned so as to give the purchaser a good title in a question with the seller to the right, estate, or succession, when it comes to be vested in the seller. But such right or estate in expectancy, or *spes successionis*, is not attachable by the diligence of creditors of the person in expectancy or entitled to succeed, and would not be carried

* Russell and Christie, Jan. 15, 1867, *ante*, vol. v. 282; Burns *v.* Craig, Feb. 4, 1869, *ante*, vol. vii. 476.

† Bell's Prin. sec. 1498; Menzies' Lectures (1st ed.), 310; Smith and Kinnear *v.* Burns, June 23, 1847, 9 D. 1344; Thomson, Dec. 17, 1863, *ante*, vol. ii. 325.

‡ Muir *v.* Pollock, Dec. 9, 1851, 14 D. 152; Burnside *v.* Smith, June 10, 1829, 7 S. 735; Paterson's Trustee *v.* Paterson, Jan. 29, 1870, *ante*, vol. viii. 449; Sinclair *v.* Staples, Jan. 27, 1860, 22 D. 600.

to the trustee in his sequestration if he should be discharged before such right, estate, or succession was vested in him. Therefore assuming (1) that the annuity was settled and regulated entirely by the first clause of Mrs. Graham's will, and that the second and third clauses were not contained in the said will, and (2) that the right to the annuity vested in Mr. Graham before the date of his discharge under the sequestration, so as, if he had been solvent, to be attachable by his creditors, the annuity would fall under the sequestration, and be carried to the trustee, and could be now still claimed under the sequestration for the benefit of Mr. Graham's creditors.

"2. The third clause of the will, taken by itself and apart from the second clause, would have no effect in preventing the annuity from falling under the sequestration, so long as the trustees under the will do not exercise the powers thereby conferred on them to refuse or discontinue payment of the annuity. But the trustee and creditors under the sequestration can take this right and interest of the bankrupt only *tantum et tale*, as it stood vested in the bankrupt, and subject to all the conditions and qualities legally attaching to it.

[41] "3. The omission of Mr. Graham to give notice to the trustee in the seqestration of the bequest of the annuity having been made would have no effect on the discharge obtained by Mr. Graham, because the terms of the will, and particularly the second clause, taken either alone or in connection with the third clause, prevented the annuity from falling under the sequestration. If the annuity had vested in the bankrupt so as to be carried to the trustee in the sequestration, the omission to notify the fact to the trustee would, under section 103 of the Bankruptcy (Scotland) Act, 1856, have had the effect of annulling his discharge as one of the 'benefits of the Act' which by that omission he forfeited. But in the circumstances of this case, and looking especially to the conditions of the will respecting the annuity, it cannot be held to be an estate acquired by the bankrupt, or descending or reverting to him within the meaning of section 103, because (supposing the annuity to have been otherwise a right of such a nature as to vest to him before the date of his discharge, so as, if he had been solvent, to be attachable by his creditors, and therefore in case of insolvency to be carried by his sequestration) it was prevented from so vesting by the second clause of the will, and was forfeited by the existing bankruptcy of the person in whom, on the above supposition, it would then otherwise have vested.

"4. A discharge obtained without consent of or composition with creditors has not the effect of annulling the sequestration with respect to property vested in or disposable by the bankrupt before his discharge, though not actually payable to him till after the date of the discharge."

C. & A. S. DOUGLAS, W.S.—JOHN LATTA, S.S.C.— Agents.

[*Distinguished*, M'Donald *v.* M'Gregor, 1874, 1 R. 817. *Approved and applied*, Smiths *v.* Chambers' Trs., 1877, 5 R. 97. *Commented upon and approved*, Kirkland *v.* Kirkland's Tr., 1886, 13 R. 798. *Approved*, Reid *v.* Morison, 1893, 20 R. 510. *Referred to*, Obers *v.* Paton's Trustees, 1897, 24 R. 719.]

No. 16. X. MACPHERSON, 41. 3 Nov. 1871. 1st Div.—Lord Jerviswoode, B.

MRS. JANE COWAN OR DICKSON AND HER HUSBAND, AND MISS JESSIE COWAN, Pursuers.—*Hutchison—Asher.*

ALEXANDER THOMSON BLAIR, Defender.—*Fraser—Black.*

Sale—Missives—Condition.—A person offered to purchase a house at a certain price, on condition that the seller should give a clear title. The proprietor accepted the offer, but with the condition that no search should be given. *Held* that the intending purchaser not having consented to the seller's condition there was no sale.

Husband and Wife—Sale of Heritage—Reference to Oath—Proof—Pro Indiviso Proprietors.—A married woman and her sister were *pro indiviso* owners of a house. A written offer to purchase the whole property having been made to them, they gave an acceptance, written by the married sister, and signed by both. In a reduction of the missive brought by them against the purchaser, on the ground, *inter alia*, that the

husband of the married pursuer had not adhibited his concurrence to the acceptance, the purchaser proposed to refer to the oath of the married pursuer and her husband whether the husband had consented to the acceptance. The Court *refused* to sustain the reference, on the ground that the alleged sale was a sale of the entire property, and that the oath of the husband could not affect the interest of the unmarried pursuer.

Question, Whether the concurrence of a husband to a missive by his wife, agreeing to sell heritable property belonging to her, can be referred to the oaths of the spouses. *Opinion* (*per* Lords Kinloch and Ardmillan), that the consent of the husband can only be proved by writing.

Mrs. Jane Cowan or Dickson, wife of John Dickson, residing in Edinburgh, and her sister, Miss Jessie Cowan, were proprietors *pro indiviso* of a house and garden-ground in Causewayside of Edinburgh. Early in 1870 Alexander T. Blair made proposals for the purchase of this property, and finally in May he made a holograph written offer in these terms:—

"7 Livingstone Place, Edinburgh, 11th May 1870.

"Misses Cowan.—Madams,—I here make offer to you of the sum of four hundred pounds sterling (£400) for that northmost half of that [42] house, together with the ground about the same, known by the name of the Broad Stairs, situated in Causewayside, Edinburgh, and the said price to be paid when titles are handed over to me or my agent, you giving a good and clear title, and the expense of transfer of title to be borne mutually by seller and purchaser. Entry to be given at Whitsunday first, when price will be paid.—I am, yours respectfully,

(Written across stamp) { ALEXANDER T. BLAIR, 11th May 1870.

"NOTE.—My former offers to be cancelled. ALEX. T. BLAIR."

On the following day the pursuers gave to the defender a letter in these terms:—

"Edinburgh, 12th May 1870.

"Mr. Alexander T. Blair, Livingstone Place.

"Sir,—We accept of your offer of the 11th inst. for the property belonging to us in Causewayside, the price to be payable on your receiving a valid disposition, the expense of which, including stamp and revising, to be paid mutually by seller and purchaser. As we know of no incumbrances on the property, no search will be given, and you must take the title on that footing, or there is no bargain. Entry to be given Whitsunday first, at which time price will be paid.

(Written across stamps) { JANE COWAN OR DICKSON, JESSIE COWAN. 12th May 1870."

This letter was holograph of Mrs. Dickson, and was signed by Mrs. Dickson and her sister.

In a letter by Mr. Blair to Mr. Lee, the pursuer's agent, dated 8th June 1870, he said,—"I have no other offer to make, which offer is dated 11th May 1870. Misses Cowans' title must be in accordance with my letter of 11th May 1870." In a letter bearing the same date Mr. Lee wrote to Mr. Blair intimating that as there had been no completed bargain the transaction had fallen through. In a letter by Mr. Blair to Mr. Lee, dated 30th June 1870, he said that he considered the acceptance he had got a proper acceptance.

In September 1870 Mrs. Dickson (and her husband) and Miss Cowan brought this action against Blair, concluding for declarator that they were the sole proprietors of the house and garden in question, and for reduction of the missives above set forth. They alleged that the letter of 12th May was fraudulently obtained from them by the defender, and that the husband of Mrs. Dickson was ignorant of the transaction of sale sought to be reduced, and did not sign the letter of acceptance.

The defender admitted that Mr. Dickson did not sign the acceptance, but alleged that the sale was duly carried through by means of the missives, and that he was put by the pursuers in possession of the subjects, and made various repairs on them on the faith of the missives, and with the free knowledge and consent of all three pursuers.

The pursuers pleaded, *inter alia*;—(1) The pursuers, as proprietors *pro indiviso* foresaid, being the absolute and exclusive proprietors of the foresaid property, they are entitled to have this found and declared, and to have decree of declarator in terms of the conclusions of the summons. (2) The said pretended missives or writings are in

the circumstances condescended on not binding on or enforceable against the pursuers, and the defender has no right or claim under the same to the pursuers' property. (3) The pursuer Mrs. Dickson was a married woman at the date of the said pretended acceptance, and the concurrence of her husband was not obtained or adhibited thereto, and can only be proved *scripto*, and there [43] was no judicial ratification. (4) The said pretended acceptance does not contain any legal agreement or obligation on the part of the said Jessie Cowan relative to the alleged sale. (5) The pretended missives or letters not being in all particulars at one, but differing essentially from each other and from the footing, express understanding, and condition of granting, and there never having been that *consensus in idem placitum* necessary to constitute the contract of sale, the pretended missives do not form a concluded agreement.

The defender pleaded, *inter alia*;—(3) The missives sought to be reduced having been entered into with the knowledge and consent of the pursuer, John Dickson, and the said John Dickson having acquiesced in and adopted and homologated the said missives, and his said wife's acts in entering into the same, and into the contract expressed therein, and there having been *rei interventus* upon the faith of the said missives, the pursuers are bound to grant to the defender a disposition in terms thereof, and the action is untenable.

On 28th February 1871 the Lord Ordinary pronounced this interlocutor:—"Finds, as matter of fact, that the pursuer Mrs. Jane Cowan or Dickson was a married woman at the date of the alleged acceptance, No. 10 of process, by her and the pursuer Jessie Cowan, of the offer, No. 8 (referred to in the record as No. 7) of process, by the defender, with relation to the alleged sale of the heritable subjects set forth on the record; and that the concurrence of the pursuer John Dickson, the husband of the said Jane Cowan or Dickson, was not adhibited to the said acceptance, and has not since been obtained thereto in writing: Therefore, finds as matter of law, First, that the said acceptance is null, in so far as the same purports to be the writ of the said Jane Cowan or Dickson; and second, that in respect thereof, and that the alleged concurrence of the said John Dickson to said acceptance can only be proved *scripto*, the averments by the defender of knowledge and consent, and of acquiescence and homologation on the part of the pursuer, the said John Dickson, and of *rei interventus* on the part of the defender, with reference to the said offer and acceptance, are irrelevant in bar of the conclusions of the present action," &c.

The defender then lodged a minute of reference to oath in these terms:—"Black, for the defender, stated that he hereby referred to the oath of the pursuers, John Dickson and Mrs. Jane Cowan or Dickson, the question whether the said pursuer, the said John Dickson, consented to the missive, No. 10 of process."

On 17th March the Lord Ordinary pronounced this interlocutor;—"Having heard counsel on the minute of reference by the defender to the oath of the pursuers, John Dickson and Mrs. Jane Cowan or Dickson, as amended at the bar, and now forming No. 55 of process, whereby the defender refers to the oath of the said pursuers the question whether the said pursuer John Dickson consented to the missive, No. 10 of process, refuses to sustain the said reference, in respect that the said missive was granted by the said Jane Cowan or Dickson, when a married woman, without the consent thereto of her husband, the said John Dickson, and that the said missive is consequently null, and of no force or effect in law as the writ of the said Jane Cowan or Dickson; and appoints the cause to be enrolled that parties may be heard as to the effect and application of the present interlocutor in relation to the conclusions of the action."

And thereafter, on 25th May, this interlocutor:—Finds that the missives, Nos. 8 and 10 of process, on which respectively the defender founds in the record, have relation to the heritable subjects set forth on the record [44] as a whole, and not to the separate *pro indiviso* shares thereof alleged by the pursuers, Mrs. Jane Cowan or Dickson and her sister Jessie Cowan, to belong to them respectively, and to which a title in their favour has been produced by them in process: Further, with reference to the above finding, and in respect that, as already found by the previous interlocutors of 28th February and 17th March last, the alleged sale of said subjects to the defender was ineffectual as regards the *pro indiviso* half thereof belonging to the said Mrs. Jane Cowan or Dickson, finds that the said alleged sale was also ineffectual as regards the other *pro indiviso* half of said subjects stated to belong to the pursuer, Jessie Cowan; Therefore sustains the first and second pleas in law for the pursuers; Finds, declares, decerns, and ordains in terms of the declaratory conclusions of the summons; and

reduces, decerns, and declares in terms of the reductive conclusions thereof; Finds the defender liable to the pursuers in expenses," &c.*

The defender reclaimed, and argued;—By the general rule of the law of Scotland a husband's consent was necessary to a wife's contract. But this was not on account of natural incapacity in the wife, but merely as her administrator. It was settled law that the husband's consent could be proved *rebus ipsis et factis*. There was no attempt here to prove the signature or consent of the real owner of the subjects, nor to introduce evidence, parole or *prout de jure*, in connection with the contract. A verbal contract of sale of heritage followed by *rei interventus* could be supplemented by a reference to oath of the party, and so become binding. An improbative contract in writing also followed by *rei interventus* was surely in the same position. The averment here was, that when the wife signed the acceptance her husband was in the room, and gave his consent. Had the husband been the proprietor of the subjects it would, as already stated, have been competent to prove the contract by reference to his oath, provided *rei interventus* had followed. It could, therefore, assuredly be assumed that his mere consent to his wife's deed could be competently proved by his oath when that alone was wanting to validate the contract. There was no authority which rendered it necessary that the husband's consent should be given in writing at the time. His subsequent written statement of consent had been frequently held to be sufficient, even though not appended to the deed.†

The pursuers argued;—It was not competent to convert a document of itself null into a binding document by the oath of a person who did not sign it, and was not a party to it. There was here no averment of a verbal contract. The defender's case was founded upon a writ, and a writ only. In any view Miss Cowan could not be bound by the oath of the other pursuers. The document which she signed was null and void, and was not probative of her; she had, therefore, *locus pœnitentiæ*. The bar-[45]-gain here was for a sale of the whole property, not of a *pro indiviso* share; it could not, therefore, be maintained as valid against one, and invalid against another of the parties.‡

At advising,—

Lord Kinloch.—In this case it lies with the defender to make good, in opposition to the general title of the pursuers, that a valid contract took place under which he acquired right to the subject in question in the character of purchaser.

The case as stated by him is not one of verbal contract, followed by *rei interventus*. It is an alleged case of written contract. He produces certain written documents, which he alleges constitute the contract. With reference to the objection that one of the contracting parties was a married woman, and that her husband had not adhibited his concurrence, he offers to prove by the oath of Mr. and Mrs. Dickson that the hus-

---

* Note.—It appears to the Lord Ordinary, whatever power may have been, in a legal sense, vested in Jessie Cowan to dispose of her own *pro indiviso* share of the subjects in question, free of the concurrence or control of her sister, that she had no intention to sell, and did not, in truth, sell such share, or mean to deal with it, otherwise than in concert with her sister, the owner of the other share."

† *Defender's Authorities.*—Telfer *v.* Hamilton, Jan. 21, 1735, M. 5657; Riddell *v.* Scot, Dec. 20, 1728, M. 5681; Hepburn *v.* Kirkwood, Jan. 6, 1686, M. 5650; Rait *v.* Galloway, Nov. 26, 1833, 12 S. 131; Ersk. iii. 2, 3; Gowan's Trustees *v.* Carstairs, July 18, 1862, 24 D. 1382; Walker *v.* Flint, Feb. 20, 1863, *ante*, vol. i. 417; Dickson on Evidence, 505; Cochran *v.* Hamilton, Feb. 23, 1698, M. 6001; Borthwick *v.* Grant, Feb. 17, 1829, 7 S. 420; Hepburn *v.* Blair, Jan. 29, 1702, M. 6047; Brownlee *v.* Waddell, Nov. 22, 1831, 10 S. 39.

‡ *Pursuers' Authorities.*—Landales *v.* Landale, June 12, 1752, M. 14,477; Caddel *v.* Sinclair, June 3, 1749, Kilkerran, 445; Renton *v.* Wedderburn, July 7, 1632, M. 12,488; Napier *v.* Dick, Nov. 21, 1805, Hume, 388; Longworth *v.* Yelverton, July 30, 1867, *ante*, vol. v., H. L. 144—L. R. 1 Sc. Ap. 218; Philip *v.* Cumming's Executors, June 3, 1869, *ante*, vol. vii. 859; Dick *v.* Donald, Dec. 12, 1826, 2 W. & S. p. 522; Miller *v.* Milne's Trustees, Feb. 3, 1859, 21 D. 377; Hill *v.* Arthur, Dec. 6, 1870, *ante*, vol. ix. 223; Melvill v. Dunbar, Feb. 12, 1566, M. 5993; Boyle *v.* Crawford, March 5, 1822, 1 S. 372; Lady Bute's Chaplain *v.* The Earl, Jan. 1, 1666, 2 B. Sup. 423; 1 Bell's Ill. 35; Comrs. of Forfeited Estates *v.* Drummond, March 22, 1720, Robertson's Ap. 290.

band did in reality consent. "Black, for the defender, stated that he hereby referred to the oath of the pursuers, John Dickson and Mrs. Jane Cowan or Dickson, the question whether the said pursuer, John Dickson, consented to the missive, No. 10 of process."

In this state of things I consider myself freed from the necessity of considering how matters would stand if the alleged case were one of verbal contract followed by *rei interventus*. The defender has entirely excluded himself from the condition of one who stands on such a case. It is settled and trite law that a verbal contract concerning heritage, intended to be set up by *rei interventus*, cannot be proved by parole evidence, but must be established by oath of party. The defender does not offer to prove a verbal contract by the oath of the pursuers. His minute of reference is strictly confined to the matter of concurrence in a written deed produced. Even, therefore, had a verbal contract been averred, it is not offered to be proved by the only competent evidence. It is only in combination with proof of the contract by reference to oath that proof of *rei interventus* is admissible. The *rei interventus* may itself be proved by parole evidence. But there is no room for such evidence unless the verbal contract is established by reference to oath. The defender, doubtless for sufficient reasons, has made no such reference.

The question then arises, whether there is here any written contract, either sufficient in itself, or capable of being made so by the establishment of Mr. Dickson's concurrence through means of a reference to oath. I am of opinion there is none such.

In the first place, I think the written documents show that no concluded contract of any kind ever passed between the parties. The defender's offer of 11th May 1870 expressly set forth, as one of the conditions of the bargain, "you giving a good and clear title." The answer by the pursuers of 12th May stated, "as we know of no encumbrances on the property, no search will be given; and you must take the title on this footing, or there is no bargain." This was an express declinature of one, and a very important, part of the defender's offer. It is not shown that the defender ever agreed to this altered proposal. The reverse seems proved by his letter to Mr. Lee of 8th June 1870, written after parties had come to be at variance, in which he says, "I have no other offer to make, which offer is dated 11th May 1870. Misses Cowan's title must be in accordance with [46] my offer of 11th May 1870." The parties therefore never came to a concluded agreement. And in this view it is immaterial to inquire whether Mr. Dickson's concurrence can now be established by the proposed reference. For, supposing it to be established ever so clearly, there was still no concluded contract, and the defender's case fundamentally fails.

But, secondly, and independently of this circumstance, and assuming that the writings showed on their face a concluded contract, I am of opinion that the contract is null for want of Mr. Dickson's concurrence in his wife's act, and that this concurrence cannot be established by means of reference to oath. The concurrence of the husband was not of the nature of a consent by a third party interested, taking away a personal objection. It was essential to the act of the wife, which without such concurrence was null. The writing without such concurrence operated no legal effect. I am of opinion that the concurrence was as necessary to be given in writing as the wife's own agreement. I do not inquire whether it required to be adhibited at the time of the wife's subscription, or might be expressed subsequently. I do not pronounce on the point. At whatever time given, I think it was indispensable it should be given in writing, as much as the wife's own signature. And if so, I think the want cannot now be supplied by a reference to oath. It is trite that a contract as to heritage must be expressed in writing, or else there is *locus pœnitentiæ*. If the written contract wants an essential party, there is in the eye of the law no writing at all, and *locus pœnitentiæ* remains. I consider this to follow from the essential principles of our law in regard to contracts as to heritage. The want of Mr. Dickson's concurrence, expressed in writing, I conceive to operate as a fatal flaw in the contract, wholly incapable of being rectified by any reference to oath.

I am therefore of opinion that Mr. and Mrs. Dickson are not bound in any legal contract to the defender, and cannot be brought under an obligation by means of the proposed reference to oath. And I think the Lord Ordinary is clearly right in holding that Mr. and Mrs. Dickson not being bound, Miss Jessie Cowan is not more bound than they. For the proposed sale was not of separate *pro indiviso* shares, but of the whole subject; and if there is no contract as to one of the proprietors, it is an incomplete con-

tract as to the other. Miss Jessie Cowan may have other pleas besides this; but into these I do not now enter, because I think this consideration is sufficient to support the judgment, as given in her favour, as well as that of the other pursuers.

LORD DEAS.—In so far as this case is rested upon written probative missives, I am clearly of opinion, with my brother Lord Kinloch, that upon the face of these there is no concluded bargain. The defender's offer for the property, dated 11th May 1870, contained the following condition:—"You giving a good and clear title, and the expense of transfer of title to be borne mutually by seller and purchaser."

The pursuer's letter of acceptance of 12th May contained the following qualification:—"As we know of no encumbrances on the property, no search will be given; and you must take the title on that footing, or there is no bargain." Now, it is plain that on the face of these missives they did not meet each other. The acceptance was not unqualified. There was something more required, and that was by no means an immaterial thing. The condition of acceptance was, no search, or no bargain. The consequence of this was either that the purchaser must himself be at the expense of a search beforehand, or that he must take the risk of whatever incumbrances might exist on the property. The two letters I have quoted are the only letters that can be founded on as constituting the bargain. They are probative documents, being holograph of the respective parties; for, as both sellers could not right the acceptance, it is not disputed that, being written by Mrs. Dickson, it is to be dealt with as holograph of both. If the defender had sent a holograph reply, saying he agreed to the qualification, that would have been sufficient. But so long as this was not done, there was no concluded bargain. The correspondence between the agents is of no materiality in the question, and did not, indeed, relate to it. The only subsequent letter of importance is that addressed by the defender to the agent for [47] the pursuers on 30th June 1870, in which the defender says he considered the acceptance he had got "a proper acceptance." But whatever inference might have been drawn from the terms of that letter, as importing assent to the qualification, the conclusive answer is, that the letter came too late. It is dated three weeks after the defender had declined to make any new or amended offer, and the pursuer's agent, Mr. Lee, had, in the meantime, by his letter dated 8th June 1870, distinctly intimated to the defender that, as there had been no completed bargain, the transaction had fallen through. There is very clearly, therefore, not the necessary legal evidence of a concluded written bargain between the defender and the proprietors, and that of itself is sufficient for decree in this action of declarator.

Another ground which appears to me, *separatim*, conclusive is, that supposing that the husband's concurrence could competently be proved under a reference to oath (a question which it is not necessary to decide), there is here no proper and sufficient minute of reference.

The counsel for the defender were asked whether they would not amend their minute of reference, and after taking time to consider the point they declined to do so. Now, that minute of reference is in these terms:—"Black, for the defender, stated, that he hereby referred to the oath of the pursuers, John Dickson and Mrs. Jane Cowan or Dickson, the question, whether the said pursuer John Dickson consented to the missive, No. 10 of process." There is, in this minute, no reference to the oath of Miss Cowan, the other pursuer, and I entirely demur to the proposition that the consent of the husband can be proved by the oath of his wife and himself as in a question with the other pursuer, Miss Cowan.

The sale was not a sale of a *pro indiviso* half of this property, but of two *pro indiviso* halves as forming one subject.

Now, the offer is an offer addressed to the two sisters jointly of £400 as the price of their property, and the acceptance bears to be a joint acceptance by both sisters. The defender could not have been required to accept of the one *pro indiviso* half of the property without the other; and, except in so far as the buyers and sellers were mutually bound, there could be no concluded bargain. But how is Miss Cowan to be bound by the oath of Mr. and Mrs. Dickson? If the bargain was to be proved by an oath of reference at all there ought to have been a reference to Miss Cowan's oath also.

Something was said about allowing a proof of *rei interventus*, which might have raised embarrassing questions as to the order and mode of procedure had *rei interventus* been relevantly averred, and had there been a bargain in terms admitting of its being validated by *rei interventus*. But we have here no relevant averments of *rei interventus*,

fifteen twenty tons fishing salt; our price delivered at Peterhead is 36s. 6d. per ton nett. We shall push it forward [36] as soon as possible;' that in conformity with the telegram, as received, the pursuers, on the 2d September, despatched by rail to 'Morice, Peterhead,' 8 tons 18 cwt. salt, and on 5th September 9 tons 11 cwt. 2 qrs., and at the same time forwarded invoices thereof to the same address: Finds that as no such person as Morice, Peterhead, could be found, the said invoices were returned to the pursuers through the dead letter office on 15th September, and said salt was not delivered to the defender: Finds that the defender having thereafter refused delivery of the salt, in respect it was too late for the purpose required, it was sold under judicial warrant."

The Sheriff-Substitute (Comrie Thomson) pronounced an interlocutor, in which, after findings in fact, he found "as matter of law that in a question between the parties to this action the defender is liable to the pursuers for the loss which has arisen in consequence of the mistake in the telegram received by the pursuers; and with these findings, appoints the case to be enrolled."

The Sheriff pronounced an interlocutor, in which, after the findings in fact above quoted, he found "in point of law that as the Post-office authorities are only agents to transmit messages in the terms in which the senders deliver them, there was no contract between the pursuers and the defender for the purchase of the salt forwarded to the above address, and the defender is not indebted to the pursuers in the sums sued for: Therefore assoilzies the defender from the conclusions of action."*

The pursuers appealed. They argued;—The sender of a telegram [37] takes the risk of its correctness. There was no privity of contract between the receiver of the message and the telegraph authorities.

The defender argued;—There was no completed contract between the pursuers and the defender. The defender, if in doubt, could have repeated the message. The point was decided.

LORD COWAN.—This is a case of general importance. The view I take of it is precisely that of the Sheriff. In principle there is no ground for this claim; and in the English Courts there has been a corresponding case in which the claim has been refused.

---

* "NOTE.—The only question in this case is who is responsible for a mistake made by a telegraph clerk in the transmission of a message. A person is in general responsible for his messenger, because it is his own fault if he employs one who makes a mistake. But as regards telegraphic messages the public has now no choice, for by the Act 32 & 33 Vict. cap. 73, the Postmaster-General has the exclusive privilege of transmitting telegrams within the United Kingdom, and it is well settled that although he and his subordinates are each liable for their own personal negligence, he is not liable for the neglect or default of the officers employed in the department. That being so, on what principle should the risk of mistakes be thrown on the sender of the message—mistakes which he does nothing to occasion, and which apparently he can do nothing to prevent. The transmission of telegrams having ceased to become a matter of private enterprise, and being one of the duties performed by the State, the principle of the maxim *qui facit per alium facit per se* has no application, and as when the telegraph is used, both sender and receiver are equally cognisant of the risks incident to the medium of communication, there is nothing in the relation of the parties implying a warranty on the part of the sender that his message would be accurately transcribed and faithfully transmitted by the public official, who undertakes the duty, and over whom the sender cannot possibly exercise any control. It is, however, unnecessary to argue the question as one of principle, because in the recent case of Henkel *v.* Pape, 10th November 1870, L. R. C. Ex. 7, it was decided by the Court of Exchequer that the sender of a message incurs no responsibility for any mistakes which may be made in the passage from him to the receiver, and as the circumstances of that case were precisely analogous to the present, the Sheriff conceives that the precedent ought to be followed. The legal position of the parties then is this: The pursuers must prove their contract. The defender instructed the Post-office authorities to carry a message to Liverpool on certain terms, but that message was never delivered, and another was substituted in its place, which the defender never authorised. There is therefore no contract between the parties, such as the pursuers put forward in their summons, and consequently the defender must be assoilzied, with expenses."

This action is laid on the contract of sale; therefore the first question is, whether or not there has been a concluded contract between the parties. An attempt is made by the pursuer to make out this by the two telegraphic messages produced. The first of these is correct; and the second is incorrect. The correct message was handed in by the defender to the telegraph office, to be transmitted to the pursuer. But a mistake was made by the telegraph officials, which led to the message being delivered to the pursuer in a materially and essentially altered form. Now, can it be said that there was here *consensus in eundem contractum* between the parties in this transaction? Clearly not. The pursuer may have been willing enough to implement the order he received; but then the defender had not sent that order, and had not consented to it.

It is said by the pursuer that in the case of a message going wrong as this has done, the sender is responsible; and the reason he alleges for throwing the responsibility upon the sender is this, that the telegraph company is not responsible. That may be the case, but it by no means follows that a party who had committed no fault is to be subjected to the loss, and far less that, as under a contract of sale—for that is the ground of this claim in the summons and record—the pursuer is on that account to be held entitled to recover when there has been no sale. In conclusion, I may say that I cannot conceive a case more in point than the English decision referred to in the Sheriff's note, and founded on at the bar.

LORD BENHOLME.—This is a plain case. The summons concludes for a certain sum as the price of a quantity of salt. But there has been no such *consensus* between the parties as is requisite for the constitution of a contract.

Ill consequences may happen to either party by such a blunder. Could it be said that the sender would be entitled to damages from the party to whom a message was addressed, for non-implement of an order which he never received?

But if I had had any doubt upon the matter it would be dispelled by the judgment of the English Courts to which we have been referred.

LORD NEAVES.—I agree. This is a demand for a price, and the question is, was there a contract of sale. Sale is a consensual contract. Was there here a *consensus*? *Consensus* may be by the parties themselves or by their authorised agents. Here there was an apparent assent to the proposed sale, but no consent, unless the telegraph officers are to be considered as the authorised agents of the sender, to the effect of making him responsible for any blunder which they may commit. That seems to me an inadmissible proposition, and one certainly of a most serious character to the mercantile classes. To hold that a sender communicating through a telegraph clerk is equally bound as if he had sent the message by a clerk of his own is a proposition to which I cannot assent.

If the mistake here had been found out *tempestive*, and the sellers in Liverpool had at once said, we will now send you the salt, there might have been some right accruing to them, but the error occurred at a critical period of the season, and was not found out until the salt was of no use.

It appears to me, therefore, that there was no completed contract of sale between the parties.

The LORD JUSTICE-CLERK was absent.

[38] This interlocutor was pronounced:—"Dismiss the appeal, affirm the judgment appealed from, and decern," &c.

ALEX. MORISON, S.S.C.—MORTON, WHITEHEAD, & GREIG, W.S.—Agents.

No. 15. X. MACPHERSON, 38. 3 Nov. 1871. 1st Div.—B.

ROGER MILTON TRAPPES, Petitioner.—*Sol.-Gen. Clark—Balfour.*
CHARLES MEREDITH AND OTHERS, Respondents.—*D.-F. Gordon—Rhind.*

Spes successionis—Bankrupt—Discharge.—A *spes successionis* may be sold and assigned so as to give the purchaser a good title, in a question with the seller, to the subject when it comes to be vested in the seller, but a *spes successionis* is not attachable by the creditors of the person entitled to succeed; and in the event of his becoming bankrupt and obtaining his discharge before the right has vested in him, it will not be carried to the trustee in the sequestration.

for £2000, dated 30th January 1829. In return, Sir James Boswell, on the same day, granted to Mrs. Leslie Cuming the following receipt:—"Edinburgh, January 30th, 1829.—Received from Mrs. Leslie Cuming the loan of two thousand pounds sterling on the thirtieth of January eighteen hundred and twenty-nine. JAMES BOSWELL." This receipt was holograph of and signed by Sir James Boswell. The receipt was retained by Mrs. Leslie Cuming, and was found in her repositories after her death. The cheque which Mrs. [50] Leslie Cuming gave to Sir James Boswell was in the following terms:—"£2000. Edinburgh, Jan. 30, 1829.—Gentlemen, please pay self or bearer two thousand pounds, which place to my account. JANE LESLIE CUMING. Messrs. Ramsay, Bonar, & Co." Sir James Boswell cashed the cheque the same day, drew the money, and appended to the cheque a receipt in the following terms:—"Received the above. JAMES BOSWELL." The cheque, with Sir James Boswell's receipt for the money annexed, Mrs. Leslie Cuming afterwards got up from her bankers, and carefully preserved. It was found in her repositories after her death. During her life Mrs. Leslie Cuming took no steps to recover payment of said sum of £2000, or of any interest thereon, from the said Sir James Boswell while he lived, nor from his general disponee and executrix, Dame Jessie Jane Montgomery Cuninghame or Boswell (his widow), after his death, which took place in November 1857. Ten days after the date of the loan Mrs. Leslie Cuming bequeathed the debt to Grace Lady Boswell, mother of Sir James, by a testamentary writing, in the following terms:—"£2000. Springfield, Feb. 10, 1829.—I give the two thousand pounds I lent Sir James Boswell, my nephew, to his mother, Grace Lady Boswell, at my death. (Signed) JANE LESLIE CUMING. To Grace Lady Boswell, Feby. ten, eighteen hundred and twenty-nine." This document was holograph of and signed by Mrs. Leslie Cuming, and it was addressed in her hand-writing on the back thus—"Grace Lady Boswell." It was found in Mrs. Leslie Cuming's repositories after her death, in the same place with her cheque and Sir James' receipt above mentioned. Besides the said testamentary writing bequeathing the said £2000 to Grace Lady Boswell, Mrs. Leslie Cuming left several other codicils, or testamentary writings, and settlements of certain specific subjects belonging to her, both heritable and moveable, and of various sums of money in favour of sundry legatees. But she did not name an executor; and she left no settlement or bequest of her general estate, heritable and moveable, and as to such general estate she died intestate on 22nd February 1863. After Mrs. Leslie Cuming's death, her nephew, Sir Thomas Montgomery Cuninghame, her executor-dative, raised in the Court of Session an action against the widow and general disponee and executrix of Sir James Boswell, concluding that she should be ordained to pay to him the said sum of £2000 sterling, with the interest thereof at the rate of 5 per cent. per annum from the 30th day of January 1829. In that action the Lord Ordinary (Ormidale), on 11th June 1867, decerned in terms of the conclusions of the summons, and the Second Division of the Court, on 29th May 1868, adhered.* Grace Lady Boswell, to whom the debt was specially bequeathed by the said Mrs. Leslie Cuming, survived the testatrix; but she is now dead, and her sole executrix and representative is her daughter, Mrs. Vassall. It was admitted that Mrs. Vassall, as representing her mother, Grace Lady Boswell, was entitled to the principle sum of £2000, and to the interest thereof from the 22d February 1863, the date of Mrs. Leslie Cuming's death, till paid. A question, however, arose between Mrs. Vassall and Sir Thomas Montgomery Cuninghame, as executor of Mrs. Leslie Cuming, in regard to the interest of the £2000 prior to the date of the testatrix's death. On the one hand, Mrs. Vassall claimed, as part of the bequest, the whole interest on the £2000 from the date of the loan, viz., 30th January 1829, to the date of Mrs. Leslie Cuming's death. On the other hand, Sir Thomas M. Cuninghame, as executor of Mrs. Leslie Cuming, maintained, and his widow and sole executrix nominate, Dame Charlotte Montgomery Cuninghame, now maintained, that the bequest of the said debt of [51] £2000 did not include the interest thereon prior to Mrs. Leslie Cuming's death, and that the interest to that date formed part of the general executry estate of Mrs. Leslie Cuming, to be administered for behoof of her general representatives.

In these circumstances the following question was put for the opinion and judgment of the Court:—"Whether Mrs. Vassall, as representing her mother, the deceased

* *Ante*, vol. vi. 890.

Grace Lady Boswell, is entitled to the interest accruing prior to the death of Mrs. Leslie Cuming upon the said sum of £2000 lent by her to the late Sir James Boswell, and bequeathed by her to the said Grace Lady Boswell?"

Argued for Lady Cuninghame;—There was no evidence of any intention on the part of Mrs. Leslie Cuming that interest should accrue on the legacy in favour of the legatee, and the interest therefore went to the representative of the testatrix.*

Argued for Mrs. Vassall;—Bequest of a debt carries the interest. The probable intention of the testatrix was, that on her death her nephew should have only one creditor, namely, his mother, for both the principal sum and interest.†

At advising,—

LORD PRESIDENT.—My Lords, this case is attended with great difficulty. The facts are peculiar, but they are few, and can be shortly stated.

Mrs. Leslie Cuming, who was the aunt of Sir James Boswell, on the 30th January 1829, lent Sir James the sum of £2000, and took therefor a receipt in the following terms:—"Edinburgh, January 30, 1829.—Received from Mrs. Leslie Cuming the loan of £2000 sterling, on the 30th of January 1829.—James Boswell." The money was received by Sir James in the form of a bank cheque, which he cashed upon the same day, appending to the cheque the following words:—"Received the above.—James Boswell." This cheque so noted was returned by her bankers to Mrs. Leslie Cuming, and was put up by her with the receipt by Sir James Boswell. In the course of ten days thereafter Mrs. Leslie Cuming wrote another document, holograph of herself, which contained a bequest to Lady Boswell, the mother of Sir James, as under:—"Springfield, Feb. 10, 1829.—I give the £2000 lent Sir James Boswell to his mother, Grace Lady Boswell, at my death.—Jane Leslie Cuming." All these documents were found together in the repositories of Mrs. Leslie Cuming at her death on 22d February 1863.

From the date of the loan in 1829 till her death in 1863 no interest was ever paid to Mrs. Leslie Cuming on this money, nor, as far as we can see from the case, was it ever asked. At all events, Mrs. Leslie Cuming got none during her life, and I think we are entitled to infer that she never asked for any.

The question whether interest was due throughout the whole of these thirty-four years is one of great difficulty; but we have not got to decide it. It has been already decided by a judgment of the Second Division of the Court. I am not surprised to find that the Judges in that Division differed as to the judgment they were to pronounce; but I am surprised to find that the true and proper defence was not stated for Sir James Boswell. He pleads that the documents libelled are not *habile* grounds of debt or claim against him, and that the claim is excluded by taciturnity and *mora*. Then, with respect to interest, he pleads that any claim therefor is excluded (1) in respect there was no stipulation and no demand ever made for payment of interest, and (2) in respect of taciturnity and *mora*. It appears to me that the true defence, which is at once suggested by the documents before us, is, that Mrs. Leslie Cuming never meant that interest should run on this loan; but unfortunately this was competent and [52] omitted, and it is therefore *res judicata* that interest is due on the loan for the whole thirty-four years.

The interest claimed was originally at the rate of 5 per centum per annum, but by a compromise that rate was reduced to 3 per cent. Even at that lower rate, however, the amount now claimed as interest amounts to £2040, being more than the principal of the original loan. This must be taken as due by Sir James Boswell's representatives, and, as I understand, it has been paid to the executor of Mrs. Leslie Cuming. The only question for us to decide is, whether Mrs. Vassall, as representing her mother, the deceased Grace Lady Boswell, is entitled to the whole of this sum of interest, or only to such portion of it as may have accrued since the death of Mrs. Leslie Cuming.

It is difficult to approach this question in an impartial state of mind; for I must confess that I have still a lingering suspicion that Mrs. Leslie Cuming never meant interest to run on this loan. I suppose, however, that we are bound to decide the

---

* Norris *v.* Harrison, 2 Maddock, 268; Rollow *v.* Irving, 4 Pat. 521; Cuming, 2 S. 620; Lock *v.* Venables, 27 Bevan, 598.

† Chaworth *v.* Beech, 4 Vesey, 555; Voet, 32, sec. 34, and 35, sec. 3, l. 5; Dig. 32, 34, 1.

case upon the assumption that Mrs. Leslie Cuming did intend that interest should run, though for thirty-four years she never asked any, even though there is no suggestion of her having been in such wealthy circumstances as to make this interest of no importance to her.

Assuming, then, that interest was to run, and (as we know) was never asked for, we must assume that it was meant to accumulate in the hands of the debtor. This points at an intention to benefit her sister, Lady Boswell. She does not leave £2000 to Lady Boswell—she leaves the £2000 lent to Sir James Boswell. If Sir James had died insolvent this legacy would have been lost, whereas, had it been a general legacy of £2000, and Sir James had died insolvent, the sum would have had to be made up out of her general executry estate. This was a legacy of a specific sum. I think, therefore, in the circumstances which I have endeavoured to explain, viz.:—(1) That Mrs. Leslie Cuming intended interest to run, and (2) that interest was never demanded by her during her life,—it must be held that it was the intention of Mrs. Leslie Cuming that the interest should run up and accumulate in the debtor's hands for the benefit of his mother, Lady Boswell. I therefore answer this question in the affirmative, and find Mrs. Vassall entitled to the whole of the interest from 1829 to 1863.

LORD DEAS.—If this had been a direct bequest of the £2000 in favour of the debtor I should have had no doubt that it carried the interest as well as the principal. But the bequest was in favour of a third party, and we must look therefore more narrowly to the terms of the document, taken in connection with the whole facts and circumstances, as indicative of the intention of Mrs. Leslie Cuming. I do not think that what is said to have been the Roman law, viz., that in such bequests the interest must always follow the principal, has been adopted into our law. I think our law goes no further than to hold that there is a presumption to that effect. Some difficulty arises here on the words of the bequest. If it had been a bequest of the document of debt itself, under which Sir James Boswell was the debtor, I should have had no doubt that that carried the interest; but the bequest is of "the two thousand pounds I lent Sir James Boswell, my nephew, to his mother, Grace Lady Boswell, at my death." These words raise some difficulty. On the other hand, the relation in which the parties stood to each other is material. Sir James was the nephew, and his mother, Lady Boswell, was the sister of the testatrix. Laying out of view the question, whether the testatrix intended herself to have exacted interest from Sir James,—assuming, as we are bound to do by the judgment of the Second Division, that she did so intend, my opinion is, that whatever was exigible by the testatrix herself from Sir James, she (the testatrix) meant to give to his mother. Further, it is material to observe that Mrs. Leslie Cuming made this written bequest almost immediately after she made the loan to Sir James. If she had died next day after making the bequest her intention would have been clear, that all that was owing by Sir James should go to his mother, and I am not disposed to think that the circumstance of her surviving for many years authorises a different result. No doubt, testamentary writings are generally to be regarded as of the date of the death, but that rule does not hold in all sorts of questions. Here the date of [53] the writing is a material element, as showing that Mrs. Leslie Cuming intended that all that would have come to herself under the document granted by Sir James should go to his mother; and that, upon the whole, is, I think, the legal and equitable result.

LORD ARDMILLAN concurred.

LORD KINLOCH.—I am of opinion that this case is to be decided, not by the application of any absolute or inflexible rule, but by a sound construction of the meaning of Mrs. Leslie Cuming in the document bequeathing the claim. Applying this principle, I arrive at the conclusion that Mrs. Cuming must be held to have bequeathed to Lady Boswell the arrears of interest as well as the principal, and that both belong to Mrs. Vassall as Lady Boswell's representative.

It must be held settled that this was a debt bearing interest, for the Court have decerned for interest against the debtor's representative. It must be further held that Mrs. Cuming, the creditor, did not intend to exact interest during her lifetime, for in point of fact she never asked any. The question then is, whether Mrs. Cuming, in bequeathing the claim to Lady Boswell, the debtor's mother, intended to bequeath also the interest, which it was her purpose to accumulate with the principal during her own lifetime.

I have no difficulty in answering this question in the affirmative. Although there

is no inflexible rule on the subject, there is always a fair presumption that the interest on the principle sum goes with the principal to which it is an accessory. There might have been considerable difficulty if it had been clear that Mrs. Cuming had intended to uplift the interest during her lifetime, and that it was only by accident that it remained unexacted, or if this was a mere balance of interest remaining unpaid. In such a case it would have been open to be strongly pleaded that, not intending to leave any interest over at her death, but to uplift it all during her life, the claim for arrears of interest had not been made over to the legatee, and so by force of law remained with the creditor's general representative. But in the actual case, and holding that Mrs. Cuming intended the whole interest to lie over unexacted till her decease, I cannot suppose her purposing anything else than that Lady Boswell was to be creditor both in principal and interest. I cannot suppose her purposing to mak e two creditors in the claim—the one for the principal, the other for the arrears of interest. Her object was plainly to give to Sir James Boswell, the debtor, a friendly creditor, who would not deal hardly with him, perhaps would not exact anything at all, or only so much as his circumstances made reasonable. This object would have been frustrated if the interest, which from Mrs. Cuming's longevity became of greater amount than the principal, had been severed from the principal, and left to devolve on the creditor's general representative, whoever that might be. I am of opinion that such was not Mrs. Leslie Cuming's intention; that Lady Boswell was made her legatee both in the principal and prospective interest; and that Mrs. Vassall, as now representing Lady Boswell, is alike entitled to both.

The following interlocutor was pronounced:—"Find and declare that Mrs. Vassall, the party of the second part, is entitled, as representing her mother, the deceased Grace Lady Boswell, to the interest accruing prior to the death of Mrs. Leslie Cuming upon the sum of £2000 lent by her to her nephew, the late Sir James Boswell, and bequeathed by her to the said Grace Lady Boswell, and decern: Find the said second party entitled to expenses, and remit," &c.

DALGLEISH & BELL, W.S.—MACKENZIE & BLACK, W.S.—Agents.

No. 18. X. MACPHERSON, 54. 7 Nov. 1871. 1st Div.—Lord Mure, M.

DAVID KINNEAR (Ferguson's Trustee), Pursuer.—*Millar—Lee.*
MRS. JANET TAINSH OR FERGUSON, AND GEORGE FERGUSON, her Husband, Defenders.—*J. C. Smith—Mackintosh.*

Husband and Wife—Provision to Wife—Conjugal Rights Amendment Act, 1861 (24 & 25 *Vict. cap.* 84), *sec.* 16.—A married woman, for whom no provision had been made by marriage-contract or otherwise, succeeded *stante matrimonio* to a legacy of £500, whereof £405, with £300 borrowed by her husband from a third party, was invested in the purchase of heritable property, the disposition being taken to the husband and wife in conjunct fee and liferent, for his liferent use allenarly, and to the issue of the marriage in fee, whom failing, to the wife's nearest heirs and assignees whomsoever, reserving full power to her, notwithstanding the destination, to sell or burden the subjects. At this time the husband was not insolvent, but six months afterwards his estates were sequestrated, and the trustee in the sequestration subsequently raised an action to reduce the disposition. *Held* (repelling the reasons of reduction) that the fee of the property, subject to the husband's liferent, and the burden of £300 secured upon it, did not exceed a reasonable provision for the wife, which, under the 16th section of the Conjugal Rights Amendment Act, was protected from her husband's creditors.

In 1869 Mrs. Janet Tainsh or Ferguson, wife of George Ferguson, spirit merchant in Portobello, succeeded to a legacy of £500, bequeathed to her by her uncle, William Dow. By the terms of the bequest her husband's *jus mariti* was not excluded.

In August 1869 Mr. Ferguson purchased certain heritable subjects in Portobello at a price of £705, whereof £300 was advanced to him in loan by the Standard Invest-

ment Society, to whom he granted a bond and disposition in security for that amount, and the balance (£405) was paid out of the legacy to his wife. The seller of the property not having obtained a conveyance from the superior, the latter granted a feu-charter in favour of Mrs. Ferguson and her husband, in conjunct fee and liferent, for his liferent use allenarly, and the issue of the marriage in fee, whom failing, to the heirs and assignees whomsoever of Mrs. Ferguson, "declaring that, notwithstanding the destination herein, it shall be competent to the said Janet Tainsh or Ferguson to sell or burden the said subjects, and to exercise every other right of ownership therein."

In February 1870 Ferguson's estates were sequestrated, and the trustee in the sequestration subsequently raised this action against Mrs. Ferguson and her husband, "for himself and his interest, and as taking burden on him for his said wife, and also as administrator-in-law for Helen Ferguson, only child procreated of the marriage," concluding for decree of declarator, to the effect that the heritable subjects above-mentioned were, to the extent of £405, purchased by Ferguson with funds belonging to him *jure mariti*, and were vested in the pursuer as trustee in his sequestration; or otherwise, that the conveyance of the fee of the property in favour of Mrs. Ferguson was a donation by her husband, made *stante matrimonio*, revocable by him, or by the pursuer as his trustee; and in like manner, that the destination in favour of the issue of the marriage was revocable, and that the property belonged to the pursuer, as Ferguson's trustee. The summons also contained an alternative conclusion for reduction of the feu-charter, under the Act 1621, cap. 18, on the ground of Ferguson's alleged insolvency at its date.

The defenders pleaded;—(1) The investment of the legacy left by the female defender's uncle being made, not in contemplation of bankruptcy, or in the knowledge of insolvency, and not as a donation by a husband to his wife, but as a moderate and suitable provision for her out of funds to [55] which she had in equity the primary right, the deed in question, in so far as favourable to her, ought to be maintained. (2) The legacy in question, being money to which the female defender has a primary equitable right, the pursuer ought not to be allowed to obtain possession of the property paid for by it, without making a provision for her adequate to secure her against absolute want.

After a proof, the Lord Ordinary pronounced an interlocutor, which, after various findings in fact,—"Finds, that it is not proved that, when the property in question was purchased, the defender George Ferguson was insolvent; and finds that previous to that date no provision had been made, by antenuptial contract of marriage or otherwise, by the defender George Ferguson in favour of the other defender: Finds in these circumstances, in point of law, that the defender George Ferguson was entitled to apply a portion of the said legacy in making a reasonable provision for the other defender; and that the application of the sum of £405 in the purchase of the said property, to the extent of £250, and the destination thereof in favour of the defender Mrs. Ferguson to the same extent, was, in the circumstances, a reasonable provision, and was not revocable by the said George Ferguson, and is not revoked by his sequestration; and that the defenders are, to that extent, entitled to be assoilzied from the conclusions of the action; but finds, on the other hand, and in point of law (1), that the sum advanced in purchase of the said property, in so far as it exceeded £250, constitutes a donation *inter virum et uxorem*, and was revocable by the said George Ferguson, and is revoked by the sequestration; and (2) that the declaration in the feu-charter, to the effect that, not withstanding the destination, it should be competent to the defender Mrs. Ferguson to sell or burden the property, and exercise every other right of ownership therein, in so far as it conferred on Mrs. Ferguson right so to deal with the property during her husband's life, was also a donation, revocable by the said George Ferguson, and revoked by his sequestration; and appoints the case to be enrolled, that parties may be heard as to the terms in which decree should be pronounced, in order to carry out these findings; and reserves in the meantime all questions of expenses." *

---

* NOTE.—The Lord Ordinary has felt this case to be attended with considerable nicety, as regards both the question of insolvency and the amount of the provision which ought, in the circumstances, to be held to be a reasonable provision for the defender Mrs. Ferguson in the event of her survivance.

[56] Thereafter the pursuer lodged in process a minute stating "that the subjects in question would sell more readily and realise a higher pur-[57]-chase price were they

"1st, As regards the insolvency, there is not much difference between the parties as to the debts which were due or incurred by the defender George Ferguson when the property was purchased in August 1869, and which seem to amount in all to about £240. The assets, on the other hand, when viewed apart from the value of the property to which the defender was in right *jure mariti*, cannot, in the opinion of the Lord Ordinary, be said to amount to more upon a fair computation than about £210. In estimating this sum the stock in trade has been taken at £73, being the amount made out by the defender from such materials as he had in his possession, and which is not so much as the average value of the stock which, according to one of the leading witnesses for the pursuer, a dealer would require to have constantly on hand for a business such as that carried on by the defender. The value of the fittings and furniture have been estimated at £70, although that is more than they realised when sold under the sequestration. Because it appears to be pretty clearly proved that upwards of £100 was paid for such articles when the business was set agoing in the end of 1867; and there is no evidence to show that, if they had been valued or realised in August 1869, they would then have incurred a depreciation of more than about one-third of their value. It is proved that there was £49 at the defen-[56]-der's credit in the bank at that date; and assuming the goodwill of the business to be worth from £20 to £25, which is much below the estimate some of the witnesses put upon it, the assets taken together would amount to somewhat more than £210, leaving a deficiency of about £30, in so far as the defender's trade assets were concerned. But when it is considered that the defender was, at this time, in right *jure mariti* to funds amply sufficient to meet this deficiency, and leave a balance wherewith to make a reasonable provision for the other defender, the Lord Ordinary has been unable to come to the conclusion that insolvency has been established as at the date of the purchase in August 1869.

"But there is another view in which, even after the purchase was made, the defender may be held to have been still solvent. By the destination in the feu-charter the property is taken to the defender for his liferent use allenarly; and it seems pretty clear that the life interest of the defender, who was apparently not above middle age, in a property valued at £700, and upon which only £300 had been borrowed, when capitalised, would amount to more than the difference between his debts and available assets, and it appears to be settled (A B, 17th November 1837, Fac. Coll.) that the valuation of a liferent annuity, by conversion of it into a capital sum, is a proper item for consideration in dealing with questions of insolvency.

"2d, Holding the defender therefore to have been solvent in August 1869, the Lord Ordinary—having regard to the sums which were held to be reasonable provisions in the cases of Craig and Galloway, 17th July 1861, 4 Macq. p. 267, and of Rust *v.* Smith, January 14, 1865, 3 M. 378—has come to the conclusion that £250, or one-half the value of the legacy, was not an unreasonable sum to set apart as a provision for the other defender. Had this money not belonged originally to Mrs. Ferguson the Lord Ordinary would have been disposed to hold that about a third of the amount would, in the circumstances, have been a proper sum to apply by way of a provision. But as the money came through the wife her provision may, it is thought, be fixed at a larger sum; and he has taken it at the one half, being the amount which, with the apparent approbation of the Court, was fixed in the case of Small, 24th February 1870, as a reasonable provision for a wife, in dealing with a question of this description under the 16th section of the Conjugal Rights Act, 24 & 25 Vict. c. 86.

"3d, Upon this assumption, the Lord Ordinary has found that the application of the legacy, to the extent of £250, in the purchase of the property in question, is not challengeable as a donation, and was not revoked by the defender's sequestration, but that the conveyance is revocable, and may be cut down as regards the excess, which seems to have been recognised as a competent course in disposing of the case of Craig *v.* Galloway in the House of Lords, and to be sanctioned by the principle of the decisions in the case of Kemp and Napier, Feb. 1, 1842, 4 Dun. 558; and of Dunlop's Trs., March 24, 1865, 3 M. 758, both in this Court and in the House of Lords.

"It was contended, on the part of the pursuer, that the effect of the declaration in the feu-charter, empowering the defender Mrs. Ferguson to dispose of the subjects

disburdened of any provision in favour of the female defender, and in lieu thereof proposed to secure a provision to the female defender of £250, payable to her in the event of her surviving her husband, and, upon his death, to be effected upon a policy of insurance with the North British and Mercantile Insurance Company, Edinburgh; and he moved the Lord Ordinary to approve of the said proposal, and in respect thereof to reduce, decern, and declare, in terms of the conclusions of the summons, but superseding extract of the said decreet until the said policy of insurance has been effected."

The Lord Ordinary then pronounced an interlocutor approving of the proposal contained in the foregoing minute, and found that, on the policy therein referred to being effected, the pursuer would be entitled to decree, in terms of the reductive conclusions of the libel, but that no expenses were due to either party.

Against these interlocutors the defenders reclaimed, and argued that if the case fell within the provisions of the Conjugal Rights Amendment Act of 1861, section 16, Mrs. Ferguson was entitled to an immediate provision out of the legacy to which she had succeeded; and that, in any view of the matter, the contingent reversion of £250, which was all that the Lord Ordinary had allowed, was much too small.* Independently of the statute, and at common law, the provision was reasonable, and the husband being solvent at its date, it was not revocable, and the deed was not liable to reduction either under the Act of 1621, cap. 18, or otherwise.

At advising,—

Lord President.—The object of the present action is to claim for the trustee and creditors in Mr. Ferguson's sequestration the whole property settled by the feu-charter of 7th August 1869; and the defence stated on the part of the wife is substantially this, that the deed in question made no more than a fair provision for her as Mr. Ferguson's wife. This defence I am prepared to sustain. I think the case comes within the operation of the 16th section of the Conjugal Rights Amendment Act. We have here a married woman succeeding to property, or at least money, which was not reduced into possession by the husband, or his creditors, or any one claiming through him; so that the operation of the statute is not excluded by the proviso contained in the 16th section. The feu-charter obtained by husband and wife from the superior of the property bears *ex facie* that the price to the extent of £405 was to be paid from money inherited by Mrs. Ferguson, the remaining £300 being provided by the Standard Investment Company. The deed then settles the fee of the subjects

---

during her life might have enabled her to deprive her husband of his liferent, and may prevent the creditors from now taking any benefit from the bankrupt's liferent interest in the property. The Lord Ordinary is disposed to doubt, as at present advised, whether the declaration would necessarily have that effect, inasmuch as the right of fee appears to be expressly burdened with the liferent interest of the bankrupt. But assuming that this would have been its effect, and that the husband, by consenting to its insertion, had thereby put it in his wife's power to defeat his liferent, and to dispose of the property for her own benefit during her husband's life, this was, it is thought, challengeable by the husband as a donation; and the Lord Ordinary has therefore found it to be revoked by the sequestration. The effect of this will be to make the liferent interest of the bankrupt available for the creditors after payment of the interest due upon the bond.

[57] "4th, It was maintained, on the part of the defenders, that, even assuming the bankrupt to have been insolvent at the date of the purchase in August 1869, the conveyance in Mrs. Ferguson's favour, in so far as reasonable, was protected by the 16th section of the Conjugal Rights Act, because the purchase was made out of money to which a married woman had succeeded, before any possession had been had of it by the husband or his creditors. And although no actual claim such as that pointed at by the statute appears to have been made by the husband against the wife in relation to the money, before the purchase was made, and the matter was arranged without any difference having arisen between the parties, the Lord Ordinary is disposed to think that there are plausible grounds for maintaining that the transaction falls within the principle at least of the statute, and might be supported by it. But as he has come to the conclusion that the bankrupt was not insolvent at that time, he has dealt with the law of the case in his interlocutor upon that footing."

* Somner *v.* Somner's Trustee, March 2, 1871, *ante*, vol. ix. 594.

upon the wife, subject to the husband's liferent. There is, indeed, a destination over; but as the wife is, notwithstanding the destination, entitled to dispose of the property, [58] and exercise every other right of ownership, she seems to me to be in the position of an unfettered proprietor, subject only to the husband's liferent.

Now, as far as I can see, the only question is whether that provision of the fee of £405 to the wife exceeds a reasonable provision within the meaning of the 16th section of the statute. The question is not whether it comes up to a reasonable provision, but whether it exceeds a reasonable provision; and if it does not, she is entitled to be assoilzied. Now, I am of opinion that it does not exceed a reasonable provision, and that decree of absolvitor must therefore be pronounced. From what passed at the discussion, we can easily see that other questions may remain behind; but they do not necessarily arise at present. All that we now decide is that the deed giving the liferent of the subjects to the husband and the fee to the wife was not an unreasonable provision in her favour, and that we must therefore assoilzie her from the conclusions of this summons.

LORD DEAS.—It is necessary in this case to observe what are the conclusions of the summons. (After reading them, his Lordship proceeded)—I have no hesitation whatever in holding that we cannot find in terms of any of these conclusions. The husband was not insolvent when the feu-charter was obtained. The effect of it was to make a provision for the wife, to whom none had previously been made. The money was inherited by her, and had never been reduced into possession by the husband. We have at present nothing to do with the effect of the bond to the Standard Investment Company, as the conclusions of the summons are limited to the £405. Other questions remain behind, but I am clear that the wife and child are entitled to absolvitor. I will only add, that I have arrived at this result on the footing that the husband's liferent is indefeasible, for I have no idea that the wife's power to sell entitles her to sell otherwise than under the burden of the liferent.

LORD ARDMILLAN and LORD KINLOCH concurred.

This interlocutor was pronounced:—"Recall the Lord Ordinary's interlocutor of 11th February 1871, and the interlocutor of 16th June 1871: Find that in the course of the year 1869 the defender Mrs. Janet Ferguson succeeded to a sum of £405 by the will of her uncle, the late William Dow, brewer: Find that the said sum had not been reduced into possession by her husband, George Ferguson, or any one on his behalf, or on behalf of his creditors, prior to the purchase of the heritable subjects contained in the feu-charter, No. 13 of process: Find that, by the terms of the said feu-charter, the subjects thereby conveyed are settled on and vested in the said George Ferguson in liferent, for his liferent use allenarly, and the said Janet Ferguson in fee: Find that the fee of the said subjects, subject to the liferent of her husband, did not form more than a reasonable provision in favour of Janet Ferguson, the wife: Therefore repel the reasons of reduction; sustain the defences, and assoilzie the defenders, and decern: Find the defenders entitled to expenses; allow an account," &c.

W. OFFICER, S.S.C.—DOUGLAS & SMITH, W.S.—Agents.

No. 19. X. MACPHERSON, 58. 7 Nov. 1871. Bill Chamber, 2d Div.—Lord Mackenzie, I.

JOHN SHIELL, Complainer.—*Scott*—*Brand.*
WILLIAM MOSSMAN, Respondent.—*M'Kechnie.*

Jurisdiction—Small-Debt Act, 7 Wm. IV. & 1 Vict. c. 41, secs. 13 and 31—Execution—Charge.—By the 13th section of the Small-Debt Act it is enacted that a small-debt decree shall be a warrant for "imprisonment, where competent, after the lapse of ten free days, if the party against whom it shall have been given was personally present when it was pronounced, but if he was not so present, poinding and sale and imprisonment shall only proceed after a charge of ten free days."

[58] A defender in a small-debt action having been imprisoned without a charge, upon a decree *in foro*, pronounced when he was not personally present, brought a suspension

of the warrant in the Bill-Chamber, in which *held* (1) that the 31st section of the Act, excluding review and stay of execution of small-debt decrees, did not apply to irregular proceedings following upon a decree, and that the suspension was competent; and (2) that the complainer having been imprisoned without a charge was entitled to have the note passed, and liberation granted.

This note of suspension and liberation was presented in the Bill-Chamber by John Shiell against William Mossman, praying for suspension of a warrant of imprisonment on a small-debt decree, and for liberation.

On 4th August 1871 the Sheriff of Haddington and Berwick pronounced a decree *in foro* against the complainer at the instance of the respondent for £11, 10s. 9d., with £3, 4s. 7d. of expenses, the extract decree bearing after the decerniture,—"And ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after the lapse of ten free days." The complainer had been present at a previous diet when proof was led and the parties were heard, but was not personally present when decree was pronounced. His agent, however, was present.

By the 13th section of the Small-Debt Act (1 Vict. cap. 41) it is enacted, that "decree and warrant being signed by the clerk shall be a sufficient authority for instant arrestment, and also for poinding and sale and imprisonment, where competent, after the elapse of ten free days from the date of the decree, if the party against whom it shall have been given was personally present when it was pronounced; but if he was not so present, poinding and sale and imprisonment shall only proceed after a charge of ten free days by serving a copy of the complaint and decree on the party personally, or at his dwelling-place." The complainer was imprisoned without a charge.

He brought this note of suspension, and pleaded;—(1) The complainer not having been personally present when decree was pronounced against him, the pretended warrant of imprisonment should be *simpliciter* suspended, or otherwise suspended until a charge for implement of the decree shall be given and have expired. (2) The complainer having been incarcerated without being previously charged to implement the said decree, is entitled to be liberated.

The respondent pleaded;—(1) No jurisdiction. (2) It is incompetent to bring a small-debt decree under review by suspension.* (3) The decree and whole proceedings being *ex facie* regular, the prayer of this note of suspension ought to be refused. (5) A diligence, though alleged to be wrongous, cannot competently be set aside while the decree on which it proceeded stands unreduced, and therefore this note falls to be dismissed. (6) The decree being *in foro*, and in terms of the statute, the respondent is entitled to have the prayer of the note refused, with expenses.

The Lord Ordinary (Mackenzie) refused the note.†

---

* Small-Debt Act (1 Vict. c. 41), sec. 31, enacts,—"No decree given by any Sheriff, in any cause or prosecution decided under the authority of this Act, shall be subject to reduction, advocation, suspension, or appeal, or any other form of review or stay of execution, other than provided by this Act, either on account of any omission, or irregularity, or informality in the citation or proceedings, or on the merits, or on any ground or reason whatever."

† "NOTE.—The complainer admits that a decree *in foro* was pronounced against him on 4th August 1871, in the Sheriff Small-Debt Court at Dunse, for the sum of £11, 10s. 9d., with £3, 4s. 7d. of expenses. He avers that, although this decree was *in foro*, he was not personally present at the time that it was [60] pronounced; and he maintains that the decree which was annexed to the summons, in conformity with the provisions of section 13 of the Small-Debt Act, 1 Vict. cap. 41, improperly contains a warrant authorising poinding and sale and imprisonment, after the elapse of ten free days from the date of the decree, which is only competent, according to the provisions of the section if he had been personally present, and does not contain a warrant authorising poinding and sale and imprisonment after a charge of ten free days, as it ought to do, seeing that he was not personally present. Having been imprisoned on 29th August 1871, without any previous charge, the complainer, who offers neither caution nor consignation, craves in his note that what he calls the warrant of imprisonment contained in the decree be suspended, and that he be liberated.

"The Lord Ordinary is of opinion that the note of suspension and liberation is

[60] LORD JUSTICE-CLERK.—It does not seem to me that the Lord Ordinary's view can be supported. The 13th section of the statute authorises execution on small-[61]-debt decrees in two different positions—first, where the party decerned against was personally present; and second, where he was not personally present. He may not have been personally present, and yet the decree may have been *in foro*. In the first of these positions there is no necessity for a charge, and imprisonment may follow after a lapse of ten days from the date of the decree without a charge; but in the second, there must be a charge, whether the decree be *in foro* or in absence.

There are certain remedies provided when the decree is in absence; but a decree may be, as this was, a decree *in foro*, although the party was not personally present.

---

incompetent, in respect of the provisions contained in the 30th and 31st sections of the Small-Debt Act. By these sections it is enacted that 'no decree given by any Sheriff in any cause or prosecution decided under the authority of this Act' shall be subject to any form of review or stay of execution on any ground or reason whatever otherwise than by appeal to the Court of Justiciary, and such appeal is declared to be competent only upon the grounds therein specially set forth, one of these being, 'such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done.' The Lord Ordinary considers what the complainer seeks to suspend under the name of the warrant of imprisonment is truly the decree given by the Sheriff against him under the authority of the Act, which, in conformity with the provisions of the 13th section of the Act, is annexed to the summons. That section provides, that when the parties shall appear, the Sheriff, after hearing them and taking proof when necessary, 'may pronounce judgment, and the decree, stating the amount of expenses, if any, and containing warrant for arrestment, and for poinding and imprisonment when competent, shall be annexed to the summons or complaint, and on the same paper with it, agreeably to the form in schedule (A) annexed to this Act, or to the like effect.' The form, No. 7 of schedule A, being that referred to in this section, is entitled, 'Decree for pursuer in a civil cause,' and it bears that 'the Sheriff of the shire of finds the within designed defender, liable to the pursuer in the sum of with of expenses, and decerns and ordains instant execution by arrestment, and also execution to pass hereon by poinding and sale and imprisonment, if the same be competent, after free days.'

"The decree pronounced against the complainer and annexed to the respondent's summons is in exact conformity with this schedule, and it is not disputed that it is *ex facie* regular. The Lord Ordinary cannot doubt that this is, according to the true intent and meaning of the Small-Debt Act, a decree given by the Sheriff under the authority of that Act. It is called a decree in the 13th section of the statute, and it is thereby directed to contain, as part of it, a warrant for arrestment and for poinding and imprisonment. It is entitled a decree in the statutory schedule, and it bears that the Sheriff decerns and ordains execution by poinding and sale and imprisonment. It is also called a decree in the 19th section of the Act, which provides that such decree, or an extract thereof, may be enforced in another county, upon being produced to and indorsed by the Sheriff-clerk of such other county. No doubt the decision of the Sheriff, entered in the Book of Causes, in conformity with the provisions of section 17 of the Act, is in that section called 'the final decree.' But that does not, it is thought, affect the construction of the 13th section, in which that final decree is called 'judgment,' and which contains the provisions for the 'decree' containing warrant for arrestment and poinding and imprisonment, when competent, being annexed to the summons, according to the form in the statutory schedule. It is this decree only which could be produced to and indorsed by the Sheriff-clerk of any other county. The complainer is truly, therefore, seeking a review or [61] stay of execution of that statutory decree, on the ground of deviation in point of form from the statutory enactment. Such review and stay of execution cannot, the Lord Ordinary considers, be given in the Court of Session.

"It may be noticed that the Sheriff-court Act of 1853 (16 & 17 Vict. c. 80) provides, section 26, that when a decree pronounced by the Sheriff in the Small-Debt Court for any sum exceeding £8, 6s. 8d. shall have been put in execution by imprisonment, the party imprisoned may bring such decree under the review of the Sheriff by way of suspension and liberation."

The irregularity in the proceedings occurred subsequently to the decree. The clerk granted a warrant for imprisonment without a charge, whereas there ought to have been a charge. This is a suspension, not of a small-debt decree, but of irregular proceedings occurring after the decree.

I think the note should be passed, and warrant granted for the liberation of the complainer.

LORD COWAN.—The prayer here is for suspension of the warrant of imprisonment, not of the decree. The decree may still be a good foundation for the diligence of arrestment, though the warrant of imprisonment be suspended. The error here was not in the decree, but in the proceedings following the decree. For this reason the objection to the competency of this suspension quite fails. The provision of the Small-Debts Act as to finality of decrees under it, have no application to such a case as the present. Then, on the merits, the statute lays down as clearly as words can, that where there is to be poinding or imprisonment, there must be a charge if the party decerned against was not "personally present" at the pronouncing of the decree. This cannot be disputed to have been the case here. For although present at the previous procedure, the decree is marked in the book as having been pronounced in absence of the suspender. A charge of ten free days is in every such case required by the very terms of the statute. It was plausibly argued that as the complainer was present throughout the whole steps in the process, and represented by his agent at the pronouncing of the decree, he must be held to have been present; but the statute is imperative, and the object to serve which the enactment was introduced would not otherwise be attained. When present he knows that decree has gone out against him; but when absent he is ignorant of that fact, and must have notice by a charge that he may by payment or by other means avoid the execution of ultimate diligence.

As to the respondent's argument, that on this interpretation of the statute a party not personally present would be entitled to a re-hearing, and the other remedies of a decree in absence, I do not agree to it. A decree may be *in foro* although the party decerned against was not present in person.

LORD BENHOLME.—A plausible argument was constructed on the words "personally present," it being urged that they meant present either in person or by an agent; but the words are very remarkable, and mean that unless the person decerned against was present in person at the place and time when the Sheriff signed the decree he is entitled to a charge. The decree may have been *in foro*, but yet if not present in person he is entitled to that mode of execution. Now, this complainer has been deprived of that right through the irregularity of this clerk. The extract decree authorises imprisonment without [62] a charge, and can it be said that the aggrieved party is to get no redress against that blunder? The decree itself is unimpeachable.

LORD NEAVES.—I am of the same opinion.

We must start with this principle, that by common law every decree must as a general rule be followed by a charge before execution of certain kinds can take place. At common law no man can be put in prison without being charged to implement the decree. Under the summary and statutory proceedings here in question it is declared that when a man has been personally present at the pronouncing of the decree his presence is held to be equivalent to a formal charge, and the ordinary precedent charge is dispensed with. But if he has not been personally present,—for example, if some of his family only have been present,—the ordinary charge is not dispensed with. Before you can dispense with the rule of the common law the precise terms of the statute creating the exception must be complied with.

This interlocutor was pronounced:—"Alter the interlocutor reclaimed against, and remit to the Lord Ordinary to pass the note, and grant liberation as prayed."

ADAM SHIELL, S.S.C.—THOMAS LAWSON, S.S.C.—Agents.

No. 20. X. MACPHERSON, 62. 8 Nov. 1871. 2d Div.—Lord Gifford, Teind Clerk.

THE REVEREND JAMES O. HALDANE, Pursuer.—*Webster—Nevay.*
THOMAS WEDDERBURN OGILVY, Defender.—*Sol.-Gen. Clark—Balfour.*

Teinds—Locality—Acquiescence—Mora—Interest.—An interim locality in 1821 did not allocate the full stipend, the minister being unable to condescend upon sufficient free teinds. In 1869 a minister who had been inducted in 1836 objected to the interim locality, on the ground that the teinds of lands of a heritor who had been no party to the process were subject to allocation. The heritor admitted liability for the future; but pleaded (1) that it was incompetent in the locality to find him liable for arrears; and (2) that the minister was barred by *mora* and acquiescence from claiming them. Pleas *repelled*, and *held*, that the heritor was liable for arrears from 1836, with interest at the rate of 5 per cent.

Teinds—Bona fides—Bona fide perception and consumption—Arrears of Stipend.—*Held* that a plea of *bona fide* perception and consumption of teinds was not a relevant defence by a heritor having a heritable right to teinds against the claim of a stipendary minister for arrears of stipend.

Opinion, that such a plea would be relevant if stated by a heritor against a titular.

Bona fide perception and consumption.—Opinion, that the plea of *bona fide* perception and consumption applies only in cases where the fruits of land have been reaped by a person holding a colourable but imperfect title.

Bona fide perception and consumption.—A proprietor cannot support a plea of *bona fide* perception and consumption by an averment that he was personally ignorant of a fact appearing on the face of his own title.

In 1811 an augmentation of stipend was granted to the minister of Kingoldrum.

The original scheme of locality did not allocate the whole stipend modified, the minister being unable to condescend upon teinds from which his full stipend could be drawn. An interim scheme was approved of on 7th March 1821, which subsisted as a rule of payment until 1869.

Colonel Ogilvy of Ruthven or his predecessors in the estate were not localled on in that interim scheme.

In 1869 the present minister sisted himself in the process, and having discovered that a portion of Colonel Ogilvy's lands of Auldallan lay in the parish of Kingoldrum he lodged objections to the interim locality of 1821, and a record was made up.

[63] After some procedure Colonel Ogilvy admitted that the lands lay in Kingoldrum, and that the teinds were unvalued. Colonel Ogilvy did not after that dispute that he was liable in payment of £7 per annum for the crop of 1869, and for the future, but he disputed his liability to pay £412, 12s. 4d., the arrears since 1836, when the minister had been inducted.

He pleaded;—(1) It is incompetent to find due or give decree for the alleged arrears of stipend in question in the present process. (2) The minister is not entitled to have decree for any arrears prior to the date of the foresaid processes being wakened and to his objections being lodged, in respect that the present objector, and his predecessors and authors, have *bona fide* received and consumed the whole teinds of the lands of Auldallan not paid as stipend to the minister of Lintrathen. (3) The minister's claim to the arrears in question is excluded by *mora*, taciturnity, and acquiescence. (4) In no view can the present objector be made liable for any of the said arrears prior to his succession in 1853, in respect that he only succeeded to the lands in question as heir of entail, and that he does not represent his predecessors and authors, proprietors of the said lands.

The minister pleaded;—(1) Under the provisions of the Act of Sederunt of 20th June 1838 the respondent is entitled to decree in the present process for the arrears claimed. Irrespective of said Act, the respondent is entitled to have his claim to arrears established, and decree therefor in this process. (2) There being no relevant grounds for the objector's plea of *bona fide* consumption, he is as heritor liable for the arrears applicable to his own period of possession, and he is also, as the heritor succeeding to and representing his mother, liable for the arrears applicable to her period of

possession. *Separatim*, He is also, as his mother's general heir and representative, liable for these last-mentioned arrears.

The Lord Ordinary allowed a proof, and thereafter pronounced this interlocutor:—"Finds that the objector, Thomas Wedderburn Ogilvy, is not liable to pay to the Reverend James Ogilvy Haldane the arrears of stipend shewn in the state of arrears No. 97 of process, prior to the stipend due for crop and year 1869, and to this extent sustains the objections for the said Thomas Wedderburn Ogilvy to the said state of arrears; but finds that the said Thomas Wedderburn Ogilvy is liable to be localled upon, and to pay to the minister in respect of the lands of Auldallan, situated in the parish of Kingoldrum, the sum of £7 per annum for crop and year 1869, and for all subsequent crops and years until a new locality is made: Further, and in regard to the expenses incurred in all the questions between the minister and the said Thomas Wedderburn Ogilvy, part of which were reserved by interlocutor of 9th July 1869, finds, in the circumstances, no expenses due to either party up to the present time, and decerns." *

---

* "NOTE.—The main question argued before the Lord Ordinary, and as to which the proof was led, was whether the objector, Thomas Wedderburn Ogilvy, was liable in the arrears of stipend prior to 1869 claimed by the minister in respect of the objector's lands of Auldallan situated within the parish of Kingoldrum. The objector, Mr. Wedderburn Ogilvy, has admitted that he is liable to pay stipend for crop and year 1869, and subsequent years, and the amount of stipend to be paid was fixed by interlocutor of 9th July 1869 at £7 per annum, so that the only question between the parties since 9th July 1869 has been the liability for arrears.

"Against the claim for arrears two pleas are relied upon by Mr. Ogilvy,—First, That in point of form the claim for arrears cannot be enforced in the present process, but that the claim must be made and tried in an ordinary action; and second, and on the merits, that the arrears cannot be claimed in respect that down to 1869 the whole teinds now allocated as stipend were *in bona fide perceptæ et consumptæ* by Mr. Ogilvy. It was in reference to the question of *bona* [64] *fides* that a short proof was led on 17th March current. All other matters of fact either appear on the face of the documents, or are admitted in the joint minute of admissions, No. 144 of process.

"In the event of it being found that arrears of stipend were due by Mr. Ogilvy, further questions arose as to their amount, and as to the interest claimed thereon. There was also a question as to whether Mr. Ogilvy represented the prior proprietors of Auldallan, or was liable for arrears prior to the date of his own succession to these lands. This last question was taken out of the case by a joint minute, adjusted by the parties of this date (March 27, 1871), and lodged at the conclusion of the debate.

"The whole questions as to the arrears claimed, are, in the Lord Ordinary's view, attended with much nicety and difficulty. The ground on which the Lord Ordinary's judgment proceeds is chiefly, indeed almost exclusively, the plea founded upon *bona fide* perception and consumption, but it may be right shortly to notice the other questions also.

"(1) The question as to the form in which the arrears are claimed depends mainly upon the terms of the Acts of Sederunt 5th July 1809, and 20th June 1838. The first of these Acts provides for the preparation of an interim scheme of locality, 'according to which the minister's stipend shall be paid, aye until a final locality shall be settled.' The second Act, that of 20th June 1838, provides that in certain cases a new interim scheme of locality may be prepared, and also a state of arrears; that on the new scheme and state of arrears being approved of, the Lord Ordinary shall give decree for the arrears, and the new or rectified scheme shall subsist as a new interim rule of payment till set aside by any other rule which may be afterwards granted on cause shewn.

"In the present case the original scheme of locality did not allocate the whole stipend modified to the minister, the minister being unable at the time to point out teinds from which his full modified stipend could be drawn. Only a part of the stipend therefore was localled under the interim scheme approved of on 7th March 1821, and under this interim scheme the stipend so partially localled was drawn by the present minister and his predecessors down to 1869. This interim locality took effect from 1811, when the stipend was modified, and thus subsisted as a rule of payment for fifty-eight years.

[64] The minister reclaimed. The import of the proof as to *bona fides*, and the argument of the parties, are fully given in the note of the Lord Ordinary, and the opinions of the Judges.

"In 1869 the present minister sisted himself to the process, and having discovered that a portion of Mr. Ogilvy's lands of Auldallan were in the parish of Kingoldrum, and that although the teinds of that portion were unvalued, they were not included in the interim locality of 1821, he lodged objections in February 1869; and ultimately, after making up a record with Mr. Ogilvy, his objections were sustained of this date (July 9, 1869), to the effect of finding that the lands in dispute were to be localled upon, all questions, however, as to arrears being reserved. Thereafter, a new interim locality was made up and approved, and a state of arrears, bringing out a sum, with interest, due to the present minister since his induction in 1836, amounting to £419, 12s. 4d. This includes, however, the stipend for crop 1869, being £7, which Mr. Ogilvy does not dispute, so that the real question between the parties relates to the arrears prior to 1869, amounting to £412, 12s. 4d. The question of form is, whether, supposing this sum due, decree can be given therefor in the present process.

"The objector's contention is, that the Act of Sederunt of 1838 does not apply to the present case; that the original locality has not become ineffectual by any of the causes mentioned in the Act. On the contrary, it has been completely effectual for the whole sum thereby localled, just as effectual as it was when it was pronounced. He urged that the omission of lands from an interim locality, whether accidental or intentional, was no reason for getting a new interim locality, and that at all events no new interim locality could be given which would have the effect of making a new heritor a party to the process, so as to subject him to payment of arrears.

[65] "The Lord Ordinary, if it had been necessary to dispose of this question, is inclined to think that, if arrears were really due by Mr. Ogilvy, they could competently be decerned for in the present process. It would be with extreme reluctance that he would remit the minister to an ordinary action to make good arrears of stipend included in the final decree of modification. Such action may be necessary where parties not heritors are sought to be made liable for arrears, or otherwise; but supposing Mr. Ogilvy the proper debtor as heritor, it would be very hard that, with the proper parties in Court, and with the whole elements for decision available, the minister should be denied his remedy in the action which has for its very object the fixing the stipend, and determining the liability therefor, and that from the date of the decree of modification.

"The construction of the Act of Sederunt of 1838 contended for by Mr. Ogilvy seems to be too strict and critical. The evil to be remedied was the non-recovery of 'the stipend awarded,' that is, modified; not the non-recovery of a portion only of the stipend localled. The 'efficacy' which is spoken of in the Act is the efficacy to make good to the minister the modified stipend, and an error by omitting an heritor altogether seems as good a reason for a new interim scheme as an error in the teind stated, or as a deficiency caused by a surrender of teinds. In short, where, during the tedious process of a locality, a readjustment may be made, so as to prevent the minister suffering deficiency 'to a considerable extent,' there would seem to be a fair case for the application of the remedial Act of Sederunt.

"On the other hand, however, the Lord Ordinary is clearly of opinion that all fair objections and all equitable defences against payment of arrears must be open in the present process, just as they would in any ordinary action. In this view, the Lord Ordinary cannot give effect to the minister's plea that the interlocutor of 9th July 1869, fixing £7 as the teind of Mr. Ogilvy's land, is *res judicata*, fixing the amount not only for the future, but also for the past, and that the same, coupled with the approval of the new interim locality, implies decree for the arrears sought, saving only questions of calculation. It seems conclusive against this view, even were there nothing else, that all questions as to arrears were expressly reserved by the interlocutor of 9th July 1869; but on a broader ground the Lord Ordinary thinks that if arrears may be competently decerned for at all, all equitable objections must be open for consideration.

"(2) On the question of *bona fide* perception and consumption there is much difficulty, and much room for argument.

"As to the matter of fact, the Lord Ordinary thinks that it is sufficiently proved that Mr. Wedderburn Ogilvy was entirely ignorant that any part of his lands was situated in the parish of Kingoldrum, or that he was liable in any part of the stipend

[65] LORD BENHOLME.—This reclaiming note submits to the review of the Court an interlocutor of Lord Gifford, whereby his Lordship has sustained the defence of

---

of that parish. Until a question arose about a division of commonty a few years ago he never heard it alleged that any part of his estate was in Kingoldrum, and even then he understood it was only a small patch, trifling in extent, and still more trifling in value. It is also proved that Mr. Ogilvy, after paying stipend in Lintrathen, which he understood to be out of his whole lands of Auldallan, spent the rents on the footing that there was no further claim against him.

"Of Mr. Ogilvy's personal *bona fides*, therefore, there can be little doubt; but as he himself explains that he is entirely ignorant regarding his title-deeds, and regarding documents relating to his property, leaving everything to his agents, it is necessary to inquire whether the parochiality of the portion of Auldallan in Kingoldrum was a matter of notoriety, which ought to have been known to Mr. Ogilvy or his agents. Here also the proof is clear enough. The local factor, Mr. Forrest, the tenant in the lands, Mr. Mackay, and the Edinburgh agent, Mr. Mackenzie, were examined. They all say that they never heard of the claim for Kingoldrum stipend till the present question was raised. The tenant in the lands, born at Auldallan, and whose father was previously tenant therein, while paying schoolmaster's salary, road-money, and parochial burdens in Lin-[66]-trathen, has until recently paid none in Kingoldrum. The older titles down to 1826 describe the lands in dispute as in Lintrathen, and not in Kingoldrum, and the whole tacks down to that granted in 1867 describe the lands as in Lintrathen parish. It is true that in the valuation-rolls from 1856 downwards a portion of the lands is entered as in Kingoldrum, but this seems to have arisen from the knowledge of the valuation assessor, and cannot be held as importing a knowledge of the present claim in Mr. Ogilvy.

"Still further, Mr. Ogilvy held a decree of valuation of the teinds of Auldallan, and this valuation was exhausted by the stipend paid in Lintrathen. Mr. Ogilvy seems to have believed *in bona fide* that no further teind was payable for his estate, and even when he and his factors came to know that a small corner of the estate was in Kingoldrum parish, there was nothing to disturb their belief that the whole teinds were nevertheless valued. It was only when a copy of the decree of valuation was recovered from the record by Mr. Mackenzie, after the present question arose, that he became aware that a portion of Auldallan, in Kingoldrum parish, was not included in the decree of valuation. No copy of that decree of valuation was among the estate papers, and none was ever seen by Mr. Mackenzie till he sent to the teind office. As for Mr. Ogilvy himself he never saw the decree of valuation at all. It may be added that down to 1868 or 1869 the minister of Kingoldrum himself did not know that any part of Auldallan was within his parish.

"On the whole, therefore, the Lord Ordinary thinks it may be held that Colonel Ogilvy drew and spent the free rent of his lands, including the teinds in Kingoldrum, to which he has an heritable right, and that in entire ignorance of the present claim, and in the *bona fide* belief that no such claim was running up against him.

"The question of law remains, does the *bona fide* perception and consumption of teinds bar the claim of a minister who is ultimately found to have a right to stipend out of these teinds? The Lord Ordinary thinks that, without laying down any general rule, this question must be answered in the affirmative in the present case.

"There are certainly cases where the *bona fide* consumption of teinds does not bar a claim for arrears. Thus where payments of stipend are made under an interim decree of locality there is an implied judicial contract that, when final decree is pronounced, over and under-payments will be adjusted, going back to the commencement of the process, and all pleas, either of prescription or of *bona fide* consumption, are excluded—(Weatherstone *v.* Marquis of Tweeddale, 12th November 1833, 12 S. 1).

"This case was strongly founded on by the minister as conclusive of the present question, and as applicable to a claim for arrears by the minister as well as to claims of relief among the heritors. The Lord Ordinary cannot so read the judgment. The minister is no party to the judicial contract among the heritors, who are *correi debendi*, each to the extent of his teind, and it may well be that if he fails to make a demand at all his claim for arrears may be met by the plea of *bona fide* consumption, when no such plea would avail against an heritor claiming relief for over-payment. Such over-payments are necessarily made under the interim decree, and relief cannot be got till

[66] *bona fide* perception, stated by Mr. Wedderburn Ogilvy, to a claim by the Rev. Mr. Haldane, the minister of the parish of Kingoldrum, to a considerable sum of

---

the final locality. The claim of relief is necessarily reserved, and all the heritors parties to the process are bound to know thereof, and to act accordingly.

"But the main specialty in the present case is, that neither Mr. Ogilvy nor his author were ever personally made parties to the present process, or were ever made aware that they had any interest either actual or contingent therein. No doubt all the heritors in a parish are cited edictally at the parish church, and so constructively made parties to the process of locality. But this is not enough in a question of *bona fides*. *Mala fides* can only be induced by personal and individual knowledge, and not by a mere edictal citation of which the party never heard, and made in a parish church in which he never sat, and with which [67] he thought he had nothing to do. The minister who raised the augmentation and locality did not include the owner of Auldallan as one of the heritors. No part of Auldallan was given up in the minister's rental or otherwise. Mr. Ogilvy and his authors were not held as confessed to anything. Neither Mr. Ogilvy nor his lands are once mentioned in the process till after it has gone on for sixty years, when, for the first time, the parochiality of a portion of the lands is discovered by the present minister.

"In such a case the Lord Ordinary is by no means sure that the plea of *bona fide* consumption would not avail even in a question with the other heritors; for while there is a judicial contract between heritors who underpay and overpay that they will adjust accounts at the end of the day, it would be very strong to hold that there is such a judicial contract with an heritor who was never asked to pay at all, and whom everybody supposed to have nothing whatever to do with the matter,—a supposition that was acted on for sixty years.

"But the plea applies with stronger force against the minister. He made no claim against the absent heritor, because he honestly believed that no claim existed. The omitted heritor had the same honest belief. It is out of the question to suppose that as between them there was a judicial contract of any kind, far less a contract that arrears might run up at 5 per cent. interest, and that all objections, prescription as well as *bona fide* consumption, should be excluded.

"But then it was said by the minister that, apart from Weatherstone's case, teinds are not a subject which can be *bona fide* consumed, and an ingenious argument was submitted that every one interfering with them must be held to know that stipend is due therefrom. The Lord Ordinary thinks that the minister's argument on this point is not well founded either in principle or in authority.

"Teinds, though they are *debita fructuum*, are recognised as a heritable right of property. Mr. Ogilvy is undoubtedly the heritable proprietor of his teinds in Kingoldrum, although they are not included in his decree of valuation. It can hardly be disputed that a supposed proprietor of teinds may uplift and consume them *in bona fide*, just as a supposed proprietor of lands may uplift and consume the land rents. No doubt teinds are subject to payment of stipend, but land rents also are subject to certain burdens, which may or may not be extinguished. The fallacy of the argument for the minister lies in assuming that all teinds must every year pay stipend, and that to their full extent, so that there must be a *conscientia rei alienæ* in every one who intromits therewith. But it is not true that teinds are always liable in stipend. There is an order of liability among teinds, and it is not till those primarily liable are exhausted that any liability for stipend attaches to the postponed classes.

"Still further, the argument for the minister forgets that the *bona fides* of Mr. Ogilvy consists in the honest belief that the lands were in Lintrathen, and that he had paid stipend out of them in that parish. *Bona fides* may be founded on any honest belief leading to the conclusion that the annual proceeds belong to the consumer. An honest belief that there were no teinds due would do, as will be shown immediately. A *decimæ inclusæ* title, which, though bad in law, the holder believed to be good, would be a fair foundation for *bona fide* consumption, and the *bona fide* belief in the non-parochiality of lands seems an excellent foundation for acting as if the minister of a foreign parish has no claim.

"Indeed the very fact that teinds are *debita fructuum*, to be drawn year by year from the fruits, and are never *debita fundi*, or permanent burdens on the property itself, is a reason why the principle of *bona fide* consumption should apply to teinds

[67] money, as arrears of stipend lately allocated to him by a corrected scheme of locality. Without at present adverting to the particular circumstances of the [68] case, I observe

with peculiar force. The intromitter with teinds may fairly hold that claims upon them will be made year by year, and may safely consume the free balance.

"But there is authority for holding that the principle of *bona fide* consumption applies to teinds as well as to other subjects; and Bankton, II. viii. 141, ex-[68]-pressly does apply to teinds. The principle, as laid down by Erskine, II. i. 25, and *post*, says that a heritor, 'if the lands immemorially out of use of the payment of tithes, will be free from bygones preceding the date of citation, though he should be subjected in time coming; and if the minister's title was not limited by a decree of locality, use of payment to him will be deemed a consideration for the whole tithes, and free the heritor from bygones to the titular or patron.'—See various old cases cited by Bankton.

"In the case of Stirling *v.* The Feuars of Denny, 25th June 1731, Morison, 1717, it was expressly held that a small payment to the minister, without challenge by the titular, was a *bona fide* payment for the whole teind, and barred the titular's claim for arrears. This is a decision of the House of Lords. See Report, 1 Paton, Craigie, and Stewart, p. 90.

"In Elder *v.* Fotheringham, 8th January 1869, 7 Macph. 341, where an alleged *decimæ inclusæ* right was found to be invalid, it was sustained as a good title as founding *bona fide* consumption, and the minister was held not entitled to bygone arrears of stipend, but only to have it found that the lands should not be exempted in future.

"In Cuthbert *v.* Waldie, 24th January 1840, 2 D. 447, *bona fide* consumption of teinds was sustained as a good defence for bygones, prior to the date of reduction of a final decree of locality, which was found to be erroneous and inept. No doubt here there was a final decree of locality, and the case forms a contrast to the case of Weatherstone; but it is quite conclusive that *bona fide* consumption may be applicable to teinds. Reference may also be made to Scott *v.* The Heritors of Ancrum, 25th February 1795, Mor. 15,700; Haldane *v.* Adamson, 11th December 1804, Mor. *Bona et Mala Fides*, Appx. 3.

"In the whole circumstances, the Lord Ordinary has found himself constrained to sustain the plea of *bona fide* consumption in the present case. It need hardly be added that though consumption seems to be proved in the present case perception would have been enough.

"(3) The view which the Lord Ordinary has taken makes it unnecessary to deal with the subordinate questions as to the amount of the arrears and as to interest. He will only observe that he could hardly hold the interlocutor of 9th July 1869, which proceeded without proof, and upon an admission, as fixing the rent of the lands from 1811 downwards as £35 per annum. The admission was an admission of the then present rent, which, though it may regulate the future till some change takes place, cannot exclude proof that in preceding years the rent was less. It seems to be proved that by improvements and otherwise the rent has been greatly increased during the successive leases. Indeed there might have been ground for holding that the rent of 1811 was the true rent till a new augmentation was brought; otherwise Mr. Ogilvy would be in a worse position than the heritors who were held as confessed upon their rentals of 1811.

"On the other hand, and on the question of interest, the Lord Ordinary, if he had held arrears to be due at all, would have awarded simple interest at 5 per cent. He thinks that this follows from the judgment in the case of Dawson *v.* Pringle, 15th June 1808, Mor., Appx., Annual-rent, 5. He, however, abstains from entering into these questions.

"The only remaining point is the matter of expenses, and this question embraces the expenses under both records, that is, both as to the parochiality of the lands and their liability for future stipend, and as to the minister's claim for arrears.

"The Lord Ordinary regrets much that the parties should have thought it necessary to have made up a second record as to the arrears. The question of the parochiality of the lands was decided by the Lord Ordinary's predecessor (Lord Mure), and if the attention of the present Lord Ordinary had been called to the subject and to the former record, he would not have allowed a new record to be made up. A very small addition to the former record would have really raised the whole questions. As it is

that, in order to support this interlocutor, your Lordships must be prepared to decide two questions in favour of the objector, Mr. Ogilvy—first, [69] whether the said defence is relevant at all, against the claim of a stipendiary minister; and, secondly, whether the objector has qualified a sufficient case of *bona fides*. The former of these is by far the more interesting, involving an important and general point of law, and, in my opinion, turning upon distinctions in the law of Scotland of a fundamental character.

The proper range and application of this defence are suggested by the very terms in which it is announced. It deals with *fructus percepti*, the fruits of land that are capable of being reaped; and where no such fruits are in issue it can have no application. Its normal application is, where land has been possessed, and its fruits reaped or enjoyed upon a colourable but imperfect title. When the infirmity of such title is ultimately discovered and ascertained, the true proprietor, whilst he successfully vindicates his right to the principal subject, and to its future fruits, is liable to be met with this special defence as to bygones.

In sharp distinction to the claims of such proprietor stands that of a mere creditor, who sues upon a *nomen debiti*—whose rights extend to nothing else, and to nothing more, than the recovery of a sum of money. The debt may be secured upon land. It may be due by heritable bond. It may be a *debitum fundi*. But the security, which is a mere accessory, does not alter the essential character of the principal claim. That claim is exclusively pecuniary. It is a claim for a sum of money that may be counted, and not for fruits that may be reaped.

It is believed that this prominent distinction has never been disputed or overlooked, in reference to what I have termed the normal application of this defence. It remains to consider its application to the subject of teinds.

The Lord Ordinary is undoubtedly right in holding that the defence of *bona fide* perception may apply to arrears of teinds. His Lordship's error appears to me in not observing the true limitation of its application. The distinction already noticed, between a proprietor vindicating a landed estate and a mere creditor claiming a sum of money, is strictly analogous to the distinction, in the case of teinds, between a titular and a mere stipendiary. Against a proper titular, who is the legal proprietor of the heritable, and in general feudal, estate of teinds, the defence of *bona fide* perception—the perception of those fruits which are the subject of his right and the object of his claim—is directly and peculiarly applicable. Against the stipendiary, on the other hand, who, under his modification and locality, has no other than a claim for an annual payment of money, the defence has no application. The source of the Lord Ordinary's misapprehension, in this respect, becomes apparent from the manner in which he accounts for the established principle, that in the final adjustment of the accounts of over and under-paying heritors, under an interim locality, the defence of *bona fide* perception cannot be admitted. His Lordship bases this principle upon the somewhat artificial hypothesis of a *quasi* contract of ultimate restitution among the heritors. And as an under-paying or a non-paying heritor cannot be supposed to be a party to any such *quasi* contract with the minister, so his Lordship concludes that the same law cannot be held to exclude the defence in question as between them. I cannot help thinking that this is a somewhat narrow, if not a mistaken, view of this subject. The claim of an over-paying heritor against an under-paying heritor is strictly and simply a claim of debt. It is a claim for money, and for nothing [70] else—for money advanced by the creditor for the debtor, at a time when their respective pecuniary liabilities were misunderstood. During the subsistence of the erroneous interim locality the one heritor has had in his pocket the money of the other, and money being the only thing

---

the minister has succeeded in the first [69] record and the heritor in the second; and although there has been a proof and an inquiry under the second record which was not necessary under the former, the Lord Ordinary thinks that success has been divided between the parties. The heritor has not been successful, in the Lord Ordinary's view, in his attempt to exclude the question altogether, and drive the minister to an ordinary action. It is perhaps not inequitable to take into view the long exemption which the heritor has enjoyed, and the good fortune which has exempted him from all bygones. The minister's ignorance of the true position of the lands was his misfortune and not his fault, and he has been put to great expense in getting the error rectified. In the whole circumstances, the Lord Ordinary thinks it equitable that each party should bear their own expenses."

that he has to restore, he cannot defend himself upon the allegation that he has been reaping and consuming fruits.

The claim of the minister for his bygone stipends is precisely of the same kind. Just as the claim of the over-paying heritor is for money which he has advanced, and of which he claims restitution, so the claim of the stipendiary is for money which he ought to have received from the heritor. It is a claim for money, and money alone, and he cannot be dealt with as if his claim were for the fruits of the earth. In what cases then has it ever been held that this defence applies to teinds? The answer seems plainly to be, that it applies to the claim of a proper titular, and to his claim alone. It is a titular, and a titular only, who has a good claim to those fruits of land which constitute teinds—a good claim to that which is the subject, and consequently the basis of this defence.

All the cases referred to by the Lord Ordinary, when carefully examined, appear to support the view of the law I have suggested, and there are others to which his Lordship has not adverted, which run directly counter to the grounds of his decision.

In the case of Stirling *v.* The Feuars of Denny, referred to by the Lord Ordinary, it was a titular against whom the defence was sustained. The case of Cuthbert *v.* Waldie turned upon the effect of a final locality. And the claim was not one at the instance of a stipendiary.

The only case in which it might, at first sight, be supposed that this defence was held applicable to the claim of a stipendiary is the case of Elder *v.* Fotheringham, 8th Jan. 1867, *ante*, vol. vii. 341. This case is twice referred to by the Lord Ordinary in the course of his note. His Lordship announces as law that "a *decimæ inclusæ* title, which, though bad in law, the holder believed to be good, would be a fair foundation for *bona fide* consumption." And he afterwards refers to the case of Elder *v.* Fotheringham as one in which, "where an alleged *decimæ inclusæ* right was found to be invalid, it was sustained as a good title, as founding *bona fide* consumption, and the minister was held not entitled to bygone arrears of stipend, but only to have it found that the lands should not be exempted in future."

The Lord Ordinary appears to have been a good deal moved by this decision, in which undoubtedly a stipendiary was the claimant. But, on examining the case it will be found that the heritors' main defence was founded on the protection of a final interlocutor, which, as to bygones, the minister was not allowed to open up, he having acquiesced in it for several years after his induction. None of the Judges founded their opinion upon *bona fide* perception, which indeed is not mentioned by any of them except Lord Kinloch, who is careful to observe—"I do not so hold on the ground of the rule applicable to *fructus bona fide percepti*, a rule somewhat difficult of application in the case of an inherent burden, such as that which lies on teind."

No case, then, can be referred to in which the claim of a stipendiary has ever been successfully met by this defence, and, if I mistake not, it was admitted at the bar that the interlocutor under review is the first that has ever been pronounced to that effect. But this is not all, for there is more than one case in which the opposite doctrine has been authoritatively established, and the clear distinction between property and debt—between a titular and a stipendiary—has been given effect to.

The distinction between a claim for money unduly retained and one for bygone teinds reaped upon a colourable title was well brought out in the case of Oliphant *v.* Smith, 30th Nov. 1790, Mor. 1721.

The Faculty report bears as follows:—"In 1750 the predecessor of Mr. Smith obtained a decree against the predecessor of Mrs. Oliphant for payment to him as titular, of the teind-duties of the lands of the latter, for thirty-nine years preceding, and then deduced an adjudication against the estate for the amount, being a considerable sum. Many years afterwards, during which period Mr. Smith con-[71]-tinued in possession of the teinds, Mr. Oliphant, in consequence of the recovery of title-deeds, shewing his right to them, prevailed in an action of reduction of the above-mentioned decrees for payment and of adjudication. It came then to be a question how far the possession on the part of Mr. Smith, which was admitted to have been *bona fide* held, could avail him; whether the whole sum of arrears understood as *fructus percepti*, or at least the annual rents of that sum as accumulated in the adjudication, should be found to belong to him, or if he was to retain only the teind-duties subsequent to the decree in his favour, which he had levied."

The ultimate finding of the Court repelled Mr. Smith's claim to retain the sum contained in the adjudication, or its interests, as being simply a debt, but held that

"the defence of *bona fides* is applicable to the teind-duties uplifted by Mr. Smith, from the date of the decreet, 1750, to the date of citation to this action." The report of the case bears that "in a reclaiming petition it was endeavoured to show, by the following authorities from the civil law and from the law of Scotland, that a *bona fide* possessor is not bound to restore the interest of money *indebite solutum*, any more than the natural fruits of other subjects." Then follows a list of authorities, which, however, produced no effect upon the Court, for the petition was refused without answers.

It is proper to refer to one other case, because it relates to teinds, and brings out in striking language the distinction between the claim of a titular and that of a stipendiary. It is the case of Beg *v.* Rig, July 3, 1751, Mor. 1719. This was an action at the instance of the widow of a stipendiary for arrears of stipend due to her deceased husband. The report bears—"The defence was *bona fide* possession and consumption, the lands being held *cum decimis inclusis*; for so was found in Douglas *v.* Wedderburn, 19th July 1669; Stirling *v.* The Feuars of Denny, 25th June 1731. Pleaded for the pursuer—The decisions were betwixt titular and heritor, which does not apply to the case of a minister. The rights of titular and heritor are exclusive of each other; but an heritor's right to teinds does not exclude a minister's stipend."

The Court ultimately repelled the defence; thus negativing the pretension of the heritor in pleading *bona fide* perception against a stipendiary. This case, which for more than a century has ruled the practice of the Court, sets forth in the argument of the successful party the true ground of judgment in terms both logical and satisfactory.

I am therefore of opinion that the Lord Ordinary is in error in holding that the defence of *bona fides* is relevant in this case.

But further, I am of opinion that, as to the matter of fact, the objector has not, or rather cannot, qualify any proper case of *bona fides*. And here I may say that I do not go upon any suspicion as to the personal truthfulness of the objector. No one who knows Mr. Wedderburn Ogilvy will be disposed to doubt or disbelieve the judicial statement that he makes as to his ignorance that any part of his lands lie in the parish of Kingoldrum. But this does not exhaust the case. The question is this, whether he was, in the circumstances of his case, entitled to be ignorant of a fact which was declared on the face of his most important titles—his investiture under the Crown, and the valuation of 1799, accessible to him on record, if not contained in his charter chest—a valuation led with special reference to the subsequent locality under which he and his predecessors have been relieved from the burden of unvalued teinds in the parish of Lintrathen, and which contained, *in gremio*, a conclusive proof that the party, his predecessor, who led it, had other lands in the parish of Kingoldrum. No man seems entitled to be ignorant, in such a case, when that ignorance is to be made to affect the rights of others. It occurs to me that the doctrine of *res noviter veniens ad notitiam*, as adopted in our practice, affords an analogy of some utility in this case. It is not enough for a party pleading *res noviter* to say that, in point of fact, he was not aware of what, at a late stage of a case, he wishes to found upon and to prove; more especially if the information was within his power, and bore materially on his own rights and interests in conflict with those of a competitor.

But perhaps the most unfavourable view for the objector which can be taken [72] upon this part of the case is suggested by asking the question, upon what title the objector had right to reap and enjoy the teinds of his lands in the parish of Kingoldrum. His title plainly was his crown-charter and infeftment; and these writs bore, on the face of them, the parochial situation of these lands. The objector's own title was conclusive against himself, and it would be contrary to all principle for him to found upon his title as to one effect and to ignore it as to another. In conclusion, I have to say that I agree with the Lord Ordinary in thinking that it is competent to decern for the arrears of stipend in this depending conjoined locality, without rendering it necessary to raise a new action. Just as an over-paying heritor would have his remedy in the adjusted locality, without a separate action, so the minister is entitled to recover his arrears due under the adjusted locality, without raising a separate action.

I have to propose to the Court that the interlocutor of the Lord Ordinary should be altered; that the objector's defence of *bona fide* perception should be repelled; and the cause proceeded with as to the question of interest, and also as to the value to be adopted as the measure of the teinds in the earlier years of this accounting.

LORD COWAN.—The Lord Ordinary has sustained the objections stated by the heritor, to the effect of relieving him from payment of arrears of stipend prior to that

due for crop and year 1869. And in his note he explains that he has arrived at this conclusion on two grounds, 1st, that the defence of *bona fide perceptum et consumptum*, pleaded by the heritor, is well founded in the facts established in this case, parole and documentary; and 2d, that such defence cannot be got quit of by the minister on the ground of its being inapplicable in principle to a claim for arrears of stipend. I am of opinion that on both grounds the conclusion arrived at by the Lord Ordinary is erroneous.

There are certain facts which do not admit of dispute.

The lands, from the teinds of which the stipend claimed is asserted to be due, lie locally in the parish of Kingoldrum, of which the reclaimer is incumbent. The teinds of these lands have not been localled on for stipend to the minister of any parish, certainly not of Kingoldrum, and as certainly not of Lintrathen. As regards the latter parish, however, the teinds of the estate, under the general name of Auldallan, in so far as the lands are situated in that parish, have been localled on for stipend, and are exhausted in terms of a decree of valuation in 1799, and of a decree of locality obtained in 1802.

Further, the special lands, the teinds of which are here in question, have been described in the crown-titles of the heritor and of his predecessors from time immemorial as "lying within the parish and lordship of Kingoldrum," while the remaining lands of the estate of Auldallan are described as lying within the parish and barony of Lintrathen. This is especially the case in the crown-charter of 1827, expede by the objector's mother, and in the objector's own title, completed under precept from Chancery in 1854. There are indeed intermediate base rights, which are confirmed by the terms of these charters, in which the whole estate of Auldallan is described as within the parish of Lintrathen; but the immediately preceding crown-charter, which appears to have been dated in 1694, has not been shown to have been expressed otherwise than the instrument of resignation on which the charter of 1827 was expede.

Then as regards the claim of the minister for these arrears of stipend, it rests upon a decree of augmentation obtained by his predecessor in the year 1811, in which no final decree of locality has been pronounced, but a mere interim decree, under which the teinds of the whole lands within the parish, other than those of the special lands belonging to the objector in Kingoldrum, have been exhausted, and are insufficient to meet the stipend modified to the minister in 1811.

These appear to be the more material facts bearing on the defences pleaded by the objector, with this addition, that the lands, the teinds of which are in question, were inserted in the statutory valuation-roll for 1856–1857, and in all the subsequent valuation-rolls, as lying within the parish of Kingoldrum, and have been assessed for parochial burdens as locally within that parish.

[73] As to the defence of *bona fide* perception, I am of opinion (1) that no heritor can plead that defence when the facts on which it is alleged to be based are at variance with the terms of the title-deeds by which he is invested in his estate; (2) that personal want of knowledge of the contents of his title, because of his having left the management of his estate to others, will not avail the heritor in such a question as this; (3) that in this view the heritor must be held to have been perfectly able to make himself acquainted with the fact that the portion of his estate of Auldallan in question was locally within the parish of Kingoldrum, and consequently that the teinds of those lands were liable to be localled on for stipend to the minister of that parish; (4) that as regards the objector's payment of stipend in the parish of Lintrathen, such payment could not but have had reference to the decree of valuation 1799, by which only that portion of the estate locally in that parish was included in the decree,—the other portion of it, on the very ground of its being within the parish of Kingoldrum, having been excluded; so that the valued teind paid to the minister as stipend was on the face of that decree confined to the portion of the estate locally within Lintrathen; (5) that it is not a valid ground for excluding the effect of this decree in the present question that its terms have only been recently brought to light, inasmuch as that, after the death of the objector's predecessor, who obtained the valuation, his mother, in the first place, and he himself on his succession to her, must be viewed as having continued the payment of stipend under the valuation, on the same footing as their predecessor had made it; and (6) that it is their own laches, or that of their managers and agents, that they were in ignorance of the precise terms of the decree in virtue of which the stipend in Lintrathen parish has been continued to be paid.

Without entering more minutely into the question, and on the grounds to which I have more specially adverted, I have arrived at the conclusion that the objector cannot be held to be in a situation to maintain the plea of *bona fide* perception, although such a defence could legally, if well founded in fact, be pleaded in answer to the minister's claim.

On this point, however, I cannot concur in the view taken of the import of the decisions to which the Lord Ordinary refers in his note. There is no decision to the effect that a minister's claim for stipend from the teinds of lands within his parish,—when that fact is ascertained during the dependence of a process of modification and locality, and those teinds are found never to have paid stipend at all to the minister of any parish,—can be thus successfully answered. Stipend is a debt payable by the proprietor of teinds; and accordingly, Forbes, in his work on Tithes, says, p. 339, "Minister's stipend and augmentation are another legal burden, and the main ones, to which teinds are liable, against which no right or title whatsoever can secure." But while it appears to me that the decision in the case of Weatherstone *v.* Marquis of Tweeddale has a clear application in principle to the present case, I do not enter on this branch of the argument after the full and satisfactory opinion just delivered by Lord Benholme; for in all respects on this point I concur in his Lordship's views.

The LORD JUSTICE-CLERK and LORD NEAVES concurred.

The following interlocutor was pronounced:—"Alter the interlocutor of the Lord Ordinary reclaimed against: Repel the plea of *bona fide* perception and consumption stated for Mr. Ogilvy, and find the minister entitled to arrears of stipend from that portion of the lands of Auldallan lying within the parish of Kingoldrum for crops and years 1836–1868, both inclusive, with interest at the rate of 5 per cent. per annum; and for ascertaining the amount of said arrears, find that one-eleventh part of the annual real rent of the whole estate of Auldallan is to be held as applicable to the portion within the said parish: Find the minister entitled to expenses; allow an account," &c.

MACKENZIE & BLACK, W.S.—RICHARDSON & JOHNSTON, W.S.—Agents.

[*Commented upon*, Campbell's Trs. *v.* Sinclair, 1878, 5 R. (H. L.) 119. *Referred to*, Duncan *v.* Brown, 1882, 10 R. 332.]

No. 21. X. MACPHERSON, 74. 10 Nov. 1871. 1st Div.—Lord Mure, I.

LAING AND IRVINE, Pursuers.—*Sol.-Gen. Clark—Balfour.*
WILLIAM ANDERSON, Defender.—*Watson—Birnie.*
THOMAS CATHRAE AND AGNES ISABELLA CATHRAE, Defenders.—*Shand—Asher.*

Prescription, Triennial—Act 1579, c. 83.—*Held* that the triennial prescription did not apply to an account for goods sold by a manufacturer in Scotland to a merchant in Australia.

Laing and Irvine, manufacturers in Hawick, raised this action in December 1870 against William Anderson, residing in Elgin, executor of the deceased Andrew Cathrae, merchant in Melbourne, and Thomas and Agnes Cathrae, two of the next of kin of the deceased, to recover the balance on an account for woollen goods sold by the pursuers to the firm of Mark and Cathrae, merchants, Melbourne, of which the deceased was a partner, and sent out to them at Melbourne at various dates during the year 1853, amounting in all to £914, 6s. 10d.

The defender Anderson, *inter alia*, pleaded;—(2) The claims of the pursuers in the present action fall within the operation of the Act 1579, cap. 83 (the Triennial Prescription Act). (3) The claim is excluded by the English Statute of Limitations, 21 Jac. I. c. 16.

The other defenders stated the same pleas.

The Lord Ordinary (Mure) pronounced this interlocutor:—"Finds that the account sued for falls within the operation of the Act 1579, cap. 83: Therefore sustains the second plea in law for the defender Anderson, and the first plea in law for the other

defenders: Appoints the case to be put to the roll to arrange as to further procedure, and reserves in the meantime all questions of expenses."*

The pursuers reclaimed. They argued;—The cases of Ord and Bruce † [75] do not sustain the Lord Ordinary's inference. The Act was intended to apply to small accounts, payment of which might be forgotten, not to large orders by one merchant to another.‡

The defenders argued;—The question must be decided by the *lex fori*.§ This was merely a case of a wholesale transaction, and the Act applies.‖

At advising,—

LORD PRESIDENT.—The question in this case is one of considerable and general importance. The pursuers conclude for payment of a sum alleged to be a balance due to them on certain mercantile transactions between them and a certain Andrew Cathrae about the year 1853. They allege that Mr. Cathrae, who was then resident in Australia, and a partner of the firm of Mark and Cathrae, transmitted orders to the pursuers, who are manufacturers and merchants in Hawick, for woollen goods to be sent out to Mark and Cathrae to Melbourne. The goods were sent out. Certain payments were made to account, but there still remains a considerable outstanding balance, for which the pursuers are now suing. The demand is met by two defences—that the claim is excluded (1) by the operation of the Scotch Act of 1579; (2) by the English Statute of Limitations, 21 Jac. I. c. 16. For the second plea there is no room. The matter must be determined by the law of Scotland, the *lex fori*. It remains to consider whether the statute of 1579 applies to the claim as now made—one arising from mercantile dealings between the manufacturer in this country and a colonial merchant. It is not a contract of mandate, but one of sale. If we were construing the statute for the first time I should have no doubt that it is not applicable to the present claim. "Merchants' compts," in the language of the sixteenth century, did not

---

* "NOTE.—The fact that the goods in question had been furnished to a party in a foreign country was not of itself founded upon, at the discussion before the Lord Ordinary, as a ground for maintaining that the plea of prescription did not apply in this case, as it was not disputed that the mode of enforcing payment of a debt must, in the ordinary case, be regulated by the law of the country where payment was sought to be enforced—Don *v.* Lippman, 26th May 1837, 2 Shaw and M'Lean, p. 682. But it was contended that as the debt sued on arose out of wholesale transactions between manufacturer and merchant, it was not of a description to which the Act applied, and it is not without hesitation that the Lord Ordinary has come to the conclusion that it does.

"For if the question raised had related to a consignment of goods to a commission-agent on sale for behoof of the pursuers, or to the balance on an account-current relative to a series of mutual dealings between merchants, the Lord Ordinary would have had no difficulty in holding, on the authority of M'Kinlay, Dec. 11, 1851, and other cases, that the triennial prescription did not apply. The present, however, is not a case of that description, but resolves into an ordinary claim for the price of articles furnished by one party to another; and although, if the question had been still open, the Lord Ordinary might have been disposed to have adopted the view indicated by Lord Fullerton in his opinion in the case of M'Kinlay, to the effect that the words 'merchants' accounts,' used in the statute were probably intended to be applicable to the accounts of parties dealing from day to day by retail, and not to wholesale transactions, he does not consider that it is now open to him to adopt any such construction. For it seems to have been decided in the case of Ord, Feb. 15, 1630, M. p. 11,083, and of Bruce, Feb. 11, 1670, 1 B. Sup. p. 609, that the Act applies to wholesale bargains; and the Lord Ordinary is not aware that the rule laid down in those decisions has ever been authoritatively departed from—Bell's Principles, sec. 628."

† Ord, Feb. 16, 1630, M. 11,083; Bruce, Feb. 11, 1670, 1 B. Sup. 609.

‡ M'Kinlay *v.* M'Kinlay, Dec. 11, 1851, 14 D. 162; Hamilton, 1795, M. 11,120; Anderson and Child v. Wood, Hume, 467; Grub *v.* Porteous, 13 S. 603; Golbie v. Lazzaroni, March 19, 1859, 21 D. 801.

§ Napier on Prescription, 871; Don *v.* Lippman, May 26, 1837, 2 S. & M'L. 682; Farrar *v.* Leith Bank, June 13, 1839, 1 D. 936; Bruce, Feb. 11, 1670, 1 B. Sup. 609.

‖ Mackenzie on Statutes, 196; Ord, *supra*; Bruce, *supra*.

apply to transactions of this sort. I entirely agree with the opinion of Lord Fullerton in the case of M'Kinlay, 11th December 1851. The expression "merchants' compts" means shopkeepers' accounts. I am not prepared to say that any sound distinction can be drawn between wholesale and retail transactions, if by wholesale is meant merely supplying large quantities at one time. The statute extends to supplies made by shopkeepers to a large extent, and that not only to consumers, but it may be to smaller dealers in the same goods. But this is a proper mercantile transaction, by which the produce of this country, manufactured by one party, and sold by him, is transmitted to another country to a merchant there. I am glad to see that the Lord Ordinary sympathises with the view I take. He considers himself bound to decide otherwise, in consequence of two previous decisions. I think these cases decide a question of a different kind. The case of Ord, 16th February 1630, has no application to the present. If it had been a case in point it would have been difficult to dispute its authority. Coming as it did within half a century of the statute it has almost the authority of a contemporaneous interpretation. But it was a case of commission agency, not of sale. "Mr. James Ord having pursued Duffs, as heirs and executors to umquhile Alexander Duffs, for payment of the prices of certain glasses, which were received by the said umquhile Alexander at sundry times, pertaining to Mr. James (Ord), and were sent by him to England with his servant in a ship freighted by the said Alexander to that effect, in which ship the said Alexander made sail, and who, after selling off the said glasses in Hull in England, intromitted with the whole prices thereof, and never made him payment thereof." The glasses belonged to Ord, and were sent along with his own servants in a ship to England and sold. Duffs intromitted with the proceeds of sale, and never accounted. It was a contract of mandate. The case, even in this view, might have been important as a strong [76] example of the application of the statute 1579 to a proper mercantile transaction. But the case, so explained, is overruled by subsequent authoritative decisions—Hamilton, Jan. 24, 1795, M. 11,120; Anderson and Child *v.* Wood, Jan. 18, 1809, Hume, 467; M'Kinlay, Dec. 11, 1851, 14 D. 162. It is clear, then, that (1) the case of Ord was one of mandate or commission, and not of sale; (2) that, so explained, it must be held to be a case of no authority. The other decision to which the Lord Ordinary refers is that of Bruce, reported only in Brown's Supplement, i. 609, taken from Gosford's notes. Entertaining a strong opinion on the non-applicability of the statute to proper mercantile transactions, I should not allow a single obscure judgment to stand in the way of pronouncing a decision in accordance with the light which we now have. All that we are told about the claim in that case is, that it was "for merchant goods alleged sold and delivered, extending to £150 sterling." The defence was, "that the action was prescribed, being for merchant goods, and not pursued for within three years, unless the delivery were proved *scripto vel juramento*." It was replied "that the Act of Parliament did only comprehend merchants' accounts where the goods were sold by retailers, but not where they were sold in gross, such as the goods libelled were; it being offered to be proven that they were all delivered at two several times only." The only specialty insisted on to exclude the triennial prescription was, that the goods amounted to a considerable quantity, and therefore must be considered as sold wholesale and not retail. Now, this is not sufficient to exclude the operation of the statute if they are "merchants' compts," *i.e.* furnishings by a shopkeeper. For all that appears, the case of Bruce was a proper shop account, and therefore the defence was sustained. I do not feel the least difficulty arising from the cases of Ord and Bruce in deciding on what appears to me to be the true construction of the statute. I entirely concur with Lord Fullerton that the statute does not apply to proper mercantile transactions.

LORD DEAS.—This is no doubt a question of importance.

The result of my opinion upon it is the same as that expressed by your Lordship in the chair.

Andrew Cathrae, who was a merchant in Melbourne, ordered goods from the pursuers, who are manufacturers and merchants in Hawick, on several occasions during the year 1853. These orders were for woollen goods, of which the pursuers are manufacturers, and the understanding seems to have been that Cathrae's father, who was in this country, was to guarantee the payment of the price.

The question raised is, whether the pursuers' claim for payment is cut off by the triennial prescription.

I agree with your Lordship that, if this question were to be looked at merely with

reference to the terms of the Act of Parliament, it would be unreasonable to hold that a claim of this character fell within the category of merchants' accounts, and other the like debts. In the Scotch language, as then used, the word "merchant" undoubtedly conveyed the meaning of a dealer by retail, and even in the present day that is the most familiar sense in which the word is vulgarly used and understood. But the difficulty of the case arises, as your Lordship has said, from the two old decisions quoted by the Lord Ordinary in his note, or rather from the construction which has been put upon these decisions.

The one of these cases, viz. that of Ord, raises in my mind very little difficulty. It was a case which really could not fall within the statute by any reasonable construction. A man sends goods under charge of another, who receives the price and does not account for it to his employer. That is not a case of a merchant's account in any sense. It is a case of accounting between agent and employer, where the agent is in reality charged with defrauding the employer. An action of that sort cannot be barred by the triennial prescription. Such a claim, on the contrary, would remain open for any period short of forty years. As regards the other case of Bruce, we have no particulars to show how the claim was made up. We are only told that it was an account for merchant's goods. It is impossible to tell precisely what that meant. The fact that the price of the goods amounted to £150 of itself shows nothing. The mere amount of a retail shopkeeper's account against a customer would make no [77] difference in the question of applicability of the statute. The whole difficulty, indeed, arises not from these decisions, but from the fact that Mr. Bell in his Principles seems to draw the inference from them that the triennial prescription may be applicable to wholesale transactions; but I agree with your Lordship that it is not necessary for us to say that that may not be so. There may possibly be circumstances in which the statute will apply to wholesale transactions; but it does not follow that it applies here. We must look to all the circumstances of the present case, and amongst these the fact that the parties were in different countries is not to be overlooked. Of course the Scotch law applies if the case be within the statute. But this we know, amongst other things, that at the time the statute was passed half the three years allowed by it would have been consumed in making a demand and obtaining an answer, had the parties been at such a distance from each other as the parties in this case were. I can see no substantial distinction between this case and the case of Anderson and Child *v.* Wood, 18th January 1809, Hume, p. 467, which was not cited in the discussion. The pursuers in that case being in this country, had dealt largely with the defender, who was in America, and the action was brought for the recovery of the balance on an open account between them. The defender pleaded the triennial prescription, and the pursuers replied that it was not applicable to a case which arose out of large mercantile dealings, and was rather of the nature of an *actio mandati* brought by them as agents or factors for the defender, and not as shopkeepers or retailers of goods. The report bears that the Lords repelled the plea of the triennial prescription as inapplicable to the nature of the claim and the circumstances of the parties. That case seems to me to be in point here, and in addition to what has been said by your Lordship I refer to the reasons assigned by the Judges for deciding that case as they did, as equally applicable to this case.

On the whole matter, I am of opinion that not only is there no sufficient authority for sustaining the plea of prescription, but that the case I have quoted is a decided authority the other way.

LORD ARDMILLAN.—The question here raised in regard to the application of the triennial prescription to such transactions and such circumstances as are now before us is very important. It is a question of Scotch law, and foreign laws of limitation do not apply.

This prescription rests on the statute 1579, cap. 83. The words under which the claim here made is said to be comprehended and brought within the law of triennial prescription are "merchants' accounts."

On principle, and in the absence of authority to the contrary, I am of opinion that where mercantile dealings — commercial transactions — on a large scale, and more especially where the transacting parties are, as in this case, at a great distance from each other—the one in Scotland, the other in Australia—then these dealings are not within the fair meaning or sound construction of the Act of 1579.

A right to instruct and recover a debt *prout de jure* cannot be excluded or limited

otherwise than by direct enactment. A statutory prescription or limitation of action is not to be strained or extended by implication.

Since the date of the Act, the progress of mercantile enterprise, and of the multiplied and complicated relations of mercantile dealing, has been so remarkable that it is necessary to ask the question—Is the word "merchant," or the expression "merchants' accounts," fairly susceptible of the same construction now as in 1579? I think it is not. I concur in the views expressed by Lord Fullerton and Lord Cuninghame in the case of M'Kinlay, 11th Dec. 1851. I think that we must read this Act with reference to the known relations and transactions of business at its date; and in 1579 the word "merchant" meant a shopkeeper,—that it is a word of the same force and meaning as the French word "marchand," and that extensive and important transactions, such as are now before us, between mercantile men at opposite ends of the earth, are not within the just and reasonable scope and meaning of the expression "merchants' accounts." If there is no sufficient authority for introducing this triennial prescription into the wide field of mercantile transactions, as distinguished from the [78] retail business, or even the limited wholesale business, of shopkeepers or home-traders, I am not prepared to introduce it.

The commerce of Scotland—the mercantile business of Scotland—as distinguished from shopkeeping, may be said to have grown up since 1579. It is a new phase—a new field—of enterprise, a phase of almost infinite variety, a field on which the sun never sets. Are we, in the 19th century, bound to bring this Scottish commerce within the scope of a statute of the 16th century, which innovates on the common law, and imposes restriction and limitation on the right to recover debts?

I think that some confirmation of the views which I have expressed is to be found in the case of Hamilton and Co. *v.* Martin, 24th Jan. 1795, M. 11,120; and in the case of Anderson and Child *v.* Wood, 18th Jan. 1809, Hume's Decisions, 467; and most especially in the opinion of Lord Fullerton in the case of M'Kinlay.

I have not found, or heard quoted, any authority supporting directly the application of the statute 1579 to this case, unless it be the decision in the old case of Ord *v.* Duffs, 15th Feb. 1630, M. 11,083. But the report of that decision is short and imperfect, and on minutely considering it, even as reported, I take the same view of it as your Lordship. I am of opinion that it is not a reliable or satisfactory authority. The transaction in that case of Ord seems to have been not a proper sale and purchase, as between the two parties to the cause, but rather a transaction of the nature of mandate, a sale of goods by one party for the other party, probably on commission; and the action seems to have been for the price of the goods so sold and not accounted for. To such a case the triennial prescription is inappropriate, and it would not now be held applicable. That is clear; so that decision, when rightly understood, is of no authority. The case of Bruce, in 1670, looks more like an authority, but it does not come up to this case; and I agree with your Lordship in viewing it as a decision only on the plea that the extent of the transaction (£150 I think) excluded the prescription. The character of the business as mercantile was not pleaded, and could scarcely be so in 1670. Without authority, I cannot hold the triennial prescription to be here applicable. Therefore I think that we should recall the Lord Ordinary's interlocutor, and repel the plea of prescription.

LORD KINLOCH.—I am of opinion that the present claim, which is for the price of successive parcels of woollen goods, amounting in value to a good many hundred pounds, sent by the manufacturers at Hawick to a merchant in Australia, is not one to which the triennial prescription of the Act 1579 is applicable.

I conceive that this statute, when referring to "merchants' accounts," had solely in view the case of shopkeepers and retail dealers, to whom the name of "merchants" was then almost exclusively applied in Scotland. I adopt, in terms, the opinion of the Court in the case of Hamilton *v.* Martin in 1795, "that the chief object of the Act 1579 was to prevent the hardship which would arise from losing the old discharged accounts of shopkeepers and other retailers, and that it was not meant to cut off claims arising from considerable mercantile transactions." The case which was then in question was a case of consignment, not of sale, to merchants in Virginia; and the Court in part rested their judgment on the ground that the Act "did not extend to actions arising upon the contract of mandate." But they also set forth explicitly their view of the general character of the statute in the terms I have above quoted, and to which I fully subscribe.

I concur also in the similar exposition given by Lord Fullerton in the case of M'Kinlay *v.* M'Kinlay in 1851.

I conceive no conclusion to the contrary to arise legitimately out of the two old cases referred to by the Lord Ordinary. I consider these very unsatisfactory and unauthoritative decisions. One of them, that of Ord, is on its face pretty plainly a case of goods sold on mandate, the price received for which was not accounted for to the proprietor; and the modern decisions clearly overrule all pretence of application of the statute to such a case. The other, that of Bruce, has not its circumstances well explained. It does not sufficiently appear what [79] the goods really were, or in what relation the parties stood; and the plea repelled was substantially that the Act did not apply where there were only two considerable furnishings,—a bad plea under the statute, which regards not the amount, but the kind and character of the furnishings.

I am therefore of opinion that the Lord Ordinary's interlocutor should be altered, and the plea of prescription repelled.

The following interlocutor was pronounced:—"Recall the interlocutor: Repel the second and third pleas for the defender Anderson, and the first and second pleas for the other defenders, and remit to the Lord Ordinary to proceed further with the cause as shall be just: Find the reclaimers entitled to expenses since the date of said interlocutor; allow," &c.

GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—WEBSTER & WILL, S.S.C.—
J. W. & J. MACKENZIE, W.S.—Agents.

[*Commented upon*, N. B. Railway Co. *v.* Smith Sligo, 1873, 1 R. 309.]

No. 22. X. MACPHERSON, 79. 10 Nov. 1871. 1st Div.—Lord Jerviswoode, P.

REV. WILLIAM ALEXANDER KEITH AND ANOTHER (Thomas Maitland's Trustees), Pursuers.—*J. Guthrie Smith—Blair.*

MARGARET MAITLAND, Claimant.—*Millar—Trayner.*

REV. WILLIAM ALEXANDER KEITH, Claimant.—*J. Guthrie Smith—Blair.*

Succession—Testament—Holograph.—In the repositories of Thomas Maitland, deceased, there was found a deposit-receipt for £900 enclosed in an envelope, on the back of which were these words:—"To my Executors.—Miss Margaret Maitland.—This nine hundred pounds belongs to her,—five hundred to be sunk for her, and the remaining four to be given her. THOMAS MAITLAND." Only the words "To my executors," and the signature, were in the handwriting of the deceased. *Held* (*diss.* Lord Deas) that the words which were holograph were not sufficient to infer adoption of the part of the writing which was not holograph, and that the bequest being neither tested nor holograph was not effectual.

Succession—Testament—Insanity.—*Held*, on a proof, that a writing alleged to constitute a bequest of money was executed at a time when the granter was labouring under insane delusions respecting his property, and was, therefore, ineffectual as a testamentary writing.

Thomas Maitland of Pogbie died on 27th January 1870, leaving a trust-disposition and settlement and relative codicil, dated repectively in 1853 and 1858, whereby he conveyed to trustees his whole estate, heritable and moveable, including the lands of Pogbie, for these purposes—(1) for payment of debts, &c.; (2) for payment of legacies; (3) for payment of the whole free rents of his lands and the income of the residue of his estate to his son Thomas Maitland, the younger; (4) on the death of Thomas Maitland, the younger, for payment to the child or children of Thomas Maitland, the younger, other than his eldest son, if only one such child, of the sum of £2000; if two or more such children, of the sum of £3000, equally among them; (5) on the death of Thomas Maitland, the younger, and after satisfying the other provisions of the trust, for conveyance of Pogbie, and the residue of the trust-estate, to the heirs-male of the body of Thomas Maitland, the younger; whom failing, to the truster's

sister, Mrs. Keith, and the heirs whatsoever of her body; whom failing, to the truster's nearest heirs and assignees whatsoever.

Thomas Maitland, the younger, died in 1858, leaving an only child, Margaret. His widow received an annual allowance of £60 from her father-in-law, who also took charge of the education of his granddaughter Margaret.

In August 1862 a *curator bonis* was appointed to Mr. Maitland. Mr. Maitland remained under curatory till his death.

[80] In August 1870 Mr. Maitland's trustees brought an action of multiple-poinding for determining who had right to the sum of £900, contained in a deposit-receipt, dated 24th April 1861, in favour of Mr. Maitland. This document was found among Mr. Maitland's papers enclosed in an envelope, on the back of which were these words:—"To my Executors.—Miss Margaret Maitland.—This nine hundred pounds belongs to her,—five hundred to be sunk for her, and the remaining four to be given her. (Signed) THOMAS MAITLAND." Only the signature, and the words "To my executors," were in the handwriting of Mr. Maitland.

Margaret Maitland claimed the sum of £900, pleading that the writing on the envelope constituted a valid bequest in her favour.

The Rev. W. A. Keith, who, as eldest son and heir of Mrs. Keith, deceased, was entitled to the lands of Pogbie and the residue of the trust-estate, claimed the sum in the deposit-receipt, and pleaded;—(2) The writing founded on by the claimant, Margaret Maitland, being neither holograph nor tested, no valid legacy or bequest was thereby made in her favour. (3) The truster having been of unsound mind, and not capable of disposing of his estate at the time when he signed the said writing, no valid legacy or bequest was thereby constituted.

Proof was led, after which the Lord Ordinary, on 5th June 1871, pronounced the following interlocutor:—"Finds, *primo*, as matter of fact—1st, That on or about the 20th of May 1862 the now deceased Thomas Maitland of Pogbie, who was then possessed of considerable estate and funds, heritable and moveable, desired the witness Isabella Montgomery, who was then in his service as housekeeper, to bring to him a certain bank deposit-receipt for £900, which was then in a drawer in a room at Pogbie, occupied at the time by Mr. Maitland as his bedroom; and that thereafter the said Isabella Montgomery, acting on what she then understood to be the wish of Mr. Maitland, wrote on the envelope, which now forms No. 7 of process, the words 'Miss Margaret Maitland.—This nine hundred pounds belongs to her—five hundred to be sunk for her, and the remaining four to be given her:' Finds that Mr. Maitland then stated to the said Isabella Montgomery that he would sign the said writing on the envelope, but was, as she thought at the time, unable to do so, until the said Isabella Montgomery wrote his name on a piece of paper, from which he copied the signature 'Thomas Maitland,' as the same now appears on the said envelope (No. 7): Finds that he then wrote on the said envelope the words 'To my executors,' which also now appear on the said No. 7 of process; and 2d, that at the time foresaid, and when the said deceased so acted and wrote the words above specified, he was insane, and was not of a sound disposing mind; Finds, *secundo*, and as matter of law, that the said writing No. 7 is invalid and ineffectual: Therefore repels the claim made on behalf of the claimant, Miss Margaret Maitland, which is founded thereon, and appoints the cause to be enrolled with a view to further procedure, reserving meanwhile the matter of expenses."

Margaret Maitland reclaimed, and argued;—The writing on the envelope containing the deposit-receipt constituted a valid bequest, because, though it was not wholly in the handwriting of the testator, it was signed and addressed by him, and was, therefore, sufficiently recognised by him as a binding portion of his will.* Although the testator was at one time [81] insane he had ceased to be so at the time of writing the document, and therefore it must be sustained.†

Argued for respondent;—The mere signing and addressing of the writing on the envelope was not enough to make it a valid bequest. There was no proper adoption of

---

*Goldston *v.* Young, Dec. 8, 1868, *ante*, vol. vii. 188; Sinclair *v.* Weddell, June 13, 1868, 5 Sc. Law Rep. 601; M'Millan *v.* M'Millan, Nov. 28, 1850, 13 D. 187; Ersk. 3, 2, 22; Stair, 4, 42, 6; M'Intyre *v.* Macfarlane, March 1, 1821, F. C.; Christie *v.* Muirhead, Feb. 1, 1870, *ante*, vol. viii. 461.

†Morrison *v.* Maclean's Trustees, Feb. 27, 1862, 24 D. 625; Nisbet's Trustees *v.* Nisbet, June 30, 1871, *ante*, vol. ix. 937; Cartwright, 1 Phillimore, 84.

the essential bequeathing words.* The testator was of unsound mind at the date of the writing, and was labouring under insane delusions as to his property.

At advising,—

LORD ARDMILLAN.—Two questions have been presented for consideration in this case. A decision on either of these questions would be sufficient for disposal of the case. But both questions have been argued. I was disposed to think that both questions have been decided by the Lord Ordinary, but I now understand it was not so. It appears, however, to be right, and I think it is the wish of the parties, that a judgment on both questions should now be given.

In April 1853 Mr. Thomas Maitland of Pogbie executed a trust-settlement, in which he directed his trustees to pay out of his estates, including his lands of Pogbie, his debts and "any legacies or donations I may choose to leave," and in which he makes a provision of £2000 for any child of his son Thomas Maitland. Miss Margaret Maitland, the only child of Thomas Maitland junior, appears as a claimant of £900, in addition to her said provision.

The claim of Miss Margaret Maitland for the sum of £900 is rested on a document in the following terms:—"To my Executors.—Miss Margaret Maitland.—This nine hundred pounds belongs to her,—five hundred to be sunk for her, and the remaining four to be given her." (Signed) "THOMAS MAITLAND."

It is sufficiently proved that the words "To my executors" and the words "Thomas Maitland," being the signature, are in the handwriting of the late Thomas Maitland, grandfather of the claimant. The remaining part of this writing is not in the handwriting of Thomas Maitland. A deposit-receipt by the Bank of Scotland for £900, dated 24th April 1861, was found among his papers, put up in the same envelope as the writing above mentioned. Indeed, the writing is on the back of the envelope. It has no date. It is said that this document contains a valid and effectual bequest of £900, in respect that it is signed by Mr. Maitland, and addressed by him to his executors. I am of opinion that the claimant's plea on this head is not well founded. The words expressing bequest or gift, the words expressing the sum said to be bequeathed, and the name of the person said to be legatee or donee, are not in the handwriting of Mr. Maitland. The signature is his. That of course cannot of itself make the writing holograph, nor give it validity if it is not holograph. Then, can it be held that the addition of the words "to my executors," at the beginning of the writing, has the effect either of making the writing holograph, or of making it valid though not holograph?

I am of opinion that the writing before us is not rendered holograph by the additions made to it, and I am also of opinion that, not being holograph, it is not effectual.

This case is quite different from the class of cases to which we have been referred, where effect has been given to a writing, not holograph or tested, in respect of a reserved power contained in a previous settlement to make bequests by any writing under the hand of the testator. In such cases the writing, though informal, is made effectual by adoption and recognition in the prior deed. The prior deed in such a case is read as a relaxation of the ordinary requirements of law; and informal writings, if distinct and genuine, are sustained in respect of such relaxation. There is no such relaxation here.

[82] Nor does this case resemble another class of cases, where a writing is only partly holograph, and yet is sustained as holograph, because, being signed by the maker, the substantial parts of the document are holograph. In this case not one single word conferring a bequest, setting forth the sum, or specifying the legatee, is in the handwriting of Mr. Maitland. In no sense is this writing a holograph bequest. In point of fact it is not so; and, in point of law, its character and effect cannot be viewed as altered by the two parts of the writing which are holograph.

There are a great many authorities on this point, and I have carefully considered them. I shall not now examine them. It is sufficient to mention the cases of Lady Baird Preston's Trustees, July 15, 1856, 18 D. 1246; Wilsone's Trustees *v.* Stirling, &c., Dec. 13, 1861, 24 D. 163; Young's Trustees *v.* Ross, Nov. 3, 1864, *ante*, iii. 10; Crosbie *v.* Wilson, June 2, 1865, *ante*, iii. 870; and Brodie *v.* Muirhead, Feb. 1, 1870, *ante*, viii. 461. This last case, though briefly reported, was carefully considered. I think it went as far as any case which has been decided in our Courts in giving effect

* Alexander *v.* Alexander, Feb. 26, 1830, 8 S. 602; Hamilton's Executors *v.* Struthers, Dec. 2, 1858, 21 D. 51; Wilsone's Trustees *v.* Stirling, &c., Dec. 13, 1861, 24 D. 163; Rankine *v.* Reid, Feb. 7, 1849, 11 D. 543.

to a writing not itself holograph, in respect of the addition of words undoubtedly holograph. I agree entirely with the remarks made in that case by your Lordship now in the chair; and I concurred in the decision. The question even there was one of some delicacy, but the ground of decision was, that the holograph words were plainly relative to the words which were not holograph, and that the words binding the defender were in his own handwriting. It is not so here. In several old cases in the Dictionary the same point was considered. These cases were decided mainly in consideration of the words which were holograph in the writing. If these holograph words expressed the obligation, or, as the old lawyers termed it, "contained the substantials thereof," the writing was sustained. If the writing, in so far as holograph, did not express the obligation, and did not contain "the substantials thereof," the writing was not sustained. Among other cases I may just mention the case of Vans *v.* Malloch, Jan. 23, 1675, M. 16,885; George Heriot *v.* Blyth, Nov. 1681, M. 17,020; Allardice *v.* Forbes, Jan. 25, 1710, M. 16,862.

On these grounds, on which I shall not further enlarge, I am compelled to arrive at the conclusion that the improbative character of this writing is fatal to the claim of Miss Margaret Maitland.

We have next to consider the pleas separately urged by the trustees, to the effect that when the late Mr. Maitland signed the document founded on he was insane.

This question, interesting and important in every point of view, was fully argued on both sides. On the question of fact there are some points which appear to me to be beyond reach of dispute. That Mr. Maitland was seriously insane previous to and up to the alleged date of this document is beyond a doubt. It is abundantly proved, and I scarcely think that was disputed at the bar. That he was also insane very shortly after the said date is proved by several witnesses who had good means of information, and whose testimony is entirely reliable. It is sufficient on these two points to mention the witnesses Isabella Montgomery, Jeanie Montgomery, the Rev. Mr. Cooper, Mr. Archibald Broun, Dr. Otto, and Dr. Skae. Mr. Maitland's insanity was characterised and evinced by a specific and particular insane delusion. That delusion was that he had lost Pogbie, that he had been robbed and ruined by Dr. Otto, and that he himself was a beggar. That he laboured under this delusion—that it was altogether groundless —that it excited and disturbed his mind,—and that, in respect of that delusion, and with reference to all subjects or transactions within the scope or influence of that delusion, he was insane, is abundantly proved. I cannot doubt it. Now, by his settlement, dated in April 1853, a provision of £2000 had been made for the child, if any, of his son, Thomas Maitland junior. The claimant Margaret Maitland is the only child of that son. To make an additional provision to her of £900 by a writing of the nature of a bequest was, in my opinion, looking to the whole ascertained circumstances of this case, a proceeding within the scope and subject to the influence of the insane delusion to which I have adverted. I still retain the opinion which I expressed in the case of Nisbet, and which I need not now repeat. In its most important features this case stands in contrast to the case [83] of Nisbet. In the case of Nisbet the medical testimony, and the nurse's testimony, and the testimony of friends who visited Major Nisbet immediately before and at the date, and immediately after the date of the deed challenged, was all in favour of his sanity. It is not so here. I can find no witness in this case who, knowing Mr. Maitland, and having opportunity of observing him at or near to the date in question, has declared that he considered Mr. Maitland sane. The whole evidence is the other way.

In the next place, the rational conversation and conduct of Major Nisbet at and about the date of the deed rendered his recovery, or a lucid interval, very probable. A lucid interval of a considerable period, say of a month or more, was quite probable, even in the most unfavourable view of Major Nisbet's case. I mean probable on the proof, not as a mere conjecture.

Still further, in the case of Major Nisbet there was little insane delusion, and there was no connection between any insane delusion which on the proof he could be said to have had and the deed he executed, while the deed itself, originating in his own mind, was rational and natural, and was in accordance with expressed intentions. Here the insane delusion of Mr. Maitland had special reference to his property, and part of his property he disposed of by this writing. In dealing with his property, heritable or moveable, he was in thought and in act within the scope and influence of the delusion by force of which he insanely believed that he had been plundered and made a beggar

by Dr. Otto. If this writing is sustained Miss Maitland gets £900 in addition to her previous provision. But her previous provision was out of Mr. Maitland's estate, and Mr. Maitland insanely believed that he had no estate. If he fancied that her provision of £2000 was lost with the rest of his estate, and if, under that fancy, he gave this £900 to make up to her for the loss, then his insane delusion was at the root of the bequest, and the writing making the bequest on such a footing cannot be considered rational. It is also to be noticed that, as proved by Isabella Montgomery, Mr. Maitland wished to send the £900 at once to Miss Margaret Maitland, then a young girl at a boarding-school. If he wished to do this in order to save it from the hands of Dr. Otto, whose power and desire to plunder him he insanely dreaded, he being even disturbed by the fancy that "Otto dealt in magic," then the writing was certainly not "a rational act rationally done." The manner in which he dealt with his gold watch and £10 seems to support this view. Isabella Montgomery says that on one occasion, after Dr. Otto had been visiting Mr. Maitland, he (Maitland) being much excited, gave his watch and £10 to his grieve, James Montgomery, telling him to give the watch to Mr. Keith when he (Maitland) died. Isabella Montgomery, whose testimony I see no reason to doubt, and without whose testimony the claimant cannot prove the writing founded on, says that Mr. Maitland gave his watch to his grieve because he was afraid that Dr. Otto would take his watch. This was not only a groundless, but an insane fear. It was the very fear which overcame his reason, the very delusion by which his mind was insanely swayed. Now, if he signed the writings in question under this same fear of Dr. Otto, and with the intention of saving the £900 from the plunder which he insanely dreaded, and a belief in which was his insane delusion, then he was under the influence of the insane fear and the insane delusion when he signed the writing.

The case of Nisbet has been very strongly pressed on us. I have no wish even to qualify the opinion which I expressed in the case of Nisbet, in regard to the effect of partial insanity, in regard to the possibility of lucid interval, and in regard to the strong presumption in favour of a deed rational and just. But this is a very different case. No lucid interval has been here proved. It has scarcely even been definitively suggested. The writing challenged might indeed have been rational and natural under other circumstances; but, viewed in its true light, and under the actual circumstances here ascertained, it was not, in my opinion, rational, but was connected with, and was actually the product of, the insane delusion. I do not now dwell on the evidence of the eminent medical gentlemen examined for the claimant, though I have carefully considered it. They did not know Mr. Maitland. They did not attend or even see him professionally. I do not think that the medical testimony of these gentlemen goes [84] beyond the expression of an opinion on their part, formed on information given them, and without knowing or seeing the patient, that a lucid interval was possible. But this is not enough. The party who alleges a lucid interval in such a case as this must prove it. It certainly is not proved in this case.

The trustees have felt it their duty to resist payment of this alleged bequest; and on both the grounds to which I have adverted—1st, that the writing founded on is not holograph and probative; and 2dly, that Mr. Maitland was insane at the date of the writing, and in the making of the writing,—I am of opinion that the second and third pleas in law for the Rev. Mr. Keith should be sustained, and thus Miss Maitland's claim be repelled.

LORD KINLOCH.—The first question in natural order which arises in this case is, whether the alleged testamentary writing is to be considered as a holograph writing. If it is not, it is improbative, and cannot be read.

I am of opinion that the writing cannot be held holograph, and is improbative. And here, I think, we must exclusively consider the document itself, with such admissions, or evidence, as proves in whose handwriting the different parts of it are. We cannot allow it to be set up by parole evidence of its execution.

Admittedly no part of it is in the handwriting of the deceased Mr. Maitland, except the address at the beginning of it, "To my executors," and the signature "Thomas Maitland" at the end. I consider this not to be enough.

I conceive that nothing will give the character of holograph to a document not wholly in the handwriting of the alleged granter, unless either, 1st, there is so much of the material parts of it in his handwriting as sufficiently expresses its scope, and makes the rest of it unimportant; or 2dly, by words appended to it, over and above his signature, he declares expressly or by indubitable implication that he adopts the whole

writing as his. We have instances in the books of documents held as holograph on one or other of these grounds.

The present case presents neither of these two elements. Irrespectively of the signature, there is nothing holograph in the document except the words at the commencement, "To my executors." This may prove that the document was intended to operate as a codicil or testamentary instruction. But what was contained in it—that is, what was testamentarily directed—is left altogether unestablished. Nothing more is proved than that the document was a testamentary writing of some kind; but of what kind is left an utter blank.

Again, there is nothing appended to the document except the simple signature, and so the case does not come under the category of a document formally adopted by holograph words expressive of such adoption. It is settled that the mere appending of the signature is not enough, and here there is nothing else. An addition of approbatory expressions, direct or implied, might have been sufficient, as implying a knowledge and ratification of all going before. But no such addition occurs. And with reference to the preliminary words, "To my executors," they cannot imply any knowledge and adoption of what comes after. An addition at the end of a writing may bind the granter to what goes before; but preliminary words cannot fix or ratify what comes after, nor leave any just inference as to what the body of the writing was. There remains, therefore, nothing in the document, so far as proved, by Mr. Maitland, holograph, except that it was a testamentary document of some kind or another. What it contained there is no holograph to establish.

The second question before us is, supposing the document probative, whether it was executed by the late Mr. Maitland when in possession of a sound disposing mind. I am of opinion that this question must be answered in the negative.

I think it clearly proved that at the time of the execution of this writing, and both before and after, Mr. Maitland was, generally speaking, in a condition of insanity. This is conclusively established. His mind was wholly out of joint. He was under a delusion as to his estate of Pogbie having been taken from him by the practices of his medical attendant and others, which indicated entire unsoundness of mind. His conduct in consequence was indubitably that of a madman. It is needless to go into details, for his general unsoundness of mind at [85] this time was not disputed, and all that was maintained was, that the document must be held to have been executed by him during a lucid interval.

That a lucid interval may occur in the case of one generally insane, during which he may validly execute a deed, needs not to be denied. But a lucid interval involves nothing short of an entire cessation for the time of the insanity. This must be clearly established to have occurred, the onus lying on the party who avers such an interval. Has anything of this kind been proved in the present case? I think not.

I consider the only proof of the lucid interval presented by the party averring it to lie in the alleged rationality of the writing executed. All the incidents of the insanity were indubitably the same immediately before, and immediately after, the execution of the writing. But the deed is said to have been so rational as to prove that during its execution the granter was sane. We are asked, in short, to believe that a lucid interval intervened, having precisely the endurance of the execution of the writing—neither longer nor shorter. I cannot adopt this view. I do not think the rationality of a deed can be taken by itself alone as conclusive of the sanity of the granter. It is a fact of the highest importance in determining the question of sanity. But it is not by itself conclusive, just because it does not necessarily follow that, although rational in its aspect, the deed was executed from a sane and rational motive. The contrary is rather to be presumed in the case of a man generally insane. To stamp a deed as rational, it must be shown to be rational in the motive prompting its execution. I can by no means think this established in regard to the writing now in question. It is not enough to say loosely that a writing by which a sum of £900 is given by a grandfather to his granddaughter is a deed of a rational character. This may or may not be the case according to circumstances. It must further be shown that the writing was executed under the influence of a rational view of his position and relations. I have the greatest possible doubt of the sanity of the view under which this writing was executed. Mr. Maitland had already settled on his granddaughter a sum of £2000. It might be very rational to give her a sum of £900 additional; but I have no security that he did not do this under the influence of an insane belief that all his other means had been taken

from him, and that if he did not give her this £900 she would have nothing whatever on which to live. The evidence leaves it exceedingly probable that this was his condition of mind, and I am disposed to adopt this theory as the true theory of the proceeding. But so to hold is of course utterly inconsistent with holding Mr. Maitland sane at the time of the execution of the writing. The inference is directly the reverse.

At the same time it is not necessary to come to an absolute conclusion as to the precise motive prompting Mr. Maitland to execute this writing. It is enough if it be altogether uncertain whether the motive leading to its execution was a sane or insane one. This uncertainty, which is what will generally, if not always, occur in such a case, is, to my mind, altogether preventive of the writing being considered valid. The general insanity being assumed, the exceptional case is without sufficient establishment.

I am therefore of opinion that Miss Maitland's claim must be repelled.

LORD DEAS.—There are two questions in this case—first, whether this writing is entitled to the privileges of a holograph writing; and second, whether, at the time of its execution, the granter was insane, and executed it under the influence of insanity. The Lord Ordinary has explained that he did not intend to decide the first question, and I confess I rather regret that your Lordships should propose to decide it, as it is seldom satisfactory to decide a question of law when a question of fact has been fully discussed which we are all agreed is sufficient for the decision of the case.

But if both questions are to be decided I feel bound to say that in my opinion this writing is entitled to the privileges of a holograph document.

There are three classes of cases in which such questions have arisen—First, where there is a probative deed declaring that any writing, formal or informal, under the hand of the granter, is to receive effect. Second, where some essen-[86]-tial part or parts of the writing are said to be holograph, and so to give the character of holograph to the whole writing. Third, where a writing which is not holograph is adopted by the party by some writing which is holograph. It is under this last class that I am disposed to think the writing in the present case falls. It is not necessary to bring it within that class that the holograph words shall be *inter essentialia*; it is enough if the holograph words distinctly show that the granter adopts the words which are not holograph.

When we come, however, to consider whether there has been such adoption, we must keep in view the nature of the document in reference to which the question occurs. In this case the document is not an *inter vivos* but a *mortis causa* document. In 1853 Mr. Maitland had executed a regular probative deed of settlement, conveying his whole property to trustees (whom he appointed to be his executors) for the purpose, *inter alia*, of paying his debts and any legacies he had left or might leave. The writing now in dispute is proved to have been signed by him on 20th May 1862. The paper on which it is written is an envelope (such as would be used for enclosing a letter), and this envelope was found in his repositories at his death with a deposit-receipt in his favour by the Bank of Scotland for £900 enclosed in it, and the writing in dispute on the outside of it. The competency of referring to those facts in reference to a testamentary writing is undoubted. Similar facts were referred to in the case of Lady Baird Preston's Trustees *v.* Baird (decided by the whole Court), 15th July 1856. In connection with the facts just stated, I hold it further quite competent to inquire how it was that the writing came to be in the form in which it is on the back of an envelope, and to be in the drawer in which it was found. The explanation is given by Isabella Montgomery, the deceased's housekeeper, who says that he requested her to bring him "the deposit-receipt for £900"; that, at his desire, she wrote on the envelope the words "Miss Margaret Maitland. This nine hundred pounds belongs to her. Five hundred to be sunk for her, and the remaining four to be given her"; that she so wrote these words after he had himself ineffectually tried to write on two pieces of paper, his right hand and arm being partially paralysed; that he then signed the words she had written, and wrote at the top of them the words "To my executors"—all as they now appear; and that, with his consent, she replaced the envelope and deposit-receipt in the drawer in which they were found after his death.

Now, whether we take the case with or without these explanations I think we have here on the part of the deceased sufficient adoption, by the words which are holograph, of the words which are not holograph. The deceased had appointed executors by a probative deed. The address "To my executors" distinctly indicates that the words which follow are of a testamentary nature. His subscription at the end distinctly

marks the conclusion of the direction he gives to his executors. The words of that direction are so few and consecutive, and in a space so limited, that they may be said to be surrounded by the holograph address and subscription by which they are authenticated. The words so authenticated were, as I have said, of a testamentary nature, and testamentary writings are always entitled to peculiar favour. In Lady Baird Preston's case the majority of the Court gave effect to a testamentary writing (No. 11 of that process, dated 3d April 1844) which was not signed at all. I thought that was going too far even as to a testamentary writing, but I do not suppose that the Court would have given effect to the writing had it been an *inter vivos* instrument. At all events, as words not holograph may admittedly be effectually adopted by words that are holograph, I am of opinion that, having regard to the nature of the writing now under consideration, there was sufficient holograph adoption to give it the privileges of a holograph instrument.

That, however, leaves the question behind, whether the writing is invalid on the ground of insanity.

Now, I agree with Lord Ardmillan that no such question arises in this case as was discussed in the recent case of Nisbet, viz., how far any single insane delusion, whatever the subject of it may be, necessarily disqualifies a testator from executing a valid will. I see no reason to depart from any of the observations [87] I made in that case. But here the testator laboured under an insane delusion upon the very subject-matter he was dealing with, namely, his heritable and personal means and estate, and more particularly, as to the deposit-receipt for £900 bequeathed to the claimant, which he imagined to be all that remained to him, his landed estate and all his other means having, as he supposed, been taken from him by magic and otherwise, chiefly by Dr. Otto, his medical attendant. The claimant will be entitled to £2000 under his regular and probative deed of settlement executed in April 1853, when he was admittedly of sound and disposing mind. It does not appear whether he had or had not a recollection of that deed, but it is clear that if he had, he must have believed that the claimant could take nothing under it. In these circumstances it is obviously impossible to sustain the bequest, although the way in which he went about it and communicated with his housekeeper on the subject was business-like and intelligent, and the act itself was by no means irrational.

So far indeed from the act being irrational, I think it not unlikely that had he been perfectly sane he might still have done just what he did.

The circumstances were shortly these:—His trust-deed and settlement was executed on 12th April 1853. He had at that time only one child alive, namely, Thomas Maitland, the claimant's father. He had been displeased with Thomas's marriage, and the consequences appear in that deed. He gave him only an alimentary liferent of his landed estate of Pogbie, with a fee to his issue-male, and failing such issue—which is the case that has occurred—the fee to go to the truster's sister, Mrs. Keith, and the heirs of her body, together with the whole residuary estate,—a destination which has carried the whole to her son, the opposing claimant, the Rev. Alexander Keith, subject only to a legacy of £2000, payable to the claimant, Margaret Maitland, under a provision in the deed to the effect that if the truster's son Thomas left only one child (which is the event which has happened), that child (not being the heir-male) should receive £2000. The truster afterwards became reconciled to his son Thomas, who lived till October 1858. After Thomas's death the truster made an allowance of £60 a-year to his widow, sent the claimant, Miss Maitland, to a boarding-school, had her generally with him during the holidays, and evidently formed a great affection for her, which continued unabated till his death. We have indeed letters which he wrote to her after his mental malady had obviously commenced, in which he continues to express his love and regard for her. She was his only grandchild, the sole descendant of his own body; and whatever may be said for the probable operation of pride or prejudice in favour of a male heir to his landed estate, it certainly could not be predicted as either irrational or improbable that, in a sound and disposimg state of mind, he should bequeath to her this £900 in addition to the £2000 she was to get under his trust-deed and settlement.

But no such considerations or probabilities can enable or entitle us to get over the fact that what he did was done when under the insane delusion that he had nothing else to give to her, and that he had either made for her no other provision, or that such provision was altogether valueless.

The proof raises no question of general insanity. If it did I could not adopt an

observation which fell from Lord Kinloch—but which probably did not accurately convey his meaning—that such a question would be a question of probability. But it is unnecessary to go into that, because here there is, as I have said, no question involved of general insanity. The case turns upon this, that the testator laboured under such an insane delusion as to the state of his worldly affairs as totally incapacitated him from dealing with them by this testamentary writing; and more particularly, from so dealing with the sum in dispute, which he insanely imagined to be all he had in the world, and of which he expected to be deprived by the same mysterious influence which had stripped him of everything else, unless means could be taken to place the fund beyond that influence.

LORD PRESIDENT.—I am of opinion that when this writing was executed Mr. Maitland was not of a sound disposing mind. But I do not think the case can be decided as one of general insanity. I think the safe ground of judgment is, [88] that Mr. Maitland was labouring under a special insane delusion, which directly and powerfully affected his mind in regard to the subject-matter of the writing. On that ground I hold this writing to be invalid.

Upon the other branch of the case, I agree with the majority of the Court, and I begin the few remarks I make upon it by calling attention to the circumstance that the proof is entirely on the question of sanity or insanity. If there had been no question here, except whether this writing is or is not entitled to the privileges of a holograph writing, all the parole evidence would have been incompetent and excluded, except for the purpose of ascertaining whether this writing was in the handwriting of the deceased, or what part of it was so. That being ascertained, the writing must stand or fall by itself, and cannot be affected by extrinsic evidence. I cannot therefore follow Lord Deas into an examination of the circumstances under which it was executed. To do so would be to violate the fixed rule of the law of Scotland, that a writing shall not be esteemed probative unless it is tested in terms of the statute, or is among the privileged writings. Now, the only privilege that can attach to this writing is that it is alleged to be holograph. The only words which are in the handwriting of the deceased are his own signature and the address "To my executors," and the question is, whether these words are sufficient to confer the privilege of a holograph writing on the whole document. There are two exceptions to the general rule that a holograph writing must be entirely in the handwriting of the granter—First, where the essential parts of the document are in the handwriting of the granter, and merely formal words are in the handwriting of another person; second, where there are in the handwriting of the granter words which clearly express an adoption of what is not in his handwriting. Lord Deas admits that the former exception does not apply to this case, but he is of opinion that there is enough to show adoption of that part not in the handwriting of the deceased. Now, I am not aware of any case in which the principle of adoption was carried further than this—that a writing not holograph of the person alleged to be the testator has been adopted by him by holograph words. The most remarkable case of this kind is that of M'Intyre.* In that case there were two codicils to a will, the first not holograph, the second holograph, and the Court gave effect to the first, because the holograph codicil was written below it, and referred to it. The only other case of much importance is that of Christie's Trustees *v.* Muirhead, in which the words holograph of the defender and held binding upon him were, "Received the sum of £50 stg.—James Muirhead." These words were written after words not holograph, which showed that the money had been advanced as a loan by his sister. It was held, though not without difficulty, that the words in the defender's handwriting were sufficient to bind him, being explained by the previous words.

But how different is the case here. There are no words holograph of the testator expressive of his intentions at all. The words "To my executors" show that he intended his executors when the trust came into existence to be the parties addressed. That only shows that he had a testamentary purpose. What that purpose was is not to be found anywhere, except in words not in his handwriting. There is nothing in his handwriting to intimate anything beyond that he was going to give some direction to his executors. It might have been to pay a legacy, or to refrain from paying a legacy. If we are to sustain this as a holograph writing I do not know where we are to stop. Suppose a person writes a skeleton will, and appends his signature, while the

* M'Intyre *v.* Macfarlane, March 1, 1821, F. C.

legacies are filled up by some one else, would that be a holograph testament? The case would be at least as strong as the present. A testamentary purpose would be very clearly proved from the person writing a skeleton will. There would be the subscription there as here. Still the person's will would not be expressed in the holograph part. The will does not consist of the formal parts of the writing, but of the substantial directions contained in it. I think if we sustained this writing as holograph we should not only go further than ever has been done, but introduce a principle inconsistent with the general rule of law as to probative writings.

[89] The following interlocutor was pronounced:—"Recall the interlocutor of the Lord Ordinary: Find that the writing founded on by the claimant Margaret Maitland as containing a legacy of £900 in her favour by her deceased grandfather, Thomas Maitland of Pogbie, is neither tested in terms of the statutes, nor holograph of the said deceased, but is improbative, and is therefore invalid and ineffectual as a testamentary writing: Find, *separatim*, that when the said deceased Thomas Maitland subscribed the said writing he was labouring under insane delusions, and was not of sound disposing mind: Therefore, of new repel the claim for the said claimant Margaret Maitland, and remit to the Lord Ordinary, with power to his Lordship to decern for the expenses hereinafter found due, when the same shall have been taxed: Find the claimant, the said Margaret Maitland, liable to the other claimant, the Rev. William Alexander Keith, in the expenses of the competition, and remit to the Auditor," &c.

W. B. HAY, S.S.C.—W. R. SKINNER, S.S.C.—Agents.

[*Principle applied*, Gavine's Tr. *v.* Lee, 1883, 10 R. 448.]

No. 23. X. MACPHERSON, 89. 15 Nov. 1871. 1st Div.—Lord Mackenzie, B.

THE HONOURABLE GEORGE ROBERT HAY, VISCOUNT DUPPLIN, Petitioner.—*Sol.-Gen. Clark—Lee.*

THE HONOURABLE FRANCIS GEORGE HAY AND OTHERS, Respondents.—*Watson.*

Entail—Disentail—Statutes 11 *&* 12 *Vict. c.* 36, *and* 16 *&* 17 *Vict. c.* 94.—The Act 11 & 12 Vict. c. 36, sec. 2, enacts, that "where any estate in Scotland is held by virtue of any tailzie dated prior to 1st August 1848, it shall be lawful for any heir of entail born on or after the said date, being of full age and in possession of such entailed estate by virtue of such tailzie, to acquire such estate in whole or in part in fee-simple, by applying to the Court of Session for authority to execute, and executing and recording, a deed of disentail." The Act 16 & 17 Vict. c. 94, sec. 4, amended the previous Act, to the effect of enabling an heir of entail qualified, first to execute a deed of disentail, and then to present it to the Court, and apply for authority to record it.

An heir of entail in possession of an entailed estate, under a tailzie dated prior to 1st August 1848, conveyed part of it to his eldest son under the conditions of the entail. The son, who was born after 1st August 1848, when of full age executed a deed of disentail, and presented a petition to the Court for authority to record it. Petition refused, Lord President, Lord Deas, and Lord Ardmillan holding that the petitioner was not "an heir of entail" "in possession of such entailed estate by virtue of such tailzie" in the sense of the series of statutes relating to entails,—Lord Kinloch holding that it was incompetent for an heir of entail in possession to propel the fee of part of the entailed estate, and that the conveyance by the petitioner's father was invalid.

In 1870 the Earl of Kinnoull, heir of entail in possession of certain estates in Perthshire, under deeds of entail dated in 1774 and 1779, executed a deed of propulsion, whereby he propelled certain superiorities, constituting a small portion of these estates, to his eldest son, Lord Dupplin. Lord Dupplin was born on 27th May 1849.

In 1871 Lord Dupplin presented this petition for authority to record a deed of disentail of these superiorities, founding on the 2d section of the Entail Amendment

Act of 1848, which enacts, that "where any estate in Scotland is held by virtue of any tailzie dated prior to 1st August 1848, it shall be lawful for any heir of entail born on or after the said 1st day of August, being of full age and in possession of such entailed estate by virtue of such tailzie, to acquire such estate in whole or in part in fee-[90]-simple, by applying to the Court of Session for authority to execute, and executing," an instrument of disentail, &c., and on 16 & 17 Vict. c. 94, sec. 4.

No consents by the next heirs were produced.

The Lord Ordinary remitted to Mr. R. B. Ranken, W.S., who, in his report, raised the question whether the petitioner, "being in possession of the estate, not as having succeeded thereto upon the death of the last heir of entail called before him in the destination, but as deriving right to the possession from such heir who is still in life, by virtue of the deed before referred to propelling the succession to him, was, in these circumstances, the heir of entail in possession of the estate by virtue of the tailzies in the sense of the statute of 1848."

The Lord Ordinary reported the matter to the First Division of the Court. A *curator ad litem* was appointed to the three next heirs.

Argued for petitioner;—Propulsion was a recognised mode of vesting an heir of entail in full possession of the estate, either in whole or in part.* The petitioner was in possession of the estate by virtue of the tailzie. True, it was also by virtue of the deed of propulsion, but no man ever was in possession by virtue of a tailzie alone; he must make up a title, or something similar must follow on the deed of entail.

Argued for respondents;—An heir of entail in possession is not entitled to propel a part of an estate.† The terms "heir of entail in possession," and "proprietor of the entailed estate," may include any heir by whatever means he got the estate; but the term in the Act of 1848, "heir of entail in possession by virtue of the tailzie," could not be held to include one who obtained the estate, not by virtue of the tailzie, but by virtue of a direct conveyance.

At advising,—

LORD PRESIDENT.—The petitioner, Lord Dupplin, states that he is desirous of availing himself of the provisions of the 2d section of the Entail Amendment Act of 1848, for the purpose of disentailing his estate, and that he has accordingly executed and produced an instrument of disentail of certain entailed lands in his possession, and by the prayer of his petition he asks the Court to interpone authority thereto. The 2d section of the Act of 1848, upon which he founds, enacts, "that where any estate in Scotland is held by virtue of any tailzie dated prior to 1st August 1848, it shall be lawful for any heir of entail born on or after the said 1st day of August, being of full age and in possession of such entailed estate by virtue of such tailzie, to acquire such estate in whole or in part in fee-simple, by applying to the Court of Session for authority to execute, and executing," &c., an instrument of disentail, in the form and manner thereinafter provided. This section is amended by a subsequent statute, 16 & 17 Vict. c. 94, to the effect that a party desirous of availing himself of the powers conferred by the Act of 1848 may first execute an instrument of disentail, and then present it to the Court and apply for authority to record it. This is the course which has been adopted by the petitioner, and the question before us is, whether the petitioner is an heir of entail within the meaning of the section I have quoted.

The deed of entail is dated prior to the year 1848, and therefore that condition of the statute is complied with. It is also established that the petitioner was born after that date, and also that he is of full age. So far, therefore, there is no room to doubt that these conditions of the statute are combined in his person. But there remains the question, whether he is an heir of entail "in possession of such entailed estate by virtue of such tailzie"? And that unquestionably raises a difficulty of a very serious character. The petitioner's father is alive, [91] and he under the entail was entitled to succeed, and he did succeed, to the estate, and prior to the execution of a certain deed of propulsion, to be after noticed, he was unquestionably the heir of entail in possession by virtue of the tailzie. But by a deed of propulsion, executed on 5th July 1870, and recorded in the General Register of Sasines on 20th October 1870, Lord Kinnoull propelled the succession in favour of the petitioner. But he did not propel the succession as regarded the entire estate held under the tailzie, but only as regarded certain

* Craigie, Dec. 4, 1817, F. C.

† Broomfield, M. 15,618; Eglinton, Jan. 22, 1842, 4 D. 425—2 Bell, App. 149.

superiorities, which formed a mere fragment of the entire entailed estate, it being reported to us by the conveyancer, to whom a remit was made by the Lord Ordinary, that their aggregate value is only between £10,000 and £12,000, and that the bulk of the entailed estate is in possession of Lord Kinnoull.

The question comes to be, in these circumstances, whether the petitioner is heir of entail in possession, in virtue of the tailzie, in terms of the Act. He says that he is the heir of entail in possession, in virtue of the tailzie, of that portion of the estate which he proposes to disentail; that, though he has not succeeded to that part, he has obtained possession of it by a perfectly legal and recognised method, namely, a propelling deed from the previous heir; and that he must, therefore, be held to be as much the proprietor of that portion of the entailed estate, in terms of the statute, as Lord Kinnoull is of the remainder. Now, there are two questions involved in the consideration of the petitioner's position, which I do not think it either necessary or expedient to determine. They are, 1st, Whether the heir of entail in possession under a propelling deed, supposing it to convey the entire estate, is, within the meaning of the Act, the heir of entail in possession in virtue of the tailzie? and 2d, Whether a deed propelling the succession to a portion only of the entailed estate is a competent and lawful act on the part of the heir of entail in possession? I propose to assume both these points in favour of the petitioner. I propose to assume, 1st, that did the propelling deed in this case propel the succession to the entire estate the petitioner would be heir of entail in possession under the tailzie in terms of the statute; and 2d, That the deed in the present case, though only propelling the succession to a portion of the entailed estate, was nevertheless a legal and competent deed. But conceding both these points, the difficult question still remains, whether a party possessing a part of the entailed estate under such a deed of propulsion is heir of entail in possession, in virtue of the tailzie, within the meaning of the Act of Parliament.

Now, it appears to me that the question is to be solved, not by looking merely at the clause of the Act or the Act itself, with which we are more immediately concerned, but by considering the whole series of statutes by which the fetters of strict entail have been relaxed of late years in favour of the heirs in possession. There have been no less than nine such statutes passed, extending from the 10 Geo. III. c. 51, down to the Act 23 & 24 Vict. c. 95, and the statute with which we are now dealing is one of these. It goes indeed further than any of the others in relaxing the severity of the law of strict entail, but it is only one of several aiming at the same common end. But perhaps we are bound to consider this matter even apart from these statutes, under what may be called the common law of entail, which has grown up around the statute law of entail, originating with the Act 1685. It is certainly of importance to ascertain what, in the language of the common law of entail, is understood by the term "heir of entail in possession in virtue of the tailzie." Now, I think I may venture to say that since the introduction of entails in Scotland in 1685 it never was heard of that there were two heirs of entail in possession at the same time, under the same tailzie, of the entailed estate, or of separate parts of it. Such a thing is not to be found in the whole history of entail law, and seems quite inconsistent with the principle of entail, which is to maintain the integrity of the entailed estate in possession of one individual, while providing for a series of heirs, each of whom shall succeed in his turn to the full beneficial enjoyment of the entire estate. In the ordinary language of the law of entail, therefore, the heir of entail in possession under the tailzie means the heir who is in possession for the time of the entire estate. But under the [92] statutes this is made even more clear. The powers given to proprietors of entailed estates commence with the Montgomery Act, which professed to give authority to proprietors of entailed estates to execute certain improvements at the expense of the estate, or of succeeding heirs; and wherever that statute meant specifically to designate the proprietor of the entailed estate, he is always called the heir of entail in possession. In the introductory clauses he is spoken of indeed as proprietor, but when it becomes necessary to use more precision the term heir of entail in possession is always used. And so in all the series of Acts referred to. In the particular Act here in question, the entail Amendment Act of 1848, the same phraseology runs throughout every clause, and particularly the 33d clause, directing the method of application to the Court.

Now, it is very difficult to conceive that the Legislature meant by this term to designate anybody else than the heir of entail in possession of the entire estate. No doubt power is given to disentail portions of the entailed estate, but that power is given

to the person who is for the time in possession and *dominus* of the entire estate, and whose interest, in so far as not antagonistic to that of the substitute heirs of entail, may be held to induce him to deal most beneficially with the entire estate. If we were to hold that a person in the position of the petitioner is vested with all the powers conferred by law on an heir of entail in possession of an entailed estate, with reference to the fragment of the estate of which he is in possession, consequences the most strange and embarrassing would necessarily follow. And it is difficult to see how you could hold that he was thus vested with the powers of heir of entail in possession under one statute without holding that he was likewise vested with the same powers in the meaning of all the others. If, then, Lord Dupplin is entitled to disentail this portion of the estate, he is equally entitled to exercise all the powers of the entire series of statutes. It would be a very strange thing if an heir so situated is to be entitled to let on building leases or to feu under the Montgomery Act. A thing might be very expedient in itself, and very advantageous for him, which might be quite antagonistic to the interests of the heir in possession of the rest of the estate, and even destructive to the rest of the estate, if exercised by a person in possession of a small portion of it lying perhaps near the mansion-house, or otherwise in an inconvenient position. Supposing, for example, that this so-called heir of entail in possession of a fragment of the estate in that position should think proper to enter into a contract of excambion with another proprietor—conceive how the bulk of the estate might be affected. What might be very expedient for the party excambing might be most injurious to the main body of the estate, including perhaps the mansion-house and policies. In short, it is almost impossible to exhaust the suggestions of embarrassment which might arise were we to consider a person so situated as armed with all the statutory powers of an heir of entail in possession, though limited to a fragment of the entailed estate.

These considerations have led me to conclude, without hesitation, that the petitioner is not, in the meaning of the statute, the heir of entail in possession in virtue of the tailzie, even as regards that portion of the estate the succession to which has been propelled to him. I am therefore for refusing the petition.

LORD DEAS.—The primary question is, whether the petitioner is the heir of entail in possession, in the sense of that series of statutes to which your Lordship has referred.

We have had no instance, that I am aware of, from the date of the statute 1685 downwards, of a partial propulsion of the fee of an entailed estate. But assuming the competency of such propulsion, it would by no means follow that the person in possession under the propelling deed would be the heir of entail in possession in the sense of the series of statutes referred to. In short, upon the grounds stated by your Lordship, I agree that the prayer of this application must be refused.

LORD ARDMILLAN.—While I concur with your Lordship, I must say that it is not without some difficulty. I acquiesce in many of the observations of the [93] Solicitor-General with reference to the construction of the Act of 1848 and the more recent statutes; and if the present question had related to an enforcement or a relaxation of the fetters of an entail there would have been great room for a liberal construction of the statute, if its provisions are urged in favour of an heir seeking freedom from the fetters. But to my mind that is not exactly the question which we have to dispose of. The question is, whether a substitute to whom a portion only of an entailed estate has been propelled can, in regard to that portion, competently exercise the statutory powers of an heir who is in possession by virtue of the tailzie; and even giving a liberal construction to the statute, I am unable to come to any other conclusion than that at which your Lordship has arrived. The great embarrassment and confusion which, as your Lordship has pointed out, would result from there being practically two heirs in possession of the estate at the same time and under the same tailzie is sufficient to determine the question against the petitioner. The investiture under the entail cannot be so divided as that two heirs can exercise the statutory powers and privileges of heirs in possession.

I do not understand your Lordship to express any opinion on the question whether part of an entailed estate can to any effect be competently propelled. It is not necessary to decide that point; but even on the assumption that it could be done to some effect, I agree in thinking that the petitioner is not in a position to exercise the statutory power competent to an heir in possession by virtue of the tailzie.

LORD KINLOCH.—The present petition for authority to disentail is presented on the ground that Lord Kinnoull, the petitioner's father, has propelled to him the succession of a part of his entailed estate; and that by virtue of this propulsion the petitioner is,

as to that part, heir of entail in possession, born after 1st August 1848, and therefore entitled to execute a disentail by his own act without consent of any one.

Admittedly Lord Kinnoull, the father, could not execute a disentail; for he would require the consent of Lord Dupplin, given after he had attained twenty-five; and his Lordship has not yet attained that age. The disentail by Lord Dupplin, in his own supposed right, may take place without consent, he having attained legal majority.

There can scarcely fail to arise a suspicion that this is an arrangement to do indirectly what, directly, Lord Kinnoull could not do. But if the act of propulsion be a legitimate act, I do not at present see that we could deny effect to the act of disentail. The petitioner would in that case possess the entailed estate in his own right, no one else having any right in it, and I do not see how he could be denied any of the privileges of an heir in possession.

This directly raises the question, which, it appears to me, I cannot avoid determining in order to decide the present case, whether the act of propulsion was a legitimate and valid act? and my opinion is against its validity.

That an entailed estate may, as a whole, be propelled by the party in possession to the heir *alioquin successurus* I consider to be undoubted. The proceeding is substantially equivalent to a renunciation of his right by the party in possession. The effect is just what his death would have. Such propulsion is very ancient in the practice of the law. But I am not aware of any authority (none has been pointed out to us) for a partial propulsion of the estate. It is a propulsion of the whole estate with which, so far as I am aware, we have had invariably to deal. I am of opinion that a propulsion of an entailed estate *pro parte* is incompetent and inadmissible. To destroy the unity of the estate is, I think, against the conception of an entail. It is altogether anomalous to have two heirs of entail co-existing in the same entailed estate. This is quite a different case from a propulsion in fee, reserving the granter's liferent. Even that is a case which may admit of serious doubts as to the respective rights and privileges of the parties. But it only infers the constitution of a single fee, comprising the whole entailed estate. The contemplated propulsion in the present case splits down the undivided fee into two co-existent fees, held by two separate fiars. The proposal at once raises questions of difficulty, and the difficulty of which strongly confirms the incompetency of the [94] proceeding. In Lord Kinnoull's hands an act of contravention committed with regard to any portion of the estate, however small, would irritate the right to the whole. What effect would a contravention by Lord Dupplin have on the right of Lord Kinnoull? How are family provisions, or claims for meliorations, to be arranged in such a case? These, and many such questions, are more easy to be asked than answered. They are only avoided by assuming that two entailed estates are created, with all the incidents of two separate estates, as much as if they came to the different parties by two unconnected deeds of entail. But this overcomes lesser difficulties by the greatest difficulty of all. For nothing is, generally speaking, more clearly beyond the power of an heir of entail, than to split down the entailed estate into two estates, held by two co-existent fiars.

It is said that, under the Entail Amendment Act, it is competent to disentail an estate "in whole or in part." But this is under statutory authority. The question here is, what may be done without such authority? The Entail Statutes convey no right of propulsion, which rests entirely on the anterior law. They refer indeed to propulsion, but it is to that instance of it in which a propulsion is made, manifestly of the whole estate, reserving the liferent of the granter; when they provide that the consents necessary to disentail shall be those required in the case of the liferenter—thereby affording a strong implication against disentail by the propellee, as in his own right, being contemplated. No authority for the present proceeding is to be found in the Entail Acts. We are called on to determine the point on the general principles of our entail law. I am of opinion that this partial propulsion derives no support from these.

On this ground, I am of opinion that the present petition should be refused.

THE COURT refused the petition.

MACKENZIE & KERMACK, W.S.—GILLESPIE & PATERSON, W.S.—Agents.

No. 24. X. MACPHERSON, 94. 15 Nov. 1871. 2d Div.—Sheriff of Lanarkshire, I.

JESSIE WEIR OR M'DONALD, Complainer and Respondent.—*Millar*—*H. Moncreiff.*

JAMES DEMPSTER, Respondent and Appellant.—*Guthrie Smith*—*M'Kechnie.*

Possessory Judgment—Property—Servitude—Landlord and Tenant—Title to Sue.—Circumstances in which *held* that a tenant under a lease for 999 years, who had for seven years been in possession of a right of access over the ground of an adjoining tenant of the same landlord, was entitled to an interdict to prevent the adjoining tenant from disturbing the possession.

Question, whether a tenant under a long lease can acquire a right of servitude over the ground of another tenant of the same proprietor.

In this petition for interdict, presented in the Sheriff-court of Lanarkshire, Mrs. M'Donald, residing at Newmill, Roberton, prayed that James Dempster, also residing at Newmill, might be ordained to remove a barricade he had erected across a road leading to the house occupied by the complainer, and be interdicted from again erecting any barricade or other obstruction on the said road.

The petition stated—"The respondent some time ago erected a barricade across the road which leads into the house occupied by the petitioner, and thereby obstructed her entrance thereto. The road across which the barricade was erected by the respondent is the only way of entrance or access the petitioner has to and from her house, and she caused the barricade to be taken down and removed. The respondent has again placed a barricade across the road, and the petitioner is prevented from having access to and from the house occupied by her."

The complainer was tenant of a piece of ground, with the houses erected thereon, situated at Newmill, under a lease for 999 years from Martinmas 1811. The description was a bounding description.

Condescendence and answers were ordered, in which the petitioner [95] alleged—(Cond. 5) "The said ground and houses are situated on the west bank of the river Clyde, a short distance from the turnpike road at Roberton, and the access to the property is by a road leading off the turnpike road." (Ans. 5) "Denied as stated, and reference made to the defender's statement." (Cond. 6) "The respondent, some time previous to the present application being presented, erected a barricade across the road or entrance leading into the petitioner's house, and thereby prevented her having access to and from the same. The entrance across which the barricade was erected being the only entrance or access the petitioner had to her house, she caused the barricade to be taken down and removed; but the respondent erected another barricade, which still remains, and the petitioner is prevented from having access to and from her house, and has been excluded from the possession thereof." (Ans. 6) "Denied, and reference made to the defender's statement. It is admitted that the defender fenced in his own property, and that the petitioner, illegally and without warrant, tore it down." (Cond. 7) "The petitioner and her predecessors have been in the possession of the said ground and house thereon, with access thereto by the said road or entrance, for more than seven years."

The respondent was tenant under a long lease of the adjoining premises. He stated—(Stat. 4) "There is no liberty or privilege conferred on the petitioner or her authors by their titles, now produced, so to enter upon the defender's ground, and there is no reservation of such right in favour of the petitioner; and there is no relevant allegation that any prescriptive or other right to a road or passage at such place has been acquired." (Stat. 5) "The defender was tenant of the petitioner's subjects, under the deceased Mr. M'Donald, for the period from 1864 to 1867, and, for his own convenience, passed and repassed in front of his own house, having opened a part of the fence between the two properties to enable him to do so; but since the latter date the fence has been restored to its former state, and remained so, except when interfered with in the illegal manner after explained. It is explained that the

defender treats his possession as his father's." (Stat. 7) "The said property belonging to the respondent has been fenced off and enclosed since 1867, although the petitioner has on various occasions, *brevi manu*, broken down, or attempted to break down and otherwise interfere with the same."

The petitioner pleaded;—(1) The petitioner being in the possession of the ground and houses referred to, with access thereto by the entrance in question, and having, by herself and her predecessors, had such possession for more than seven years, she is entitled to continue the possession until legally dispossessed. (2) The respondent was not entitled to erect a barricade, or otherwise obstruct the entrance of the petitioner to her house, and thereby exclude her from the possession and occupation thereof.

The respondent pleaded;—(1) No title to sue. (2) The petitioner not having libelled any title to sue a possessory action, the petition should be dismissed. (3) The pursuer not having libelled seven years' possession, and, generally, stated no *termini habiles* in the petition to warrant the interdict and possessory judgment craved, the same should be dismissed. (4) It is incompetent to introduce new and separate grounds of action in the condescendence from those stated in the petition, and the new statements above mentioned should not be allowed to be pleaded, or form part of the record. (6) The defender never having obstructed or erected any barricade across any road or access to which the petitioner has right, the present application should be dismissed. (8) The present action is one involving questions of heritable right, and is an attempt to have a right of way declared incidentally, and is therefore incompetent in this form and in this Court.

[96] The Sheriff-substitute (Dyce) repelled the preliminary defences, and to this interlocutor the Sheriff (Glassford Bell) adhered.

A proof was ordered, the substance of which appears from the following findings in the Sheriff-substitute's interlocutor:—"Finds in point of fact (No. 7/11) that the petitioner's late husband was tenant under a long lease of a piece of ground, with the houses thereon, at Newmill foresaid, to the west of the subjects occupied and possessed there by the respondent; that her said husband died in 1866, and that he having left no heir, the petitioner received a deed of gift of said lease and the deceased's other estate from the Crown in her favour, and that the petitioner, after her said husband's death, continued in the occupation and possession of the said subjects, and still possesses the same: Finds (Nos. 14 and 15) that the respondent is tenant or proprietor under a long lease of a piece of ground, with the dwelling-house thereon, at Newmill fore-mentioned, immediately adjoining said property of the petitioner; Finds that, during the petitioner's and her late husband's occupancy of said subjects, the hedge between the two properties was not continuous up to the walls of the two houses, but, on the contrary, that the roadway or access leading past the respondent's and petitioner's said houses was throughout its entire length continuous and unbroken: Finds that, shortly before the presentation of the petition, the respondent obstructed the passage of the petitioner along said roadway by the erection of a barricade, composed partly of earth, stones, branches, and rubbish, and which, though removed on one or two occasions by the petitioner's orders, has been replaced in its position by the respondent, and still continues there: Finds that the only regular road or access to the petitioner's said house is that shown on the Ordnance Survey Map (No. 18), viz. from the east, by the Woodend parish road, where it leaves the turnpike road at Ladygill, and thence, at nearly right angles to it, by a road across Hillend farm, leading directly past the front of the respondent's and petitioner's said houses; and that there is no mode of access to Newmill by the 'Scaur Brae,' or by the back of the said houses, except by trespassing upon the farm of Hillend, the track by the dyke-side to the south-west being formed by the footprints of 'fishers,' who use that road as a means of reaching the river Clyde, through the mere tolerance of the tenant of Hillend: Finds that the barricade or obstruction complained of effectually bars the petitioner's sole means of access to her said dwelling, and thereby excludes her from the possession and occupation of the same: Finds that the petitioner and her predecessors have been in the continuous possession of said ground and houses, with the means of access thereto by the entrance in question, for a period of more than seven years prior to the erection of said barricade." His Lordship accordingly found "in point of law that the petitioner is entitled to the benefit of a possessory judgment, and to the warrants craved: Therefore, meanwhile ordains the respondent, at sight of Mr. James Dalziel, road-surveyor, Lanark, within ten days from this date, to remove said barricade, with

certification that if defender fail to obtemper this order the pursuer will be authorised to employ persons to remove said barricade at the defender's expense; and, *quoad ultra*, reserves consideration of the petition, with the question of expenses, until it be seen whether said order be duly obtempered."

The Sheriff adhered.*

[97] The respondent appealed, and argued;—There was no sufficient statement in the petition of a possessory title. Neither was there a relevant statement of a servitude road, and the defect could not be supplied in the condescendence.† Further, no plea of servitude had been stated. A servitude could not be acquired by one tenant over subjects held by another tenant of the same landlord. Servitudes must be permanent, but a lease must come to an end.‡ There was no easement of necessity.§ There was no prescription here, as the reclaimer, when using the road claimed, was tenant of both houses. The complainer was not entitled to a possessory judgment, as there was interruption. He also asked more than a possessory judgment, viz., that the hedge should be removed.

The complainer argued;—The proof shewed possession for seven years, which was sufficient to entitle the complainer to a possessory judgment.|| The respondent must proceed by declarator.

At advising,—

LORD COWAN.—We have had a very learned argument from Mr. Smith in this case, and if its decision had depended on his view of the issue raised by the record and proof we would have required some time to consider our judgment. I do not, however, consider that the case can be so regarded.

---

* "NOTE.—It was authoritatively settled by the case of Liston, 3d December 1835, that a party may be entitled to the benefit of a possessory judgment regarding a right of ish and entry to a plot of ground, though he held such ground under a bounding charter making no reference to such right, and con-[97]-taining no clause of parts and pertinents. In his note the Lord Ordinary remarked 'that a bounding charter, though it may be conclusive against a claim of property beyond its limits, is not necessarily exclusive of any of the known rights of servitude over adjacent properties, such as that of ish and entry, and therefore does, if supported by the requisite proof of possession, afford sufficient title for a possessory judgment.' Lord Balgray, who, with the other Judges, approved of the view taken by the Lord Ordinary, said,—'There is no rule of our law more salutary in itself, or better established, than that which declares that a party who has enjoyed peaceable possession of a right for seven years is entitled to be protected in it against summary inversion of the state of possession.'* This decision overruled and set aside what had been held in the earlier case of Saunders, 26th February 1830. In the recent case of Calder, 2d March 1870, which was the converse of the present, the Lord Justice-Clerk said, 'When a party attempts to obtain possession by a summary process, it is a sufficient answer to him that the respondent has possessed the subject for seven years.' No doubt, as Lord Benholme remarked in the same case, 'it is true that seven years' possession will not always give a possessory title, for the possession may have been precarious or violent, or there may have been some other vice in it.' But here no such element occurs. The defender's statement that the pursuer's late husband paid him 5s. per annum for the privilege of passage is not corroborated, and the proof instructs a free use of the road for more than seven years before any interruption was attempted, so that the subsequent interruptions, which were not acquiesced in, were unavailing—(See Harvie, 10th July 1827). The defender's proper remedy, if he chooses to insist in it, is by declarator; but he cannot, at his own hand, take away from the pursuer, *via facti*, the right of ish and entry which she has exercised for the above period, the more especially as it seems to be the only available access to her property."

† Magistrates of Kilmarnock *v.* Mather, Feb. 19, 1869, *ante*, vol. vii. 548.

‡ Thomson *v.* Murdoch, May 21, 1862, 24 D. 975; A. S., 10th July 1839; Lowson's Trustees *v.* Crammond, Nov. 16, 1864, *ante*, vol. iii. 53.

§ Stair, ii. 7, 3; Ewart *v.* Cochrane, March 22, 1861, 4 Macq. 7; Glave *v.* Harding, Nov. 13, 1857, 27 L. J. (Exch.) 286; Liston *v.* Galloway, 14 S. 97.

|| Wilson *v.* Henderson, Feb. 28, 1855, 27 Jur. 228.

---

* Liston *v.* Galloway, 14 S. 97.

In a proper case of declarator of right of servitude it may be a good objection [98] to a tenant's title to sue that he has not the concurrence of his landlord. But this is quite a different question. It is a complaint to the Judge Ordinary of a violent inversion of the complainer's possession of the means of access to her house. It rests on the fact of seven years' possession of this right of access, and craves for the instant restoration of things to the condition in which they stood before this *brevi manu* invasion of her right. I apprehend that every one having a title to occupy and possess at all has clear right and interest to prosecute such an action; and this is all the more applicable when the title of the complainer is under a long lease of 999 years. The principle applicable to the case is stated by Lord Balgray in a very similar case (Liston *v.* Galloway, 14 S. 97) in these terms:—"There is no rule of our law more salutary in itself or better established than that which declares that a party who has enjoyed peaceable possession of a right for seven years is entitled to be protected in it against summary inversion of the state of possession." Now, this is just a case of summary inversion of possession; and when a petitioner, having such a title as this complainer, applies to the Judge Ordinary, and proves that he has enjoyed that possession for seven years, which has been summarily inverted by a person erecting a barricade at his own hand, against whom he complains, it can be no objection to his title that the landlord does not concur in the application. I consider that every party in possession for seven years under a lawful title, though that title may be one of tenancy, is entitled to be protected against the summary invasion of his just rights.

That leaves only the question whether seven years' peaceable and uninterrupted possession has been proved. I think it has; and that the defender has failed to establish that there was any interruption.

LORD BENHOLME concurred.

LORD NEAVES.—I concur, but not quite on the same grounds as some of your Lordships.

Possessory judgments are most important remedies, and I quite agree with Lord Balgray's remarks in the case of Liston.

But there was a distinction between that case and this, inasmuch as there the party claiming the servitude was a feuar, whereas here he is a tenant. There was a bounding charter there as here, but a bounding charter is no obstacle to acquiring a servitude, which is necessarily something which operates beyond one's own property.

I doubt if we can give a possessory judgment on seven years' possession of a right which could not legally be acquired by forty years' possession, and there is great difficulty in holding that a servitude can be created over one tenancy in favour of a neighbouring tenant, where both hold of the same proprietor, even where the leases are of long duration. But then servitude is not the only category under which a right obtainable by one tenant over another tenancy may be classed. A right of access, for instance, running along the fronts of several houses, so as to form a kind of street, may, I conceive, be obtained by one tenant as against another, by forty years' possession, and much less than forty years. Seven years might not be sufficient, but much less than forty could do to infer a presumption that such a use of the properties had been arranged by consent.

I give here a judgment in favour of the possession, because I think the right claimed is a legal right, and not because I think it is technically a servitude.

The LORD JUSTICE-CLERK concurred.

This interlocutor was pronounced:—"Find that the petitioner and her predecessors have, for a period of more than seven years prior to the erection of the barricade or obstruction complained of, been in the continuous possession, and have used and exercised the right of access along the road or track in question; and that the said barricade was erected within seven years of the presentation [99] of the present petition: Therefore affirm the judgment appealed from, and dismiss the appeal, and decern: Find the petitioner entitled to expenses in this Court, and remit to the Auditor to tax and report."

WILLIAM B. GLEN, S.S.C.—MACONOCHIE & HARE, W.S.—Agents.

No. 25. X. MACPHERSON, 99. 17 Nov. 1871. 1st Div.—B.

MRS. ELIZA YOUNG OR CALDWELL AND DAVID SEMPLE, Petitioners.—*Sol.-Gen. Clark.*

THE LORD CLERK REGISTER, Compearer.—*Balfour.*

Public Records—Probative Writ—Registration—Statutes 1685, *cap.* 38, *and* 31 *&* 32 *Vict. cap.* 34.—A testamentary deed was, after the death of the granter, given in to be recorded in the Books of Council and Session, and was entered in the Minute-book of writs presented for registration, and an extract was issued, but before booking, a clerical error was discovered in the testing-clause, whereupon the principal beneficiary under the deed, and the law-agent by whom it was prepared, petitioned the Court, within six months after it had been given in to be recorded, to allow access to the deed for the purpose of adding to the testing-clause certain words specified. The Court, without pronouncing any judgment as to the effect of the proposed amendment, authorised it to be made at the sight of the keeper of the register, and appointed a copy of the interlocutor to be appended to every extract that might be issued thereafter.

Question, (1) Whether the power of the Court to allow access to the deed was limited to the period of six months after it had been given in to be recorded; and (2) whether an amendment could competently be allowed upon any other than the testing-clause.

On 19th March 1870 Mr. George Caldwell executed a disposition and settlement, whereby he conveyed certain heritable property to his wife, Mrs. Eliza Young or Caldwell, whom he named his sole executrix and universal legatary. The settlement contained a number of provisions in favour of Mrs. Caldwell, who was the principal beneficiary, and also in favour of the granter's daughter, which were declared to be in full of all their legal claims, and the deed was signed by Mrs. Caldwell in token of her approbation.

Mr. Caldwell died on 15th May 1871, and the settlement, which was in the custody of Mr. David Semple, the law-agent by whom it was prepared, was transmitted by him to Edinburgh on 18th September 1871 to be recorded in the Books of Council and Session, and was of that date entered in the Minute-book of deeds presented for registration.

An extract was subsequently obtained, when an error was discovered in the testing-clause, the writer of the deed having designed himself as "David Smith Semple, clerk to David, writer in Paisley," omitting the surname of Mr. Semple, the agent by whom it was prepared.

In these circumstances, the deed not being booked, but only entered in the Minute-book as presented for registration, Mrs. Caldwell and Mr. Semple on the 2d November 1871 presented this petition, setting forth the facts above narrated, and the 1st section of the Act 31 & 32 Vict. cap. 34, which provides, that "from and after the passing of this Act no writ that shall have been given in to be registered in the Books of Council and Session shall be taken out by the party or any one employed by him, nor shall any such writ be given up by the keepers of the register for any purpose, at any time, either before or after the same has been booked, excepting only when authority of the Lords of Council and Session has been expressly given thereto, and then only under such conditions and limitations as may be expressed in such authority, anything in the said [100] recited Act, or in any other Act, or any law or custom to the contrary notwithstanding."

The prayer of the petition craved the Court "to grant warrant on the Principal Keeper of the Register of Deeds, Probative Writs and Protests, or his substitutes, to deliver to the petitioners the said disposition and settlement of the said George Caldwell, dated 19th March 1870, or to allow them access thereto, for the purpose of supplying the foresaid omission in the testing-clause thereof, by the addition of the words, 'Declaring that the witnesses hereto are David Semple, writer in Paisley, and David Smith Semple, his clerk, and writer hereof'; or in such other manner as your Lordships may direct, and that under such conditions and limitations as to your Lordships shall seem proper, in terms of the before-recited Act."

The Court appointed the petition to be intimated to the Lord Clerk Register, for whom counsel appeared at the next calling of the case, and stated that he did not oppose the application; but that if it were granted the proper course would be to authorise the entry in the Minute-book to be cancelled, to discharge the keeper of the register of the deed, to recover all extracts, and then to give up the principal.

Argued for the petitioners;—The application having been made within six months of the date when the deed was given in to be recorded, the parties by whom it was presented might have required it back unconditionally under the Act 1685, cap. 38; and although that privilege was abridged by 31 and 32 Vict. cap. 34, the Court might under that Act allow access to the deed, so that the testing-clause might be amended by the insertion of the words specified in the petition. There was no precedent against this course, for in previous cases the Court had never refused to allow an amendment of the testing-clause, except where the deed had either been actually recorded, or produced in judgment.* In this instance the deed had merely been given in for registration, but was not booked, and the Court was not asked to pronounce any judgment upon the effect of the proposed amendment. The course suggested by the counsel for the Lord Clerk Register was unnecessary and inexpedient.

At advising,—

LORD PRESIDENT.—The object of this petition is to supply an omission in the testing-clause of a disposition and settlement executed on the 19th of March 1870. The testator died on the 15th of May 1871, and on the 18th of September following the deed was given in to be recorded in the Books of Council and Session, but it has not yet been booked, but is merely entered in the Minute-book as presented for registration. In these circumstances the petitioners, who are apparently the only parties interested in the disposition and settlement, crave to be allowed to borrow up the deed, or alternatively to obtain access to it, for the purpose of rectifying the mistake in the testing-clause; and I think that the application raises a question of considerable nicety and importance under the recent statute of 31 & 32 Vict. cap. 34. Under the former Act of 1685 there can be no doubt that a deed given in to be recorded, and not entered in the principal register, but only in the Minute-book, as given in to be registered, might within six months be returned to the person who presented it for registration, and that not for any particular or limited purpose, but because it was the absolute right of the party to get back the deed within six months, and [101] apparently to do what he pleased with it when he thus had it in his power, for the keeper of the record appears to have been discharged from all further responsibility in regard to deeds so given back, which under the statute were entered in a separate book, to be subscribed by the person getting up the deed, "that as the one Minute-book doth charge, so the other Minute-book may discharge the clerk of such writs." Now, this was considered by the Legislature to be an inconvenient and a dangerous practice, and accordingly the preamble of the recent statute sets forth that, "Whereas the giving up of writs to the parties, or others employed by them, after the same have been given in to be registered in the Books of Council and Session, has caused inconvenience, and has been found to interfere with the due and regular booking of writs":—that I read as one inductive cause of the succeeding enactments—but there is another: the preamble goes on, "and it is expedient, and will tend to greater regularity and security, that writs, after having been given in to be registered in the Books of Council and Session, should not be given up, but should remain in the custody of the keepers of the registers, subject to the authority and control of the Lords of Council and Session, before being booked, in like manner as after being booked: Be it therefore enacted," &c. Now, it is essential that in construing the statute this preamble should be kept in view, the purpose of the Legislature being that deeds, after being given in for registration, should not be given out again, but should remain with the keeper of the register, subject to the authority of the Court. Consistently with this object the 1st section of the statute provides that "from and after the passing of this Act no writ that shall have been given in to be registered in the Books of Council and Session shall be taken out by the party, or any one employed by him, nor shall any such writ be given

* Macleod *v.* Cunninghame, July 20, 1841, 3 D. 1288—5 Bell's App. 210; Brown (Petitioner), March 11, 1809, F. C.; Bank of Scotland *v.* Telfer's Creditors, 1790, Dict. 16,909; Hill *v.* Arthur, Dec. 6, 1870, *ante*, vol. ix. 223; Thoms *v.* Thoms, 1870, *ante*, vol. viii. 857.

up by the keepers of the register for any purpose, at any time, either before or after the same has been booked, excepting only when authority of the Lords of Council and Session has been expressly given thereto, and then only under such conditions and limitations as may be expressed in such authority." It was contended in argument that the exception at the end of this clause is not confined to the immediately preceding sentence commencing with the word "nor," but that it overrides the whole section. I do not think, however, that it is of much consequence whether the exception applies to the whole of the preceding enactment or not, because, assuming that under no circumstances is the party entitled to have the deed delivered up to him, but that it must remain in the custody of the keeper of the record, I am of opinion that the petitioners would still be entitled to have access to the deed, provided that the purpose for which they desire to obtain access is reasonable, and such as the Court may grant in the exercise of a sound discretion. Now, the petitioners say that the testing-clause of the deed has been inaccurately filled up, in respect that the surname of David Semple, the agent, by whose clerk the deed was written, has been omitted, and two objections to the validity of the deed may arise out of this mistake, in the first place, that the writer of the deed is wrongly designed; and, in the second place, that the witnesses are imperfectly designed; and the petitioners propose to cure the error by adding these words, "declaring that the witnesses hereto are David Semple, writer in Paisley, and David Smith Semple, his clerk, and writer hereof." Now, it is no part of our function, in disposing of this application, to decide whether the addition of these words will cure the alleged defect in the deed or not, or whether the deed is or is not invalid without the proposed alteration, but the purpose for which the petitioners seek to obtain access to the deed appears to me to be reasonable in itself, and such as we may grant. Before the recent Act the parties might have made the alteration without the authority of this Court; and looking to the reasonableness of the alteration proposed, I think we may authorise it to be made, but of course at the sight of the keeper of the register, in whose hands the deed must still remain.

LORD DEAS.—This deed is a *mortis causa* settlement, conveying certain heritable subjects to trustees for testamentary purposes. It was executed on 19th March 1870, and the granter died on 15th May 1871. On 18th September 1871 the deed was given in to be registered in the Books of Council and Session, [102] and an extract was obtained. From the moment that deed passed into the hands of the proper officer in the Register House it became, under the statute, a registered deed. The "booking" serves very important purposes; it creates an additional security for preservation of the contents of the deed, which might happen to be lost or accidentally destroyed, while the book in which it was engrossed might remain, or *vice versa*. It is the deed itself, however, which becomes part of the public register, and it does so from the moment it is received into the Register House, and by the recent statute it cannot thereafter be taken out by or given out to any party without the special authority of the Court.

What is now asked is authority to make a correction on the deed after the death of the granter, and after it has become part of the public records. There can be no question that this is, on the face of it, a startling application. Nevertheless, I am humbly of opinion with your Lordship that it may be granted. It is very important to keep in view the particular part of the deed which is proposed to be corrected. The testing-clause, in which the defect occurs, is part of the deed, but it is a peculiar part of it. It may be filled in *ex intervallo*, and indeed that part of it which specifies the date or dates of subscription, and the names and designations of the witnesses, ought properly not to be filled in till the deed is signed, as it records something actually done, and not something intended to be done. The entire clause may be added even after the death of the granter. In the case of Dick's Trustees, 26th November 1798, Hume's Decisions, 908, the testing-clause of a marriage-contract was filled up after the death of both the spouses, and the deed was held effectual. In the older case of the Bank of Scotland *v.* Telfer's Creditors, 17th February 1790, M. 16,909, the writer *ex intervallo* inserted an explanation that the name of a witness was Robert Gibson and not Robert Dickson, and the deed was held good. In the case of Blair *v.* the Earl of Galloway, 15th November 1827, F. C., and 6 S. & D. 51, the testing-clause was filled up after the lapse of thirty-two years, and the objection to the deed was repelled. In the present case, however, not only is the granter dead, but the deed has been registered, and that is what makes the difficulty.

The statute 1685, c. 38, provided that all writs given in to be registered should be booked within a year after being given in, "and if any party, or one employed by him, shall desire up a writ given in within the space of six months after its ingiving," he should be entitled to get it if not yet booked. Under that statute the practice was to allow unbooked deeds to be withdrawn within the six months, and to receive them back if presented again for registration with or without corrections. The same object was frequently attained by allowing the deeds, while unbooked, to be borrowed on receipt within the six months, and returned, when the receipt was cancelled. In Macleod *v.* Cuninghame, 20th July 1841, 3 D. 1288, an unbooked deed taken up within the six months, and presented of new for registration after correcting a clerical error in the testing-clause, was found not to be thereby invalidated, and the decision was affirmed on appeal (5 Bell's App. 210). But the statute of 31 & 32 Vict. c. 34, was intended to put an end to that practice, and to substitute another and safer means of attaining the same end. There can be no doubt, I think, of the expediency of giving some means of correcting, within a certain time after a deed has been registered, such errors in the deed as might have been effectually corrected had it not been registered. For instance, it is often expedient that deeds of settlement, which might be tampered with, or lost, of destroyed, should be lodged in the Register House as soon as possible after the death ot the granter, and if there were no possibility of correcting errors or defects which mighe soon afterwards be found in the testing-clause of the deed, great injustice might be done. Access to the deed, under authority of the Court, is therefore a very appropriate remedy for such cases. But that authority is always to be limited by such conditions as the circumstances of the particular case render expedient, and much must also depend on what the correction proposed to be made is. It might be a very different question from the present if the correction proposed to be made were in any other part of the deed than the testing-clause. The kind of deed might also very possibly make a difference.

[103] The deed now in question is a testamentary deed, and it is a very material circumstance that the agent who made the deed, and is professionally responsible for its due preparation and completion, is a party to the present application. His duty to complete the testing-clause only arose after the parties to the deed had executed it, and he is here a concurring petitioner, asking authority to correct an omission made by him in the performance of that duty. We are not called upon to say what the effect of the omission might have been if not corrected. Nor will anything we now do preclude any party interested from afterwards objecting that the correction is ineffectual. But I think it not immaterial that the objection to the deed, even as it stands, is not of a kind which we could at once pronounce a palpable nullity. The question, to say the least of it, admits of discussion and consideration. In like manner, it is not so clear, to say the least of it, that the correction will not effectually cure the defect as to entitle us to prevent that correction from being made under the favourable circumstances which here occur, of the agent, and his clerk who wrote the deed, including the testing-clause, being still alive.

On the whole, I entirely concur with your Lordship in thinking that this is a case in which reasonable grounds have been shown for the exercise of the authority which the statute has conferred upon the Court. But I think that authority should be exercised only by allowing access to the deed in the hands of the keeper of the records, and that the precise terms of the interlocutor will require consideration.

Lord Ardmillan.—Two questions may be said to be here involved, first, the question of the competency of this particular application to the Court; and second, the question of the abstract competency in the Court to give the remedy craved. My construction of the clause of the statute in question is the same as your Lordship's, viz., that as regards this matter it places deeds, before and after booking in the Register House, in precisely the same position. The ingiver of the deed, after giving it in, has no power to withdraw it, and can only obtain access to it with the authority of the Court. I am of opinion, therefore, that the application to the Court is competent; and I also think that the interposition of the Court is competent, not only within the period of six months formerly allowed for access, but beyond it, if sufficient cause be shown.

But does the Court, by responding to the application, and interposing when craved, acknowledge the right of the party to obtain possession of the deed, or uncontrolled access to the deed, or only acknowledge the sufficiency of the grounds stated in support

of the application? I think the latter. I agree with Lord Deas that where the deed is of the kind we have here, a testamentary deed of settlement, and where the party to the deed is still alive, and where the agent who prepared the deed, under whose responsibility the error was committed which it is sought to correct, and the clerk who wrote the deed, are both forthcoming, a proper case is shown for the exercise of the discretion of the Court, and in the way proposed by your Lordship.

LORD KINLOCH.—I think it clear, beyond a doubt, that the effect of the Act 31 & 32 Vict. c. 34, is to prevent any one taking out of the records a writ given in to be registered without the special authority of the Court, and this without any distinction between the case of the writ being or not being copied into the record. The statute does away with the privilege conferred by the Act 1685, c. 38, of taking out the writ at pleasure during a period of six months, provided the writ had not been "booked."

On the other hand, I conceive that under the provisions of this statute the writ may be taken out of the register by the authority of the Court, equally in the one case as in the other. But it can only be so on sufficient cause shown. The Court must have stated to it a sufficient reason for the proceeding, before interponing its authority to what is always a serious step.

I am of opinion that such a reason has been stated in the present case. The object is to amend a defective testing-clause, by the writer of the deed adding to it the statement of the fact that David Semple, writer in Paisley, is the person [104] who, by a clerical error, is called in that clause David, writer in Paisley, omitting his surname. Now, taking into view the repeated instances in which a testing-clause has been similarly amended, and the amendment held valid, if made before the deed had become the subject of judicial discussion, I can have no doubt of the competency and propriety of the Court giving access to the deed for the purpose of this amendment being made. In doing this we give no judgment, either on the objectionableness of the deed without the amendment, or on the effect of the amendment to render it valid. We have no parties before us to render such a judgment effectual, and our present intervention cannot prejudice any one not a party before us. All that is implied in the proceeding is that the case appears to us a fair one for the party being allowed to try the effect of the proposed amendment, and, therefore obtaining from us the authority, without which he would be excluded from the attempt.

At the same time, as what is proposed may as easily be done in the record office as without it, I concur in thinking it proper to avoid, as we always should do, the deed being removed from the register, by granting authority to the petitioners to obtain access to the deed within the record office to make the alteration there. This will equally serve the purpose.

This interlocutor was pronounced:—"Having heard counsel for the petitioner, and for the Lord Clerk Register, Grant warrant and authority to the Keeper of the Register of Deeds, Probative Writs and Protests, on receiving back from the petitioners the extract of the deed after mentioned already issued to them, to give the petitioners or their agent access to the disposition and settlement mentioned in the petition, viz., a disposition and settlement executed by the said deceased George Caldwell on the 19th March 1870, in the hands of the said keeper, for the purpose of allowing the writer of the said disposition and settlement, at sight of the said keeper, to add at the end of the testing-clause thereof the words specified in the prayer of the petition, viz., 'Declaring that the witnesses hereto are David Semple, writer in Paisley, and David Smith Semple, his clerk, and writer hereof'; and appoint a copy of this deliverance to be added to every extract of the said disposition and settlement that shall be issued by the said keeper, and to be authenticated by the said keeper as part of the said extract."

A. K. MACKIE, S.S.C.—C. MORTON, W.S.—Agents.

No. 26. X. MACPHERSON, 104. 18 Nov. 1871. 1st Div.—Lord Jerviswoode, B.

ROBERT HENDERSON, Pursuer.—*Rhind.*
JAMES ROLLO and ROBERT MITCHELL AND OTHERS, Defenders.—
D.-F. Gordon—Scott—Strachan.

Diligence, wrongous use of—Reparation—Law-agent—Messenger-at-arms.—Held that neither a law-agent nor a messenger-at-arms was liable in damages for executing diligence for a sum larger than was actually due, unless they were cognisant or ought to have been cognisant of the overcharge.

Diligence—1 *and* 2 *Vict. c.* 114, *sec.* 14—*Execution—Clerical Error.—Held* that an execution was not vitiated by a clerical error made in narrating the date of the decree on which it bore to proceed, and to the extract of which it referred back, the date being correctly given in the extract decree, and in the schedule of charge left with the debtor.

Diligence—Execution—1 *and* 2 *Vict. c.* 114.—*Objection* to the validity of diligence, that the execution of charge, minute craving warrant of imprisonment, and fiat, were partly written on sheets stitched on to the extract decree, and not wholly on the extract decree itself, *repelled.*

[105] On 27th January 1871 Robert Henderson was charged upon an extract of two decrees of the Sheriff-court of Fifeshire at the instance of Elizabeth Clark, to pay £2 as the inlying charges attending the birth of an illegitimate child; "*Item* the sum of £4, 10s. yearly for the aliment and support of said child, payable quarterly and in advance, commencing the first quarter's payment thereof as at the said 1st day of April 1868, and the next quarter's payment three months thereafter, and so forth, quarterly and in advance thereafter, until said child shall attain the age of ten years complete."

Henderson was apprehended on 4th March 1871, and incarcerated.

Henderson subsequently brought this action against Elizabeth Clark, James Rollo, the Sheriff-officer employed in executing the diligence, Robert Mitchell, solicitor, Perth, the agent who had instructed him, and Adam Mackenzie, the Sheriff-clerk who had written the warrant for imprisonment, on the following grounds:—

1. That the charge was for payment of aliment as for the period from 1st April 1868 down to 1st April 1871,—that is to say, of aliment which, to the extent of £9, was not exigible, seeing that the child had died on 29th March 1869.

2. That the execution of charge was disconform to its warrants, bearing that the dates of the decrees were 10th February and 18th March instead of 10th February and 16th March.

3. That the minute, by which Mr. Mitchell, as agent for and authorised by the defender Elizabeth Clark, applied for and obtained a warrant to apprehend the pursuer, and the fiat following thereon, were not written upon the extract decree, as required by the Act 1 & 2 Vict. c. 114, but upon a separate piece of paper.

The defenders Mitchell, Mackenzie, and Rollo pleaded that the action was irrelevant, and explained (1) that they were not informed and did not know of the death of the child until after the incarceration of the pursuer, Mr. Fleming, the defender Clark's agent in St. Andrews, having, on 5th September 1870, sent the extract decree to the defender Mitchell with instructions to enforce it by imprisonment, and without any intimation that the child was dead. (2) That the execution of charge was written partly on the last page of the extract decree, and bore that the charge was given "by virtue of the within extract decree and warrant, dated the 10th day of February and 18th day of March 1869, in an action before the Sheriff-court of the county of Fife, at the instance of Elizabeth Clark, residing with Joseph Ames, at Prior Muir, in the parish of Saint Andrews, and county of Fife, pursuer; against Robert Henderson, baker, residing in North Street, Saint Andrews, defender, now in Stanley, in the county of Perth; and also, by virtue of an indorsation thereon by the Sheriff-clerk-depute of the county of Perth, dated the 27th day of February 1871";

further, that the word "18th" instead of "16th" was a mere clerical error, that the decree and indorsation referred to were sufficiently identified in the execution, and that the schedule of charge correctly set forth the dates of the decree. (3) That the execution of charge, minute, and fiat were all in conformity with the Act, being written on continuous sheets of paper, the first sheet, containing the extract decree, not being large enough to contain them all.

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary, having heard counsel, assoilzies the defender Adam Mackenzie from the whole conclusions of the summons, and decerns: Finds him entitled to expenses, and remits the account thereof, when lodged, to the Auditor to tax and report: Farther, approves of the issue, No. 25 of process, as now adjusted and settled, and appoints the same to be the issue for the trial of the cause."

[106] The defenders Rollo and Mitchell reclaimed.*

LORD PRESIDENT.—There can be no doubt that the overcharge of £9, for which diligence was done against the pursuer, forms a perfectly relevant ground of damages against the defender Elizabeth Clark. The money for which the pursuer was charged was due, if it was due at all, under decree for inlying expenses and aliment, obtained against him by Elizabeth Clark in the Sheriff-court of Fife. The rate of aliment is correctly stated; but it is charged for a very considerable period after the death of the child which was to be alimented. The child died on 29th March 1869, and aliment was charged down to 1st April 1871; so that there was an overcharge of aliment for upwards of two years. Elizabeth Clark must have known not only when her child died, but also that she was not entitled to aliment thereafter. There is therefore no doubt of the relevancy of this action against her on that ground, and indeed this was not disputed by her counsel.

The first question then is, whether the agent whom she employed to do diligence for the recovery of this money, and the messenger who executed the diligence, are liable in damages on account of diligence being done for a larger sum than was actually due. Now, it appears to me that unless the agent and the messenger were either cognisant or ought to have been cognisant of the overcharge, there is no principle on which they can be held responsible; and Mr. Rhind, with all his research, has not found any case extending so far the liability of professional men. The question is simply this, whether an agent and a messenger are liable for a wrong done by their client without their knowledge. Now, I have heard of a client being made liable for a wrong committed by his agent; but the converse of that proposition is quite new to me, that an agent is to be made liable for a wrong committed by his client, unless, indeed, the agent knows of the wrong committed, and proceeds on it for his client's behoof. Upon that ground, therefore, I think the action falls as against the two defenders now reclaiming, the Sheriff-officer Rollo, and the agent Mitchell.

The other grounds of action are purely technical; and it is necessary, in order to dispose of them, to look very minutely into the diligence. It became necessary for Elizabeth Clark to make her decree against the present pursuer effectual within the sheriffdom of Perth. Her agent accordingly proceeded, in terms of the Personal Diligence Act, to obtain the concurrence of the Sheriff of Perth. His first step was to present an extract of charge of the Sheriff of Fife, and to crave warrant of concurrence by the Sheriff of Perthshire. Now, that application is written immediately after the extract, and immediately subjoined to that application there is a fiat by the Sheriff-clerk of Perthshire, dated 27th January 1871. Then follows the execution of the decree with warrant of concurrence, and that execution has in it what is certainly a mere clerical error, one of the dates of the decree upon which the diligence proceeds being written as the 18th instead of the 16th of March. The execution, however, following upon the extract decree and warrant of concurrence makes special reference back to the extract decree in which the date is accurately given. The execution bears to be by virtue of the decree to which it refers back; but the decree referred to is erroneously stated to be dated the 18th instead of the 16th March. That this could

---

* *Reclaimer's Authorities.*—Robertson *v.* Fleming, June 25, 1861, 23 D., H. L. 8; 1 & 2 Vict. c. 114, sec. 14.

Pursuer's Authorities.—Wilson *v.* Alexander, July 23, 1846, 9 D. 7 (Session papers); Carne *v.* Manuel, June 28, 1851, 13 D. 1253; Stewart *v.* Chisholm, 1784, Mor. 13,989.

do no injury to the party to be charged is abundantly clear; and in the schedule of charge left with him the date appears to have been correctly stated. It is, I think, impossible to hold that the pursuer's incarceration was illegal, merely because there occurred a clerical error in a paper which formed part of the records of the Sheriff-court, and which might never have been brought to his notice.

The second technical objection to the diligence is that the execution, the [107] certificate of registration, the minute craving warrant to incarcerate, and the fiat following thereon, are all written upon a separate sheet of paper from the extract decree and the fiat upon it. Now, that is in a certain sense true; but it is not immaterial to observe that the execution begins on the sheet of paper on which the extract is written, the reason why it is continued upon another sheet of paper being simply that the first sheet is full. It has been suggested that the first sheet of paper is not quite full, as there are certain blank spaces on the margin on which the execution, &c., might have been written. I confess I do not much fancy that mode of dealing with papers of this kind. If agents and messengers were driven to avail themselves of every little blank corner of the first sheet, I think there would be more risk of miscarriage than if they followed the course, perfectly well known to the law, of connecting the exhausted sheet by a catchword with another sheet stitched up with the first. That was what was done in the present instance; and it appears to me that this mode of proceeding was perfectly reasonable in itself, and not inconsistent with the clauses of the Personal Diligence Act.

The only matter that remains is the objection stated to the proceedings of the Sheriff-clerk. I do not think that they can be disconnected from what was done by the agent and the messenger, for if they have not done anything to subject themselves to liability, still less has the Sheriff-clerk. It therefore appears to me that we should assoilzie all the defenders except Elizabeth Clark.

The other Judges concurred.

The following interlocutor was pronounced:—"Adhere to the interlocutor in so far as it relates to the defender Adam Mackenzie: *Quoad ultra* recall the interlocutor, assoilzie the defenders James Rollo and Robert Mitchell from the whole conclusions of the summons, and decern: Find the said James Rollo and Robert Mitchell entitled to expenses, and remit," &c.

MENZIES & CAMERON, S.S.C.—GEORGE BEGG, S.S.C.—D. MILNE, S.S.C.—Agents.

[*Distinguished*, Graham *v.* Bell, 1875, 2 R. 972.]

No. 27. X. MACPHERSON, 107. 21 Nov. 1871. 2d Div.—Lord Mackenzie, I.

JOHN MILLER (Finlay's Trustee), Pursuer.—*Lord-Adv. Young—Balfour—J. C. Lorimer.*

THOMAS LEARMONTH AND OTHERS (Mr. and Mrs. Finlay's Marriage-Contract Trustees), Defenders.—*D.-F. Gordon—Millar—Guthrie.*

Husband and Wife—Postnuptial Contract—Provision—Mutual Contract—Retention—Conjugal Rights Act—Bankruptcy.—By postnuptial contract in 1852 a husband and wife who had no antenuptial marriage-contract conveyed to trustees £2600 to which the wife was entitled from her deceased father's estate, while the husband became bound to pay in 1862 a sum of £1999 to the trustees for the purposes of the trust, and in the meantime to grant security therefor, either heritable or by insuring his life to the amount, and assigning the policy to the trustees, and paying to them an annual premium, or, in their option, a single payment sufficient to redeem the annual payments. The purposes of the trust were to pay the liferent of the trust-funds to the husband, and after his decease to the wife if she should survive him, and the fee to the children *nati* and *nascituri*. These provisions were declared to be

alimentary. The husband did not implement his obligation by granting security or otherwise, and he became bankrupt in 1860.

In a question between the marriage-contract trustees and the trustee on the bankrupt's estate, *held* (1) that the husband's right to the annual proceeds of the £2600 was vested in the trustee on his sequestrated estate; (2) that the marriage-contract trustees were not entitled to retain the income, on the ground that the husband had failed to fulfil the obligation he had undertaken; and (3) that the wife was not entitled to a present provision under the Conjugal Rights Act out of the income of the £2600 so payable to the husband.

[108] *Opinion*, per Lord Benholme, that if the obligation by the father to pay the £1999 had been onerous as a reasonable provision to his children, the marriage-contract trustees would have been entitled to retain the liferent as against the husband's creditors.

The following narrative is taken from the Lord Ordinary's note:—"On 30th June 1845 John Finlay married Mary Anne Alexander, eldest daughter of Mr. Alexander, proprietor of the Theatre Royal, Glasgow. There was no antenuptial contract of marriage entered into between them. Mr. Alexander died on 15th December 1851, and as there was no contract of marriage between him and his wife, his daughter, Mrs. Finlay, had right to her share of the legitim out of her father's moveable estate.*

"On 28th February 1852 Mr. and Mrs. Finlay executed a postnuptial contract, whereby they conveyed to the defenders, and certain other persons, as trustees, the whole estates, both heritable and moveable, belonging, or which should thereafter belong to Mrs. Finlay, and particularly, 'all right, title, and interest which she, or the said John Finlay, her husband, now have or may hereafter have in the succession or estates,' of her deceased father, or of her mother, or of any other person. By this deed Mr. Finlay also bound himself to pay, on or before 1st January 1862, £1999 to the trustees for the trust purposes therein mentioned, and to open and keep up policies of insurance, or to grant security over his heritable estate in their favour for that sum.† He also thereby renounced his *jus mariti* over the estate, means, and effects then belonging, or which should thereafter belong to his wife, and the same are thereby expressly declared to be unaffectable by his creditors, or by his debts and deeds. The second purpose of the trust created by the said postnuptial contract is, 'for payment of the free yearly proceeds of the trust-estate to the said John Finlay during his life, for his liferent use allenarly.'‡ And it is expressly declared by the contract that the whole provisions therein contained 'shall be nowise attachable for debt, but the same shall be considered alimentary.'

"In an action raised in 1863 by the defenders, as trustees under the postnuptial contract, against Mrs. Alexander, widow and executrix of Mr. Alexander, and the trustee on her sequestrated estate, and also against Mr. Finlay and Mr. Miller, the pursuer of the present action, as trustee on Mr. Finlay's sequestrated estate, it was decided by judgments of this Court, and of the House of Lords, that the defenders

---

* See White v. Finlay, Nov. 15, 1861, 24 D. 38.

† "And in further security of the payment of the foresaid sums of money, principal, interest, and penalty, the said John Finlay obliges himself to insure his life to the extent of £1999 sterling, and to assign the policy or policies of insurance to the said trustees, or to constitute a security over his heritable estate in favour of the said trustees to the extent of the said sum of £1999 sterling": And also to make payment to the said trustees, "annually, of such a sum as will enable them to keep the said policy or policies in force; or otherwise, and in the option of the said trustees, I bind and oblige myself to make payment to them of such a sum as may be required for redeeming the annual premiums due in respect of the said policy or policies, for ensuring the payment of the said sum of £1999 sterling at my death, by a single payment."

‡ The deed further bears, "and, after his death, in the event of his being survived by his said wife, in trust for the payment to the said Mrs. Mary Anne Alexander or Finlay, in like manner, of the free yearly proceeds of the trust-estate during her life, for her liferent use allenarly; and after the death of the survivor of the said spouses, in trust for the whole children born, and to be born, of the marriage between the said John Finlay and Mrs. Mary Anne Finlay, in such shares," &c.

are entitled to recover and receive the sum of £2600, being the amount of legitim due [109] to Mrs. Finlay from the estate of her father, with interest from 15th December 1851, and to hold and administer the same for the purposes of the trust declared in said deed,—all questions in reference to the right to the interest or annual proceeds of the said legitim fund from that date being reserved entire.

"The present action has been raised by the trustee on Mr. Finlay's sequestrated estate for the purpose of having it found and declared that he has right to the whole annual proceeds of the said sum of £2600 from 15th December 1851, and so long as the sequestration shall subsist during Mr. Finlay's life, and of obtaining decree against the postnuptial contract trustees, ordaining them to make payment of the same to him accordingly."

The pursuer pleaded;—1. The legitim to which Mrs. Finlay became entitled on her father's death vested absolutely at that date in the said John Finlay *jure mariti*, and having so vested, the said John Finlay had no power to confer on himself and place beyond the diligence of his creditors a liferent alimentary provision out of the same. 2. The liferent provision conferred by the said John Finlay on himself by the postnuptial contract in question fell under the sequestration of his estates, and was carried to the pursuer as trustee in the sequestration by virtue of his act and warrant. 4. The defenders' plea, founded on the Conjugal Rights Act, ought to be repelled, in respect that (1) Mrs. Finlay succeeded to the legitim in question before the said Act came into operation; (2) the right to the said legitim had vested in Mr. Finlay *jure mariti*, and was in the possession of him, and of the pursuer, as trustee on his sequestrated estate, within the meaning of the said Act, before Mrs. Finlay's claim for provision out of the same was made; (3) it is incompetent to claim such provision in this action; (4) the said claim is excluded by the marriage-contract; and (5) the provision claimed is excessive.

The defenders averred,—"Mr. Finlay, in consequence of his bankruptcy and ill health, has been unable to fulfil the obligations undertaken by him in the marriage-contract. He has neither supported his wife and children in a manner suitable to their station in life, nor has he paid over to the defenders, the marriage-contract trustees, all or any part of the sum which he undertook and bound and obliged himself by the contract to pay. He failed to procure the policy or policies of insurance on his life required by the contract. And neither he nor the pursuer has offered or is now willing to fulfil any of these obligations."

The defenders pleaded;—1. The postnuptial contract being a mutual and onerous deed, the liferent alimentary provision thereby constituted for behoof of Mr. Finlay, in which his wife and children have an interest, must receive effect; and, *separatim*, the moveable fund, which has become available for the purposes of the trust having been a portion of Mrs. Finlay's patrimony, the disposal of the interest thereof, during Mr. Finlay's life, was an equitable and reasonable provision, in which Mr. Finlay had an interest, and was therefore not revocable and not affected by the sequestration of Mr. Finlay's estates. 3. Mr. Finlay and the pursuer having failed to aliment and educate the children of the marriage, or to procure the policy or policies of insurance, and fulfil the other obligations in said contract, the defenders are entitled to retain the sums sued for as against them. 4. Mrs. Finlay, and the defenders, her marriage-contract trustees, are entitled at common law, as well as under the Conjugal Rights Act, 1861, to the liferent of the legitim fund in question, which is no more than a reasonable provision out of her own patrimony, and of which neither Mr. Finlay nor the pursuer have ever obtained possession.

A proof was led before the Lord Ordinary, who afterwards pronounced [110] the following interlocutor:—"Finds that the life interest or provision made in favour of John Finlay by the postnuptial contract of marriage between him and his wife libelled on fell under the sequestration of the estates of the said John Finlay, and is vested in the pursuer as trustee for behoof of the creditors in the said sequestration: Therefore finds, declares, and decerns in terms of the declaratory conclusion of the libel, in so far as regards the whole interests, dividends, or other annual profits or proceeds which have accrued upon the sum of £2600 libelled, from and since 15th December 1851, and also in so far as regards the whole interests, dividends, or other annual profits or proceeds which shall accrue or become due upon the said sum of £2600, so long as the said sequestration shall subsist during the life of the said John Finlay, together with any interest which has or shall become due upon the said interest, dividends, or other

annual profits and proceeds: And appoints the cause to be put to the roll, in order that it may be proceeded with in accordance with these findings."*

* "NOTE.—(After the narrative above quoted)—The legitim to which Mrs. Finlay had right vested in her on 15th December 1851, the date of her father's death, and then fell under the *jus mariti* of her husband, and vested absolutely in him—(Macdougal *v.* Wilson, 20th February 1858, 20 D. 658). It was his sole and exclusive property at and for upwards of two months prior to the date of the postnuptial contract containing the provision that the liferent mentioned in his favour should be alimentary, and not attachable for debt. The Lord Ordinary considers that the said provision is inept, because no one can so settle his own property as to reserve part of it for his own use and to withdraw it from the diligence of his creditors—(Bell's Com. i. 128 and 130; Ker's Trustees *v.* Justice, 7th November 1867, 5 Macph. 4). Mr. Finlay's liferent of the proceeds of the legitim was therefore carried by the sequestration of his estates on 6th January 1860, and is now vested in the pursuer, as the trustee on his sequestrated estate, by virtue of his act and warrant of confirmation.

"It is said by the defenders that the interest of the funds conveyed to them as trustees under the postnuptial contract was truly conferred by that deed upon Mr. Finlay for the aliment of his wife and children. There is nothing in the deed to that effect; and even though the liferent of the sum which vested in Mr. Finlay as his wife's share of the legitim had been thereby expressly given to his wife for the support of herself and children, and had been declared alimentary, and not affectable by the debts of her husband, it would, in the Lord Ordinary's opinion, be carried by the sequestration of the husband as a donation *iter virum et uxorem* revocable by him, and revoked by the sequestration—(Kemp v. Napier, 1st February 1842, 4 D. 558; Johnston *v.* Dunlop, 24th March 1865, 3 Macph. 758).

"It is further maintained by the defenders that as Mr. Finlay has failed to pay to them the sum of £1999, or to deliver to them and keep up policies of insurance on his life, or to grant heritable security for the said sum, he, and the pursuer as coming in his place, are not entitled to receive the liferent proceeds of the legitim fund, and that the defenders are entitled to retain the same as against these unimplemented provisions. The Lord Ordinary is of opinion that this claim of the defenders is untenable under the postnuptial contract. The obligations undertaken by Mr. Finlay, which have not been fulfilled, are not the consideration and counterparts of the liferent provision of the legitim fund. On the contrary, they all flowed from him. The liferent of the legitim fund is also, by the express terms of the postnuptial contract, payable to him, and the defenders are not entitled to withhold implement of that trust-purpose, and to retain the proceeds in security or satisfaction of his unimplemented obligations—(Ker's Trustees *v.* Justice, *supra*; Boswell *v.* Boswell, 4th February 1846, 8 D. 430).

"The defenders further plead that Mrs. Finlay, and they, as the trustees under [111] the postnuptial contract, are entitled, both at common law and under the Conjugal Rights Act, 1861, to the liferent of the legitim fund in question, which, they say, is no more than a reasonable provision out of her own patrimony, and of which neither her husband, nor the pursuer as his trustee, has ever obtained possession. The Lord Ordinary is of opinion that at common law Mrs. Finlay and the defenders have no such right. The legitim fund became the absolute property of Mr. Finlay when the right thereto opened to his wife, and the interest thereof now belonged to the pursuer, as the trustee on his sequestrated estate, free from any claim on her part for aliment. The claim for such a provision cannot, it is thought, be maintained at common law by Mrs. Finlay, in prejudice of her husband's creditors—(Turnbull, 25th November 1709, Dict. 5895; Robb, March 8, 1794, Dict. 5900; Lee *v.* Watson, 1st December 1795, Dict. 5889; Bell's Com. i. 634). The Conjugal Rights Act does not, the Lord Ordinary considers, apply. Mrs. Finlay and her husband acquired right to the legitim, and it was conveyed to the defenders as trustees under the postnuptial contract, long before that Act became law. It is expressly enacted, by section 21 of that Act, that it shall come into operation on 1st November 1861, and the words of section 16, which is founded on by the defenders, have not any retroactive effect. Further, it is provided by section 16 that a wife shall have no claim for a reasonable provision for her support and maintenance out of property which she has succeeded to or acquired, 'if, before it be made by her, the husband, or his assignee or disponee, shall have obtained complete and lawful possession of the property, or, in the case of a creditor of the husband,

[111] The defenders reclaimed.

The defenders maintained in argument the points referred to in the Lord Ordinary's note.*

The pursuer argued in terms of his pleas, and referred to the authorities under-noted.†

[112] LORD JUSTICE-CLERK.—The present action is one for the purpose of making effectual to the creditors of John Finlay the annual proceeds of a sum of £2600, which has been found by judgment of the House of Lords to be Mrs. Finlay's share of legitim from the estate of her deceased father. The defences are two. It is first said, as against the claim of the trustee, that by the postnuptial contract executed by Mr. and Mrs. Finlay this fund was conveyed to trustees for Mr. Finlay's alimentary use of the annual proceeds, and that, consequently, these cannot be claimed by his creditors. It is said, in the second place, that the trustees under the postnuptial contract are entitled to retain the annual proceeds of this legitim fund in order to meet or extinguish an obligation undertaken by Mr. Finlay in the same contract to provide a sum of £1999 to the trustees for behoof of his wife and children.

I concur with the Lord Ordinary that neither of these defences are tenable. As regards the first, it admits of no question that a man cannot by a postnuptial contract place his own income beyond the reach of his own creditors, and we did not think it necessary to call for an answer on this part of the case.

In regard to the claim of retention, in respect of the non-fulfilment of Mr. Finlay's obligation to provide the sum of £1999 for his wife and children, there are various considerations involved in the defence of considerable importance. This sum of £1999 was only to be paid to the trustees ten years after the date of the postnuptial contract, and the contract contained a separate obligation on Mr. Finlay to insure his life during the interval. He became bankrupt before the period of payment had arrived. I think it very doubtful, in the first place, whether such a provision in a postnuptial contract created any *jus crediti* in the children *nascituri* which could be considered as onerous in a question with the trustee in the sequestration. This is not a trust created during the lifetime of the father by the conveyance to third parties of a

---

where he has, before such claim is made by the wife, attached the property by decree of adjudication or arrestment, and followed up the said arrestment by obtaining thereon decree of forthcoming, or has poinded and carried through, and reported a sale thereof.' It cannot be said that Mr. Finlay has obtained complete possession of the legitim fund. But by the Bankruptcy Act, 1856, sec. 102, the act and warrant of confirmation of the pursuer, as his trustee, transferred to and vested in him absolutely and irredeemably, as at 6th January 1860, the date of the sequestration, with all right, title, and interest, his whole moveable property, so far as attachable for debt, ' to the same effect as if actual delivery or possession had been obtained, or intimation made at that date, subject always to such preferable securities as existed at the date of the sequestration, and are not null and reducible,' and it is declared by sections 107 and 108 of that statute that the sequestration is equivalent to a decree of adjudication of the heritable estates of the bankrupt, and to an arrestment in execution and decree of forthcoming, and to an executed or completed poinding."

* Miller *v.* Learmonth, H. of L., May 17, 1870, 42 Jur. 418—L. R. 2 Sc. Ap. 109. (1) Alimentary fund.—1 Bell's Com., 154 (M'Laren's edition); Lewis *v.* Anstruther, June 11, 1852, 14 D. 857; Stevenson *v.* Hamilton, Dec. 7, 1838, 1 D. 181; Dunlop *v.* Johnston, March 24, 1865, *ante*, vol. iii. 758—aff. April 2, 1867, *ante*, vol. v. H. L. 22—L. R. 1 Sc. Ap. 109; Macdonald *v.* Macdonald's Trustees, July 10, 1863, *ante*, vol. i. 1065; Duchess of Buckingham *v.* Winterbottom, June 13, 1851, 13 D. 1129; Lowson *v.* Young, July 15, 1854, 16 D. 1103; Macdougal *v.* Wilson, Feb. 20, 1858, 20 D. 658; Macpherson *v.* Graham, 1750, M. 6113; Shaw's Trustees *v.* Shaw, Jan. 19, 1870, *ante*, vol. viii. 419. (2) Retention.—Boswell *v.* Miller, Feb. 4, 1846, 8 D. 430; Erskine, iii. 3, 86; Buchanan *v.* Speirs, 1787, M. 9201; Watson's Creditors *v.* Cameron, 1738, M. 11,196; Woollen Manufactory of Haddington *v.* Gray, 1781, M. 9144; Dickson *v.* Braidfoot, 1705, M. 10,396; Bell's Princ. 1944.

† Robb *v.* Husband's Creditors, 1794, M. 5900; Lee *v.* Watson's Creditors, 1795, M. 5889; Fraser P. and D. R. i. 443, 781; Kemp *v.* Napier, Feb. 1, 1842, 4 D. 558; Ker's Trustees *v.* Justice, Nov. 7, 1866, *ante*, vol. v. 4; Crichton *v.* Hair, 1807, Hume, 212; Macdougal *v.* Wilson, cit. 1 Bell's Com. 639, 634, Bell's Prin. 1539.

specific fund. It remains *in obligatione* merely prestable at a distant period. In the case of Morice *v.* Sprot (8 D. p. 918) it was gravely questioned whether a post-nuptial provision in favour of children could compete with creditors. That, however, was a case of a specific fund, vested in trust for children in life. Here there is no such fund, and the provision is in favour of children *nascituri*. I think it still more doubtful whether the trustees under the postnuptial contract could, on any pretence, withhold payment of the alimentary fund from Mr. Finlay, and so, it might be, deprive the family of their means of subsistence on the ground of the non-fulfilment of this obligation. But it is quite enough for the decision of the present point that this provision could only be held as onerous to the extent to which it was reasonable. It is plain on the face of it that it was not reasonable in that sense. It was beyond the means of Mr. Finlay at the time. It was made dependent on his subsequent prosperity, and, as against his own creditors, I am of opinion that it was entirely unavailing.

LORD COWAN.—The questions raised in the record have reference to the interest and annual proceeds of the principal sum of £2600 libelled.

The trustees under the postnuptial contract have been found entitled to said principal sum, under the judgments of this Court and of the House of Lords in the former litigation. As legitim to which Mrs. Finlay was entitled upon her father's death in December 1851, the amount fell under her husband's *jus mariti*; but afterwards, in February 1852, the postnuptial deed was executed, by which the sum was conveyed by him to the trustees (defenders) for behoof of his wife and children, subject, as a primary purpose of the trust, to his own liferent. The estates of Mr. Finlay were sequestrated in 1860, and the claim of the marriage-contract trustees in the former litigation was resisted, *inter alios*, by the trustee on Mr. Finlay's sequestrated estate. By the judgment of the Lord Ordinary, adhered to by this Division, it was found that the assignation of the legitim to the trustees (defenders) was granted at a time when the husband was solvent, and [113] "was, in the circumstances of Mr. Finlay, no more than a reasonable provision for his wife and children." And farther, "that the trustee in the sequestration had no right to or interest in the legitim, except to the effect and extent of claiming and receiving from the said trustees the amount of the liferent interest vested in the said John Finlay by the said postnuptial contract." The interlocutor of the Inner-House adhered, "with this explanation, that all questions between the parties *hinc inde* in reference to the interest or annual proceeds of the legitim fund are reserved entire." And a similar reservation was contained in the judgment of the House of Lords. The present action has been instituted by the trustee to have it found and declared that the interest and proceeds belong to him for behoof of the creditors in the sequestration.

The leading defence stated to the claim is, that by the postnuptial contract it is provided that Mr. Finlay's liferent interest is protected against the diligence of creditors, and declared alimentary. The ground on which the Lord Ordinary has proceeded in disregarding this defence appears to me insuperable. The doctrine stated by Mr. Bell, that no one can so vest his own funds in himself, or for his own use, as to exclude his creditors, has been repeatedly recognised and must be held as quite fixed in the law of Scotland. There having been no contract of marriage between the spouses, the *jus mariti* carried to the husband all the personal estate falling to the wife *stante matrimonio*, unless it had come to her under a deed by which the *jus mariti* was excluded. Hence, on the death of his wife's father in 1851, Mr. Finlay acquired right to this legitim fund; and it follows that the legitim assigned for the purposes of the contract in February 1852 was conveyed to them by the only party who could validly assign it to the trustees. It had no doubt come from the wife's father, and this was legitimately enough pressed in the question decided in the former action. But this does not touch the question now to be decided, whether the liferent interest, provided by the postnuptial deed in favour of the husband could be protected against the diligence of creditors. *Esto* that the deed must be held to be valid, as having set aside no more than a reasonable provision by the husband, when solvent, to his wife and children, the liferent interest reserved to himself stands in a different situation. It is the case of a person setting aside a portion of his funds by assignation to trustees to secure it from his creditors should he become insolvent; but this is just what the law forbids.

An attempt was made to show that the provision in favour of the husband was

truly for behoof of the family, as much so as if it had been a direct provision to the wife, to take effect during marriage. But the same answer must be given to this plea which prevailed in the case of Johnston *v.* Dunlop. Supposing it to be of the nature contended for, and viewed as a provision by the husband for the wife and children during the subsistence of the marriage, it is essentially revocable, and has been revoked by the husband's sequestration during the marriage; the wife and children must follow the fortune of the husband.

The second defence stated to the action is that the deed provides for a payment by Mr. Finlay to the trustees of the sum of £1999, as at Whitsunday 1862, and to secure payment of which he came under an obligation to insure his life, and to make over the policy to the trustees; and that, as this personal obligation had not been implemented, they are entitled to retain the annual proceeds here claimed in satisfaction of this obligation.

To this defence there are various answers—First, There is no proper *concursus* to give rise to the plea of retention, inasmuch as by the sequestration the liferent interest in Mr. Finlay, as regards the legitim fund, has been adjudicated to the creditors, and become vested in the pursuer for their behoof; while the obligation, in respect of which retention is pleaded, is to secure payment of a sum of money which the bankrupt had undertaken to pay over to the trustees for behoof of himself, his wife, and children, at the distance of ten years after the date of the contract, and which did not elapse till two years after the sequestration. In such circumstances I think there is no room for that *concursus* which is essential for the plea of retention. For, secondly, the obligation alleged to have been thus constituted against the bankrupt in favour of himself and his family, through the trustees, is not such as can be pleaded against the [114] bankrupt's onerous creditors to any effect. This would have been plain had there not been the intervention of trustees; but their appointment cannot legally validate an obligation, which would have been inept against creditors if granted to the parties directly; and this more especially as it is not granted in consideration of any counter assignation or obligation, but is simply an additional fund which the debtor desired to place beyond the reach of his creditors in the event of his insolvency. And, thirdly, were the obligation to be held to partake of a different character, and viewed in a different light, it is not one which can be sustained, even in a question with the wife and children, on the principle held applicable to the legitim fund as a reasonable provision,—seeing that it did not provide any part of the bankrupt's existing funds when solvent, but was an obligation to pay money *de futuro*, and was not exigible till after his bankruptcy. On these grounds, I cannot doubt that the defence of retention cannot be sustained.

But the defenders have further endeavoured to support this contract on the ground of its being a remuneratory deed, inasmuch as the wife's share of certain estates which belonged to her father was conveyed by the postnuptial deed for the same purposes with the other trust-funds. Whether the estate, to a share of which Mrs. Finlay was entitled, be heritable or moveable, under the deed of declaration of trust of 1830–31, may be doubtful; but whether viewed in the one light or in the other it cannot affect the present question. If moveable, then it fell under the husband's *jus mariti*, and the right thereto belonged to him, and its settlement by this postnuptial deed cannot be held to change the character of the deed from being truly a voluntary alienation of property by the husband to one of a remuneratory settlement. Again, if the wife's right be viewed as heritable, there being no exclusion of the *jus mariti*, the accruing annual proceeds become the husband's, as much as the interest of the legitim fund, as well before the execution of this postnuptial deed as after its date, in virtue of his rights at common law. This part of the deed therefore cannot be held to support the plea of the defenders on the ground of the deed being remuneratory. It is impossible to hold this in a question which relates entirely to the husband's right to the annual proceeds of the trust-estate.

On the whole, this defence seems to me no better founded than the others to which I have referred.

Lord Benholme.—If this case had related to an antenuptial instead of a postnuptial contract, the former of which our law holds to be more onerous, and therefore more entitled to protection, I should have doubted whether the plea of retention should not have been supported. These trustees had a duty to perform to the wife and also to the children. The interest of the wife has always been held sufficient to

compete with creditors. I do not think there would be any want of *concursus*. I think, in the case I suppose, of this having been an antenuptial contract, the situation of the trustees would have been this. As against the husband, they had to pay him the liferent of the fund. On the other hand, they had to demand from him the implement of his obligation. Then it appears to me that the creditors come in his place; and if they are entitled to vindicate his right of liferent they are also liable to be opposed just as he himself would have been. Now, there would have been circumstances which would have made this case different from and stronger than the case of Boswell, where there was an entire want of *concursus*. I would not have been satisfied that there was any want of *concursus* if I could have seen my way to support the husband's obligation as onerous. But as this is a postnuptial contract we cannot support it as an onerous contract, because it is unreasonable and excessive as regards the amount stipulated for.

On this ground alone I am inclined to concur in the judgment proposed by your Lordship.

LORD NEAVES.—I concur in the result, but not on all the grounds that have been stated. My opinion rather approaches to that of Lord Benholme. There is a great difference between an antenuptial and a postnuptial contract. Every [115] antenuptial contract is onerous, and therefore valid against creditors, unless there be something in it so extragavant as to exceed the limits of a reasonable provision. In the case of a postnuptial contract there is not the same onerosity, though, if there has been no antenuptial contract, it may be maintained by showing that it is reasonable, and will not in any case be supported beyond that limit. The House of Lords has here held that the settlement of the legitim for the wife's support was reasonable. It may be doubted whether the children have here a *jus quæsitum* under the postnuptial contract entitling them to compete with creditors. But there is no immediate question on that head.

With regard to the plea of retention, it must be observed that it has not been found that the provision of £2000 undertaken by Mr. Finlay from his own funds was reasonable. I think it was not reasonable for the husband to embarrass himself by such an obligation; and all the more so if the wife had funds of her own. Even if there were counter prestations, I would not sustain the plea of retention; but not on the grounds stated by the Lord Ordinary. There was a complete *concursus* if there were two debts; sequestration attaches the estate of the bankrupt as it stands in him *tantum et tale*; and hence it does not deprive a party of any equitable right, such as a lien, of which he was possessed. Nor is that rule affected by the fact that a debt is future, for future debts are ranked in sequestrations, being commutable into present debts. But I do not think that retention can be maintained in the position of the trustees under this deed. It could clearly not have been maintained before bankruptcy, for they got the fund on the express condition of paying the annual proceeds to the bankrupt himself. I hold that the clause making the income payable to Mr. Finlay himself excluded retention, and that the obligation to pay it is not altered by his bankruptcy, except that it must now be paid to his creditors. It is difficult to see how the trustees can intercept that income because his creditors claim it instead of himself. Further, if the settlement of the £2000 was voluntary and cannot be supported as onerous, which appears to be the case, the only foundation of the argument in support of the plea falls.

The pleas founded upon the 16th section of the Conjugal Rights Act were afterwards discussed.*

LORD JUSTICE-CLERK.—It seems to me that the last point is sufficient to dispose of the plea on the 16th section of the clause of the Conjugal Rights Act, viz., that the whole belongs absolutely to the husband. The statute requires either that the husband should obtain complete possession of the fund, or that some specific diligence should be done by a creditor in order to exclude the claim of a wife. Now, a question may arise whether sequestration has any further effect than to put the trustee in the position of the husband. But in this case the claim does not fall under the section of the statute, as the fund belonged absolutely to the husband.

---

* 24 & 25 Vict. c. 86, sec. 16; Taylor *v.* Taylor, June 23, 1871, *ante*, vol. ix. 893; Somner *v.* Anderson, March 2, 1871, *ante*, vol. ix. 594; 19 & 20 Vict. c. 79, sec. 102; Thomson *v.* Thomson, Nov. 17, 1869, 6 S. L. R. 110.

LORD COWAN.—By the arrangement which was made in 1852 a liferent was conferred upon the husband. The only question is whether the creditors are entitled to attach that liferent right. We cannot now go back to the history of the different transactions when the rights of parties were arranged by the deed of 1852. Under that deed the annuity was to belong to the husband absolutely. This prevents the application of the 16th section of the Conjugal Rights Act. It is needless to conjecture what our judgment would have been if the fund had not been the absolute property of the husband, but a fund belonging to the wife, and, through her, becoming part of his estate.

LORD NEAVES.—I am of the same opinion. If the trust-deed had not been granted the fund might still have been held in a sense to be *in medio*, and to be [116] liable to stoppage *in transitu*, in order that the wife might get some provision out of it for her support. But I think the correct view is that the deed operated as a novation of the rights of parties. Under it the wife got no present provision, but only a prospective right amounting to no more than a *jus crediti*, and unaccompanied by any possession or lien over the fund.

LORD BENHOLME concurred.

The following interlocutor was pronounced:—"Recall the following words in said interlocutor, 'so long as the said sequestration shall subsist': *Quoad ultra* adhere to the said interlocutor, reserving to the defenders any claim of retention they may be able to instruct over the fund in question, in respect of expense incurred in the administration of the trust: Find the pursuer entitled to expenses since the date of the Lord Ordinary's interlocutor, and reserve all other questions of expenses: Remit," &c.

FERGUSON & JUNNER, W.S.—WILLIAM OFFICER, S.S.C.—Agents.

[*Affirmed*, 1875, 2 R. (H. L.) 62.]

No. 28. X. MACPHERSON, 116. 22 Nov. 1871. 1st Div.—Sheriff of Caithness, B.

DONALD GUNN AND COMPANY, Pursuers and Respondents.—*Mackintosh.*
ALEXANDER COUPER, Defender and Appellant.—*J. C. Smith*—*M'Kechnie.*

Process—Mandatary.—Held that when a litigant has been ordained to sist a mandatary his opponent is entitled to demand that a mandate signed by the mandant be produced.

Donald Gunn and Company, fishcurers at Swiney, raised an action against Alexander Couper, feuar, Janetstown, Latheronwheel, in the Sheriff-court of Caithness, for £70, 7s. 2d. Proof was partly led when, on 4th October 1870, a prorogation was obtained by pursuers to admit of their examining the defender, who had left the Court. On January 18, 1871, the pursuers lodged a minute, stating "that the defender had left Scotland upwards of three months ago for New Zealand or Australia, with the intention of remaining abroad," and craving that the defender be appointed to sist a mandatary.

The defender lodged answers, in which he denied the statements made in the minute, and stated,—"The said Alexander Couper recently went south for a temporary purpose, but he never informed his agent that he intended going to New Zealand or Australia, or beyond the limits of Scotland, but simply to Greenock or Glasgow on business, and he expected to return early in March. Moreover, as the said Alexander Couper has a house and farm, on lease current for several years yet, where his wife and ten of a family reside, at Latheronwheel, where the pursuers' agent a few weeks ago, long after Couper went south as stated, sued him in an action at the instance of James Henderson and Company, which was at once settled and paid, he is not obliged to sist a mandatary, his absence being purely temporary, and of a very limited nature—his only home being at Latheronwheel, in Caithness."

After proof of the averments in the minute and answers, the Sheriff (2d March 1871) appointed the defender to sist a mandatary on or before 20th May. After the expiry of the period allowed, the defender's agent craved a continuance of the case until after the month of August, when he averred that the defender was likely to return to this country, and he produced a letter from him dated 27th February from New Zealand. He lodged a minute craving that Mr. John Cormack should in the meantime be sisted as mandatary, and produced a letter from Mr. Cormack authorising him so to be sisted.

On June 5, 1871, the Sheriff pronounced an interlocutor finding,—"In [117] respect that no consent by the pursuers to any person sisting himself in the cause, and acting therein as if he were mandatary for the defender, has been instructed; that the pursuers move for decree, because the defender has not sisted a mandatary in terms of the interlocutor of 2d March last; that the defender did not, on or before 20th May last, sist a mandatary; that the defender has not since tendered a mandate by him in favour of any person; that no power or authority by the defender to any person to sist himself as mandatary, or to appoint any person as his mandatary, or to obtain any person sisted as mandatary for the defender, is instructed; that in none of the minutes for the defender is a prorogation of time to obtain and lodge a mandate by the defender craved; that no offer of caution has been made on behalf of the defender, and of the other circumstances of this case,—dismisses the defender's appeal, and decerns," &c.

The defender appealed.*

Lord Deas.—I confess I have no doubt that if a mandate is insisted on, under the hand of the litigant who is abroad, it must be produced. According to my experience that has been always the practice of the Court, and the principle on which it is founded seems plain. One object of having a mandatary is to get a person who shall be liable in the expenses of the cause. Another is to secure a person who shall be responsible to the Court for the proper and decorous conduct of the cause. A third is, that if there be no mandate under the hand of the mandant, the proceedings may go on for years in his absence, and he may in the end disclaim the whole of them, in respect he never authorised them. Even, therefore, if I thought the question were open, I should be for deciding that a mandate is necessary. But I think the question is not open. It is quite true that frequently in practice nothing is said about it, because if a responsible mandatary sists himself the party is generally very glad to accept him. But where the question was raised I have never known any other course followed but that of appointing the party to sist a mandatary by a mandate under his own hand.

Some doubt seems to have been thrown on the point by the case of Elder, but that is just a reason why we should distinctly affirm the necessity of a mandate.

Lord Ardmillan.—I am of the same opinion, and I have no doubt that in this case a mandate ought to be produced. It is proposed in the course of the action that the defender should be examined as a witness, and before that can take place he leaves the country, and a very defective explanation is given of the reason for his departure. No mandatary for him is sisted, or proposed to be sisted for a long time, and at last his agent, producing no authority for it, proposes to sist a Mr. Cormack as his mandatary. Now, I think the general rule is, as stated by Lord Deas, that a mandatary is required, not only to be liable for expenses, but to afford additional security for the proper conduct of the cause, and I thing that the opposing party is entitled to have both principal and mandatary made liable. The theory is, not that the mandatary is a substitute for his mandant, but that the opposing party has the liability of both to rely on, and is entitled to that. The law, therefore, is satisfied only by the production of a mandate when required, as it is here, as well as the sisting of a mandatary.

A different question has been raised, where the proposal has been made by counsel at the bar of this Court to sist a mandatary, and where the proposal has been met by a refusal, for the sake of delay. In such a case, counsel having large discretion, and the mandatary being unexceptionable, the objection has [118] been repelled, and I should think it right that such an objection, taken under such circumstances, should not be

* Elder *v.* Young, June 27, 1854, 16 D. 1003; O'Haggan *v.* Alexander, 1761, M. 4644; Hope *v.* Mutter, 1797, M. 4646; Neilson *v.* Wilson, Feb. 13, 1822, 1 S. 314; Ross *v.* Shaw, March 8, 1849, 11 D. 984; Dempster *v.* Potts, June 19, 1835, and Feb. 18, 1836, 14 S. 189, 521; Bonny *v.* Gillies, Nov. 13, 1829, 8 S. 13; Darling's Practice, 108; Shand's Practice, 157.

sustained. But that is a special case; and there is no reason why the production of a mandate, as well as the sisting of a mandatary, should not be insisted on in the circumstances of this case.

LORD KINLOCH.—I think it necessary that a mandate should be produced, as well as a mandatary sisted. I do not go on the special circumstances of this case, but on the great general principle established in the practice of this Court, that when a party litigating leaves the country he must sist a mandatary, and appoint him by express mandate, which constitutes the authority of the mandatary. A mandatary without a mandate I consider to be none at all. I think, with Lord Deas, that the object of the proceeding is, not only to make the mandatary liable for expenses, but also to secure a party responsible for the proper conduct of the cause, and for the availability of every step taken in Court. Without a mandate there is nothing binding on the alleged mandant. There has been a good deal of loose practice in regard to mandataries; and probably the dicta in the case of Elder, to which reference was made, were due to the recollection of that practice. But in my own case, as a Lord Ordinary, I have invariably, when it was demanded, insisted that the person proposed as a mandatary should produce his mandate.

LORD PRESIDENT.—I come to the same conclusion, on the authority of the cases of Dempster and Bonny.

THE COURT pronounced this interlocutor:—"Find that the appellant (defender) left the country *pendente processu* in the month of October 1870, and has not since returned, or intimated any intention of returning: Find that the said appellant (defender) has not, though called on to do so, and allowed time for the purpose, appointed any mandatary to act for him in the conduct of the cause: Therefore refuse the appeal, and decern: Find the appellant liable in expenses; allow an account," &c.

HORNE, HORNE, & LYELL, W.S.—J. A. GILLESPIE, S.S.C.—Agents.

[*Approved*, Thoms *v.* Bain, 1888, 15 R. 613.]

No. 29. X. MACPHERSON, 118. 2d Div.—Lord Mure, I.

RICHARD SOMNER FRIER, Pursuer.—*Sol.-Gen. Clark—Campbell Smith.*
THE EARL OF HADDINGTON, Defender.—*Watson—Balfour.*

Landlord and Tenant—Lease.—A landlord wrote to his tenant,—"If you lay pipes for bringing water to the house, &c., you are to be paid their value at the end of the lease." *Held* that this did not mean the value of the pipes as old metal; nor the cost incurred in laying them down, but the value to the landlord and incoming tenant at the end of the lease.

Process—Construction—Proof.—In an action for implement of a written contract, where a question of construction is raised, this question should be decided by the Court before the cause is remitted to proof.

This action was brought by Richard S. Frier, sometime tenant of the farm of Fans, in the county of Berwick, against the Earl of Haddington, his late landlord, in the following circumstances:—The late Thomas Frier, the father of the pursuer, was tenant of the farms of East Fans and Darlingfield, under a lease dated in 1828, between him and the late George Baillie of Jerviswoode, the defender's grandfather, under which the tenant's possession ended at Whitsunday 1848. In 1847 arrangements were made between the pursuer's father and the defender's father for a renewal of the lease, and a holograph letter was written, the latter agreeing to let the farms again for twenty-one years. The letter contained, *inter alia*, the following provision:—"If you" (the late Thomas Frier) "lay pipes for bringing water [119] to the house and steam-mill, you are to be paid their value at the end of the lease."

The farm was possessed under this holograph letter by the pursuer's father, and after his death by the pursuer. The pursuer alleged that his father expended £98, 0s. 8d. in bringing in the water. Several questions having arisen at the expiry

of the lease in 1869, the tenant brought an action, concluding, *inter alia*, for this sum. He pleaded;—(2) The late Earl of Haddington having agreed to pay the expense of bringing in the water at the end of the lease, the defender, as representing his said father, is liable to the pursuer in payment of the said sum of £98, 0s. 8d. which was expended in reliance on the agreement with him.

The defender pleaded;—(2) Upon a sound construction of the letter of 21st September 1847 the defender is not liable for any greater sum in respect of the pipes in question than their value at the end of the lease, and in respect that as he has been, and still is, ready and willing to pay the said value, the action ought to be dismissed as unnecessary, in so far as directed to recover the same.

The Lord Ordinary pronounced the following interlocutor:—"Finds that the allegations relative to the late Earl of Haddington having undertaken to pay the expense connected with the digging and boring for water, referred to in the fifth article of the condescendence, can only be proved by writ or oath: *Quoad ultra*, and before answer, allows both parties a proof of their averments, and to each a conjunct probation; and appoints the proof to be taken before the Lord Ordinary on a day to be afterwards fixed." *

The defender reclaimed.

LORD JUSTICE-CLERK.—I am of opinion that we must decide, before the case goes to proof, whether the lease does or does not support the pursuer's view of the tenant's claim in respect of these pipes. I think that the word "value" used in the lease means, on a sound construction, the value of the pipes to the landlord at the end of the lease. Otherwise, it would mean that the landlord was to pay the price of new pipes for them after they had been used for twenty years. The tenant had the control of laying them down, and all the benefit during the lease, and he can only recover their value to the landlord at the end of the lease.

In this view of the meaning of the lease, and without going further into the matter, I am of opinion that Mr. Balfour's argument must prevail.

LORD COWAN.—There is a question regarding the construction of the lease which it is indispensable that we construe before sending the case to proof, or remitting to a valuator. The meaning of the lease is that the tenant should get, not the cost of the pipes, but their value to the landlord or an incoming tenant at the end of the lease. If the tenant elected to lay his pipes he was to be entitled to recover the value at the time of his removal from the farm,—their value then, and not their original cost. The Lord Ordinary has overlooked the fact that as to this matter the lease requires construction before ordering proof. In other respects the interlocutor is quite right.

[120] LORD BENHOLME concurred.

LORD NEAVES.—I concur. The thing to be valued is the pipes as they stand. They are an *opus manufactum*, which the tenant was specially authorised to make. They are not to be taken up, and then valued as old metal.

THE COURT pronounced the following interlocutor:—"Alter so much of the Lord Ordinary's interlocutor as allows a proof before answer of the allegations contained in the record in relation to the water-pipes: Find that, on a sound construction of the missive letter, No. 6 of process, the Earl of Haddington undertook to pay the tenant the value of the said pipes as at the end of the lease, as the same might then be ascertained; and allow both parties a proof of such value: *Quoad ultra* adhere to the interlocutor of the Lord Ordinary reclaimed against, reserving all questions of expenses."

W. H. & W. J. SANDS, W.S.—THOMAS SPALDING, W.S.—Agents.

---

* "NOTE.— . . . And as regards the sums sued for, the Lord Ordinary Does not consider that he would be warranted, at this stage of the cause, in laying down any restriction either as to the mode or extent of the proof; because as regards the pipes, parties are at issue, not only as to whether their value is to be taken as at the date when they were laid, or at the expiry of the lease, but also as to what their value was at the latter period; and as a proof will, in any view, require to be gone into on that point, the Lord Ordinary thinks it better to abstain at present from pronouncing any judgment as to the precise period at which the value is to be taken. . . ."

No. 30. X. MACPHERSON, 120. 24 Nov. 1871. 1st Div.—B.

MRS. SARAH FRANCES ROBERTSON OR RAMSAY AND HER HUSBAND, VICE-ADMIRAL GEORGE RAMSAY, C.B., of the First Part.—*Sol.-Gen. Clark.—Lancaster.* THE MARRIAGE-CONTRACT TRUSTEES OF ADMIRAL AND MRS. RAMSAY, of the Second Part.—*Watson—Balfour.*

Trust—Marriage-Contract—Revocation—Husband and Wife.—By antenuptial contract of marriage, a lady, with consent of her parents, conveyed to trustees the whole property then belonging to her, or which she might acquire *stante matrimonio*, £5000 to be held for herself and husband and the survivor in liferent, and the issue of the marriage in fee, and the residue for behoof of herself, her heirs, executors, and assignees whomsoever, exclusive of her husband's *jus mariti* over both capital and interest, with this exception only, that in the event of his survivance he should have a liferent of one-half. By the same deed the wife's parents bound themselves to allot to her one-fourth of a sum of £8000, over which they had a power of apportionment. After the death of the wife's parents, through whom she succeeded to about £35,000, she and her husband agreed that he should renounce his contingent liferent of one-half of the residue, and they concurred in asking the trustees to convey to her, exclusive of the *jus mariti*, the trust-funds, other than the £5000, the fee of which was provided to their children. *Held* that the husband, having renounced his liferent of the residue, the wife was entitled to demand and obtain from the trustees the conveyance proposed (*diss.* Lord Deas, on the ground that the trust was necessary to give effect to the exclusion of the *jus mariti* contemplated by the marriage-contract, and as the wife's parents were parties to the deed, the trustees could not, without their consents, grant the conveyance demanded by the spouses).

In 1845 an antenuptial contract of marriage was entered into between Captain (afterwards Admiral) George Ramsay on the one part, and Miss Sarah Frances Robertson, with special advice and consent of her parents, William Robertson, Esquire, of Loganhouse, and Mrs. Rachel Frances Spottiswoode or Robertson, his wife, on the other part, whereby Captain Ramsay settled on his said spouse, and the issue of the marriage between them, certain provisions, which it is not necessary to specify, which were declared to be in full of all their legal claims.

As the counterpart of these obligations, Miss Robertson conveyed to trustees named, the whole property, heritable and moveable, then belonging to her, or which she might acquire during the marriage, and in particular, "her share of the provision settled upon the children of the marriage in the contract of marriage between her father [121] and mother, which provision was, upon the death of the said William Robertson and Rachel Frances Robertson, to be divisible equally among the children of the marriage between the said William Robertson and Rachel Frances Robertson, or in such shares as they or the survivor might appoint by any writing under their hands, or under the hand of the survivor: And as it is their intention that the said Sarah Frances Robertson should at least have an equal share along with her brothers of the foresaid provision, therefore they do hereby unalterably appropriate to the said Sarah Frances Robertson and her heirs and assignees one-fourth share of the foresaid provision, and under reservation to her of any further share to which she may be entitled in the event of the death of any of her brothers, and also of any further share which the said William Robertson and the said Rachel Frances Spottiswoode or Robertson, or the survivor, may think fit to appropriate to her; and also the share which the said Rachel Frances Spottiswoode or Robertson may appropriate to the said Sarah Frances Robertson of the sum of £20,000, being a legacy to the said Rachel Frances Spottiswoode or Robertson by her uncle, Andrew Strachan, Esq., and which is now vested in trust for her behoof during her life, and afterwards to be disposed of as she may think proper: And she does accordingly now unalterably and irrevocably appropriate to the said Sarah Frances Robertson and her heirs and assignees one-fourth share of the capital sum of the foresaid legacy, whatever it may amount to, and under reservation to her of any further

share of the capital sum of the said legacy which the said Rachel Frances Spottiswoode or Robertson may appropriate to her in the event of the death of any of her brothers or otherwise."

The particular sums of money thus put in settlement by Miss Robertson and her parents consisted of (1) £2000, which belonged to her in her own right; (2) £2000, being one-fourth of £8000, the sum settled by the marriage-contract of her father and mother on their children; and (3) £5000, being one-fourth of the legacy of £20,000 left to her mother by Mr. Strachan.

These sums the trustees were directed to hold, along with the other property to which Miss Robertson might acquire right during the marriage, for the following purposes, viz.—"First, the capital sum of £5000 of the funds appropriated to the said Sarah Frances Robertson by the said William Robertson and Rachael Frances Spottiswoode or Robertson as before-mentioned, to be held in trust for behoof of the said Sarah Frances Robertson and George Ramsay, and the survivor of them in liferent, to the effect that they or the survivor shall draw the annual interest or produce thereof, and for behoof of the child or children of the marriage in fee; . . . and with regard to the remaining property conveyed by the said Sarah Frances Robertson as aforesaid, the same shall be held by the said trustees for behoof of the said Sarah Frances Robertson, her heirs, executors, and assignees whomsoever, altogether exclusive of the *jus mariti* of her husband as regarding both the capital and the interest or annual produce arising from the said property, excepting only that, in the event of the said George Ramsay surviving the said Sarah Frances Robertson, he shall be entitled to the liferent of one-half thereof."

Mrs. Rachael Frances Robertson survived her husband, Mr. William Robertson, and died in 1870. They had eight children, four of whom predeceased their father, and died intestate, unmarried, and in minority. The other four attained majority. Of these, John S. Robertson died in 1856, leaving his whole property to his brother George. George died in 1860, leaving his whole property to his brother Alexander Henry, who in 1865 entered into an agreement regarding his father's succession with [122] his mother, and with his sister Mrs. Ramsay and her husband, in virtue of which Mrs. Ramsay, on her mother's death, succeeded to upwards of £35,000, which, in terms of her marriage-contract above narrated, was paid to the trustees therein named for the purposes specified.

In these circumstances Admiral and Mrs. Ramsay, who had three children, called upon the trustees, after setting aside the sum of £5000 to be held by them, as directed by the marriage-contract, for behoof of the spouses in liferent and their issue in fee, to pay over to Mrs. Ramsay the residue of the trust-funds, to be held by her exclusive of the *jus mariti*; and to facilitate this arrangement, Admiral Ramsay consented to renounce the contingent liferent in the residue provided to him by the marriage-contract as above narrated. As the trustees, however, entertained doubts regarding their power to execute the proposed conveyance, the parties presented a special case to the Court, in which they craved a judgment on the following questions:—"(1) Whether, having regard to the agreement of the said Admiral George Ramsay to renounce his contingent liferent over the trust-property after-mentioned, the said Mrs. Sarah Frances Robertson or Ramsay is entitled to demand and obtain from the trustees payment, or a conveyance in her favour, exclusive of the *jus mariti* of her husband, of the whole trust-property vested in them under the conveyance in their favour by the said Mrs. Sarah Frances Robertson or Ramsay contained in the said contract of marriage, other than the sum of £5000 directed to be held by them for behoof of the spouses, or the survivor in liferent, and the children of the marriage in fee? Or (2) Whether the second parties as trustees under the said contract are entitled and bound to retain and hold the said property in trust, in the manner and for the purposes specified in the said contract?"

Argued for Admiral and Mrs. Ramsay;—It was not proposed to bring the trust to a termination in so far as the interests of any third party were involved. On the contrary, it was contemplated that the trustees should still continue to hold the funds settled upon the spouses and the children of the marriage; but the residue was held by the trustees exclusively for Mrs. Ramsay's benefit, and was absolutely at her disposal, subject only to her husband's liferent of one-half in the event of his surviving her; and as he was ready to renounce that contingent interest, Mrs. Ramsay, as sole beneficiary, on whose right there could be no limitation, was entitled to a conveyance in her

favour in the terms proposed.* In the case of Torry Anderson,† the trust-deed contained a clause declaring it to be irrevocable. There was no such clause in this marriage-contract; but at any rate, it was not proposed to revoke or defeat the purposes of the trust, but merely to carry them into effect in the way in which that would have been done on the extinction of the Admiral's contingent liferent interest.

Argued for the trustees;—It is settled that a married woman cannot, *stante matrimonio*, revoke or terminate a trust which has been created to protect her against the influence of her husband.‡ That was one of the main objects of the marriage-contract, in terms of which the trustees are to hold for behoof of the wife, exclusive of the *jus mariti*; and as the funds of which the trustees were now called upon to divest themselves were derived from Mrs. Ramsay's father and mother, who were [123] parties to the contract, the trust could not be terminated without their consents.

It was stated at the bar, that at the date of the marriage-contract Mrs. Ramsay had attained majority.

At advising,—

LORD PRESIDENT.—The parties to this special case are Admiral and Mrs. Ramsay on the one side, and the trustees under their antenuptial contract of marriage on the other, and the question put to us is, whether, in consequence of Admiral Ramsay renouncing the liferent which he has over a portion of his wife's estate under the marriage-contract, Mrs. Ramsay is entitled to demand and obtain from the trustees a conveyance in her favour, exclusive of the *jus mariti* of her husband, of the whole balance of the trust-property vested in these trustees, after providing what is therein settled on the children of the marriage; or, on the other hand, whether the trustees are entitled and bound to retain and hold the property in trust.

It appears to me that this question must be solved entirely by a consideration of the meaning and intention of the trust-conveyance embraced in the marriage-contract. There is no proposal on the part of the spouses to revoke the conveyance in the marriage-contract, there is no demand that the trust shall be set aside, or that anything shall be done in violation of the trust, or of any rights created by the contract. What they contend for is this: that the conveyance in the contract, and the purposes of the trust, shall be given effect to, according to their true intent and meaning. It appears to me, therefore, that in deciding the case we are not in the slightest degree affected by the case of Torry Anderson, or by the subsequent case of Pringle *v.* Anderson, because, in both of these cases the proposal of the spouses was to revoke and put an end to the trust. Now, we have no such proposal here, and the only question in the case is, whether Mrs. Ramsay is entitled to obtain a conveyance, with her husband's consent, carrying out and giving effect to the trust-purposes, as embraced in the contract.

At the time these parties were married, in 1845, the Admiral was a captain in the navy, apparently without fortune, and the settlement which he makes on his wife, and the children to be born of the marriage, is a very small one undoubtedly. But Miss Robertson, his promised spouse, was a young lady of some expectations, although the result has far exceeded these expectations. She had a sum of £2000 in her own right, consisting of £1700 left to her by some relative, and which her father made up to £2000 to her on her marriage. But besides that sum, she was also entitled to a share of a sum of £8000, settled in her father and mother's contract of marriage upon the children of the marriage, and her share of that sum, supposing an equal distribution to be made, would have been one-fourth; and in like manner, her mother had a power of apportionment of a fund of £20,000 which had been left by an uncle among her children, and if Miss Robertson got her share of that, that would be in addition, so that her expectations amounted, on a fair calculation of probabilities, to £7000 in addition to the £2000 settled as already mentioned. Now, these were the circumstances which the parties had to consider in framing Miss Robertson's marriage-contract, and, while Captain Ramsay made such provisions as he could at the time, it was

* Annandale *v.* M'Niven, 1847, 9 D. 1201; Robertson *v.* Davidson, 1846, 9 D. 152; L'Amy *v.* Nicolson's Trustees, 1850, 13 D. 240; Pretty *v.* Newbigging, 1854, 16 D. 667.

† Anderson *v.* Buchanan, 1837, 15 S. 1073.

‡ Anderson *v.* Buchanan, *sup. cit.*; Pringle *v.* Anderson, March 2, 1866, *ante*, vol. vi. p. 982; Hope *v.* Hope's Trustees, March 15, 1870, *ante*, vol. viii. p. 699.

thought that Mrs. Ramsay could not be asked to do more than settle a reasonable portion of her estate by the contract, leaving herself the undoubted and absolute fee of the balance. Accordingly what is done is this: she conveys to certain trustees "the whole heritable and moveable property presently belonging to her, and to which she may acquire right during the subsistence of the marriage, and particularly, without prejudice to the foresaid generality," her share of the provision settled under her father and mother's marriage-contract; and the estate which she thus conveyed is made subject to this provision in favour of the children of the marriage. The trustees are directed to hold the funds thus conveyed to them for the uses and purposes after specified, viz., first, the capital sum of £5000 of the funds appropriated to the said Sarah Frances Robertson, by the said William Robertson and Rachael Frances Spottiswoode or Robertson, as before mentioned, to be held in trust for behoof of the said Sarah Frances Robert-[124]-son and George Ramsay, and the survivor of them in liferent, to the effect that they or the survivor shall draw the annual interest or produce thereof, and for behoof of the child or children of the marriage in fee, the capital sum to be divided among them, if more than one, and the issue of any of the children who may have predeceased in such shares as their father and mother or the survivor may appoint, and failing such appointment, to be divided among them, and the issue of any of them who may have predeceased, equally, the issue being entitled to the share which would have belonged to the deceased parent; and in the event of there being no child of the marriage, or issue of such child who shall survive the said George Ramsay and Sarah Frances Robertson," the said sum of £5000 shall be at the disposal of the said Sarah Frances Robertson, subject always to the liferent thereof as aforesaid, and failing such disposal thereof by her, the same shall go in equal shares to the representatives of the said George Ramsay and Sarah Frances Robertson. Now, as I read this contract, that is the only proper provision made by Mrs. Ramsay, with the exception of a certain limited contingent liferent, afterwards bestowed on her husband, to which I shall immediately advert. But this is the leading provision which is settled on the parents in liferent, and the children *nascituri* in fee, as Mrs. Ramsay's contribution to the settlement. But then there follow these words:—"And with regard to the remaining property conveyed by the said Sarah Frances Robertson as aforesaid, the same shall be held by the said trustees for behoof of the said Sarah Frances Robertson, her heirs, executors, and assignees whomsoever, altogether exclusive of the *jus mariti* of her husband, as regarding both the capital and the interest or annual produce arising from the said property, excepting only that in the event of the said George Ramsay surviving the said Sarah Frances Robertson, he shall be entitled to the liferent of one-half thereof." Now, as Admiral Ramsay has renounced this right of liferent, we are quite entitled to read the part of the deed relating to it as if it had never been written, because being a liferent in favour of an individual who is of full age, it must have been known from the beginning that it was competent to renounce it *stante matrimonio*, and it must have been in contemplation that if that should happen, certain consequences must follow from the way in which the remainder of the property was dealt with.

The question then is, supposing that there had been no liferent, what is the meaning of the direction to hold the balance of Mrs. Ramsay's funds, for behoof of herself, her heirs, executors, and assignees whomsoever, altogether exclusive of the *jus mariti* of her husband? I confess I can see no answer to that question but one, and that is, that the balance of her fortune, after payment of the provisions to the children, and also after providing for this contingent liferent, should it not be renounced, fell absolutely and unconditionally to her according to her own will for the time. I cannot understand the words "heirs, executors, and assignees whomsoever" in such a clause except as conferring an absolute right of property, with a complete power of disposal either *inter vivos* or *mortis causa*, and therefore from the words of this part of the settlement, the case is clear enough. But it was suggested that this conveyance in trust might be intended to protect Mrs. Ramsay against her husband, and that the trust was interposed, in order more effectually to carry out the exclusion of the *jus mariti*, and prevent him interfering with the property at any time during the marriage. But surely the *jus mariti* may be excluded, and yet the wife may be absolute fiar of the property from which it was excluded. No doubt if that be the effect, it will be in the power of the lady to make a gift to the husband of the whole or any part of the funds from which it is excluded. There is nothing unlawful in that. The law makes such gifts revocable, but it is only thereby shown that they are lawful. A woman

may hold property exclusive of the husband's *jus mariti* without the interposition of a trust, but then it is said that where a trust is interposed the presumption is that it is interposed for the purpose of making more effectual the exclusion of the *jus mariti*, and if there were no other apparent object in constituting the trust there would be a great deal of force in that argument. But it must be observed that Mrs. Ramsay's fortune, amounting to more than £9000, according to her expectations at the time, was to be used to provide [125] £5000 for the children of the marriage, and that her husband was to have contingently the liferent of one-half of the balance. This was a sufficient reason for the constitution of the trust, without resorting to the speculation that it was constituted to make the exclusion of the *jus mariti* effectual.

But then it is further argued that the constitution of this trust must be held to be matter of contract, and contract not merely between the husband and wife, but contract between the spouses and parents of Mrs. Ramsay, who were made parties to the deed. Now, it is quite true that her parents were made parties to the deed, but it was not necessary for all its purposes that they should be so. And here it is not immaterial to observe in the outset that Miss Robertson was of full age, and entitled to act for herself, and required no interposition by her legal guardian to authorise a settlement of her estate. Her father's interposition was therefore not as her curator; but the interposition of both father and mother is easily explained if we look to that part of the deed where their names are introduced, and consider what it is they do. Though Mrs. Ramsay conveys her estate generally to the trustees, and more particularly her share of the provision settled by her father and mother's contract of marriage, upon the children of their marriage, the deed proceeds thus,—"And as it is their intention that the said Sarah Frances Robertson should at least have an equal share along with her brothers of the foresaid provision, therefore they do hereby unalterably appropriate to the said Sarah Frances Robertson, and her heirs and assignees, one-fourth share of the foresaid provision, and under reservation to her of any further share to which she may be entitled in the event of the death of any of her brothers, and also of any further share which the said William Robertson and Rachel Frances Spottiswoode or Robertson or the survivor may think fit to appropriate to her."

Now, it seems to me that this appropriation is made merely for the purpose of giving more substance and reality to the conveyance by Mrs. Ramsay than it otherwise would have had, fixing that the value of that conveyance would not be less than is here represented. Then the deed further goes on,—"And also the share which the said Rachel Frances Spottiswoode or Robertson may appropriate to the said Sarah Frances Robertson of the sum of £20,000, being a legacy to the said Rachel Frances Spottiswoode or Robertson by her uncle, Andrew Strachan, Esq., and which is now vested in trust for her behoof during her life, and afterwards to be disposed of as she may think proper: And she does accordingly now, unalterably and irrevocably, appropriate to the said Sarah Frances Robertson, and her heirs and assignees, one-fourth share of the capital sum of the foresaid legacy, whatever it may amount to, and under reservation to her of any further share of the capital sum of the said legacy which the said Rachel Frances Spottiswoode or Robertson may appropriate to her in the event of the death of any of her brothers, or otherwise." Now, the effect of these two proceedings, the one on the part of Mr. and Mrs. Robertson jointly, and the other on the part of Mrs. Robertson alone, was simply this, that instead of the conveyance by Mrs. Ramsay to the trustees being indefinite as to amount, it was thereby fixed and ascertained that the trustees should have in their hands not only the £2000 which Mrs. Ramsay then had in her own right, but £2000 of the £8000 provided in the marriage-contract of her parents to their children, and £5000 of the legacy of Strachan. I do not see the least evidence that either of the parents became contracting parties in any further sense in this deed, or that they stipulated that something else should be done in return for what they did. I think they interposed simply for the purpose of strengthening the hands of their daughter, and enabling her to make a settlement of her estate more satisfactorily. The conclusion, therefore, to which I come is, that Mrs. Ramsay is entitled to dispose of the fund remaining in the hands of the trustees after providing the £5000 for the children of the marriage, and in consequence of the renunciation of Admiral Ramsay's liferent. But in coming to this conclusion I desire to say that I do not think that this is any precedent for holding that a lady, who has marriage-contract provisions settled on her under antenuptial contract, has power to renounce or give them away, because I do not look upon the trust-settlement of the

residue of Mrs. Ramsay's property in this case as part of the marriage-contract provisions at all. If a sum had been [126] settled on her by her husband in consideration of the marriage, or in consideration of the provisions made by her on the other hand, I would not say she could renounce that. That would be a violation of the marriage-contract. But this is merely carrying out the true intention of parties in creating this trust. I think nothing else was intended than that, in the situation in which they now stand, this residue should be at her disposal, both during the subsistence of the marriage and after its dissolution. The case of Hope has therefore no application, and for the reasons stated it appears that the cases of Torry Anderson and Pringle have just as little application.

LORD ARDMILLAN.—In considering whether Mrs. Ramsay, with consent of her husband, can demand and obtain from the marriage-contract trustees a conveyance of the trust-property to the extent explained in the special case, the question which first arises is, whether, in regard to the property of which she thus demands conveyance, there is any interest other than her own remaining to be protected, or any trust-purpose remaining to be fulfilled.

This trust was created by Mrs. Ramsay herself, and for her own benefit. The trustees hold the fund in question for behoof of Mrs. Ramsay and her heirs, executors, and assignees, exclusive of the *jus mariti* of her husband, Admiral Ramsay, but with an emerging liferent of the half to Admiral Ramsay in the event of his surviving his wife. I think that Mrs. Ramsay could now assign her right and interest. She could not, indeed, evacuate the emerging liferent of her husband. But she could convey her own interest, subject to and under burden of this liferent, and exclusive of his *jus mariti*. Except in so far as regards the emerging liferent of the husband, there is no interest in any one to compete with that of Mrs. Ramsay, and no interest to be protected by the trustees, and, except in so far as regards the protection of that liferent by the trustees, there is no trust-purpose to be fulfilled. Now, in this position of matters, the lady being alone now interested, and acting with her husband's concurrence, desires to obtain a conveyance of her own estate, and to that effect to recall the trust which she herself had created. If the Admiral had predeceased her there would have been no emerging interest. If he renounces or discharges his emerging liferent that interest is at an end. But he does so, and he concurs in this application. As matter of construction of this deed I am of opinion that by Admiral Ramsay's renunciation, and his concurrence, all interest counter to that of Mrs. Ramsay is taken away, and all difficulty is removed. The only interest, except Mrs. Ramsay's own, being thus taken away, why should the trust continue. The only trust-purpose which could be said to remain, or could even be expected to arise, is withdrawn, and an assignation by her would be effectual. If she could have assigned, under burden of the emerging liferent, which I think she could, then, on the liferent being effectually discharged, she can assign absolutely.

Where there are no competing interests—where there is no duty of trust-protection —no trust-purposes, present or emergent—coming into conflict with Mrs. Ramsay's rights, the trust becomes purely administrative for the benefit of Mrs. Ramsay, the person who created it; and such a trust under such circumstances, can, I think, be recalled by the truster. If I have bestowed a gift, I have created an interest in the donee. If I have committed the care of that gift to trustees, I have created a trust for protection of the gift and of the donee. But if there is no donee, and no interest conferred, and no protection required, for what end shall the trust continue? What is there to prevent revocation by the granter? To this question I have heard no answer.

In the absence of authority, I should, on principle, be of opinion that Mrs. Ramsay, her husband concurring and renouncing his emerging liferent, can effectually revoke this trust and demand conveyance of the estate. But we are referred to the decision in the case of Torry Anderson, and that decision is pressed on us as a conclusive authority. I am not satisfied that the decision is in all respects applicable, and I am not disposed to extend the application of a decision which does not commend itself to my mind. The trust-deed in the case of Torry Anderson was declared in express words to be "not revocable" by the granter, Mrs. Torry Anderson, "on any ground or in any form whatever." This express [127] declaration was a specialty, and was considered important by some of the Judges in the majority. I may particularly mention the opinions of Lord Mackenzie and Lord Medwyn. In so far as that decision

turned on the declaration in the trust-deed of the irrevocable character of the trust, it is not an authority here, for here there is no such declaration.

But being called on to hold this decision as conclusive, and even conclusive in a case where the special declaration does not occur, I must say that, after careful consideration of the decision, and the opinions of the majority of the Judges in the case of Torry Anderson, I have the greatest difficulty in concurring in them. I am disposed rather to adopt views in accordance with the opinion of the minority of the Court. At the same time, if the trust-deed in the present case had been in all respects similar, and especially if it had contained a clause expressly declaring the deed to be irrevocable on any ground or in any form, as was declared in the case of Torry Anderson, I should not have felt at liberty to sustain, in this case, the power to revoke. To that extent I would have accepted the authority of the decision, and given effect to the clause.

In the case of Pringle *v.* Anderson, July 3, 1868, the Second Division of the Court refused to sustain a revocation, during the life of both spouses, of a trust in a marriage-contract where the trust was only terminable at death of the husband, and, where again, there was a clause declaring that it should "not be revocable or subject to alteration by the parties or either of them." But, as I read that decision, it was pronounced mainly in respect of the special terms of the deed, and in particular the presence of the clause excluding revocation was viewed as the leading ground of judgment. It is also to be observed that the possibility of important interests emerging by the birth of children was held not to be altogether excluded. This is noticed by Lord Neaves.

The point is said to have been again raised in the case of Hope *v.* Hope's Trustees, 15th March 1870, which came before the Court in the form of a special case. But I do not think that the same point was there raised. The nature of the deed, and the circumstances and position of the parties in the case of Hope *v.* Hope's Trustees, were different from what they are here. Other rights and interests than those of the parties seeking to revoke were there existing, and might even be said to be involved.

I am not aware of any decision, other than those which I have mentioned, which can be urged as authority against Mrs. Ramsay's demand. The cases of Annandale, June 9, 1847, 7 D. 1201; Robertson *v.* Davidson, Nov. 24, 1846, 9 D. 152; and L'Amy *v.* Nicolson's Trustees, Dec. 5, 1850, 13 D. 240; and Pretty *v.* Newbigging, March 2, 1854, 16 D. 667, may be referred to as explaining the effect on the trust administration of the husband's renunciation of his liferent. On that point there is little difficulty here, as his liferent is not an existing right, but only a contingent right emerging on his surviving his wife.

The result of my consideration of the case, on principle, and with reference to our Scottish authorities, is that Mrs. Ramsay, with the concurrence of her husband, is entitled to demand and obtain conveyance of the trust-property in so far as now claimed. I have only to add that I concur with your Lordship in your concluding remarks, guarding the judgment in this case from application to proper marriage-contract provisions to which other persons are parties, or in which other persons are interested. I do not think that there are any parties here so interested as to entitle them to interfere and resist Mrs. Ramsay's demand.

LORD KINLOCH.—By the marriage-contract of Admiral and Mrs. Ramsay a sum of £5000, part of Mrs. Ramsay's fortune, was vested in trustees, to be held by them for the spouses in liferent, and the children of the marriage in fee,—"And with regard to the remaining property conveyed by the said Sarah Frances Robertson as aforesaid, the same shall be held by the said trustees for behoof of the said Sarah Frances Robertson, her heirs, executors, and assignees whomsoever, altogether exclusive of the *jus mariti* of her husband, as regarding both the capital and the interest or annual produce arising from the said property, excepting only that, in the event of the said George Ramsay surviving the said Sarah Frances Robertson, he shall be entitled to the liferent of one-half thereof."

[128] There is no proposal made to interfere with the trust in so far as it concerns the £5000 provided to children. But in regard to the residue, Admiral Ramsay now proposes to renounce his contingent liferent; and the question which arises is, whether Mrs. Ramsay is entitled, with his consent, to put an end to the trust of the residue, and demand a conveyance from the trustees.

In principle, I think this demand well founded. I must look at the case as it

residue of Mrs. Ramsay's property in this case as part of the marriage-contract provisions at all. If a sum had been [126] settled on her by her husband in consideration of the marriage, or in consideration of the provisions made by her on the other hand, I would not say she could renounce that. That would be a violation of the marriage-contract. But this is merely carrying out the true intention of parties in creating this trust. I think nothing else was intended than that, in the situation in which they now stand, this residue should be at her disposal, both during the subsistence of the marriage and after its dissolution. The case of Hope has therefore no application, and for the reasons stated it appears that the cases of Torry Anderson and Pringle have just as little application.

LORD ARDMILLAN.—In considering whether Mrs. Ramsay, with consent of her husband, can demand and obtain from the marriage-contract trustees a conveyance of the trust-property to the extent explained in the special case, the question which first arises is, whether, in regard to the property of which she thus demands conveyance, there is any interest other than her own remaining to be protected, or any trust-purpose remaining to be fulfilled.

This trust was created by Mrs. Ramsay herself, and for her own benefit. The trustees hold the fund in question for behoof of Mrs. Ramsay and her heirs, executors, and assignees, exclusive of the *jus mariti* of her husband, Admiral Ramsay, but with an emerging liferent of the half to Admiral Ramsay in the event of his surviving his wife. I think that Mrs. Ramsay could now assign her right and interest. She could not, indeed, evacuate the emerging liferent of her husband. But she could convey her own interest, subject to and under burden of this liferent, and exclusive of his *jus mariti*. Except in so far as regards the emerging liferent of the husband, there is no interest in any one to compete with that of Mrs. Ramsay, and no interest to be protected by the trustees, and, except in so far as regards the protection of that liferent by the trustees, there is no trust-purpose to be fulfilled. Now, in this position of matters, the lady being alone now interested, and acting with her husband's concurrence, desires to obtain a conveyance of her own estate, and to that effect to recall the trust which she herself had created. If the Admiral had predeceased her there would have been no emerging interest. If he renounces or discharges his emerging liferent that interest is at an end. But he does so, and he concurs in this application. As matter of construction of this deed I am of opinion that by Admiral Ramsay's renunciation, and his concurrence, all interest counter to that of Mrs. Ramsay is taken away, and all difficulty is removed. The only interest, except Mrs. Ramsay's own, being thus taken away, why should the trust continue. The only trust-purpose which could be said to remain, or could even be expected to arise, is withdrawn, and an assignation by her would be effectual. If she could have assigned, under burden of the emerging liferent, which I think she could, then, on the liferent being effectually discharged, she can assign absolutely.

Where there are no competing interests—where there is no duty of trust-protection —no trust-purposes, present or emergent—coming into conflict with Mrs. Ramsay's rights, the trust becomes purely administrative for the benefit of Mrs. Ramsay, the person who created it; and such a trust under such circumstances, can, I think, be recalled by the truster. If I have bestowed a gift, I have created an interest in the donee. If I have committed the care of that gift to trustees, I have created a trust for protection of the gift and of the donee. But if there is no donee, and no interest conferred, and no protection required, for what end shall the trust continue? What is there to prevent revocation by the granter? To this question I have heard no answer.

In the absence of authority, I should, on principle, be of opinion that Mrs. Ramsay, her husband concurring and renouncing his emerging liferent, can effectually revoke this trust and demand conveyance of the estate. But we are referred to the decision in the case of Torry Anderson, and that decision is pressed on us as a conclusive authority. I am not satisfied that the decision is in all respects applicable, and I am not disposed to extend the application of a decision which does not commend itself to my mind. The trust-deed in the case of Torry Anderson was declared in express words to be "not revocable" by the granter, Mrs. Torry Anderson, "on any ground or in any form whatever." This express [127] declaration was a specialty, and was considered important by some of the Judges in the majority. I may particularly mention the opinions of Lord Mackenzie and Lord Medwyn. In so far as that decision

turned on the declaration in the trust-deed of the irrevocable character of the trust, it is not an authority here, for here there is no such declaration.

But being called on to hold this decision as conclusive, and even conclusive in a case where the special declaration does not occur, I must say that, after careful consideration of the decision, and the opinions of the majority of the Judges in the case of Torry Anderson, I have the greatest difficulty in concurring in them. I am disposed rather to adopt views in accordance with the opinion of the minority of the Court. At the same time, if the trust-deed in the present case had been in all respects similar, and especially if it had contained a clause expressly declaring the deed to be irrevocable on any ground or in any form, as was declared in the case of Torry Anderson, I should not have felt at liberty to sustain, in this case, the power to revoke. To that extent I would have accepted the authority of the decision, and given effect to the clause.

In the case of Pringle *v.* Anderson, July 3, 1868, the Second Division of the Court refused to sustain a revocation, during the life of both spouses, of a trust in a marriage-contract where the trust was only terminable at death of the husband, and, where again, there was a clause declaring that it should "not be revocable or subject to alteration by the parties or either of them." But, as I read that decision, it was pronounced mainly in respect of the special terms of the deed, and in particular the presence of the clause excluding revocation was viewed as the leading ground of judgment. It is also to be observed that the possibility of important interests emerging by the birth of children was held not to be altogether excluded. This is noticed by Lord Neaves.

The point is said to have been again raised in the case of Hope *v.* Hope's Trustees, 15th March 1870, which came before the Court in the form of a special case. But I do not think that the same point was there raised. The nature of the deed, and the circumstances and position of the parties in the case of Hope *v.* Hope's Trustees, were different from what they are here. Other rights and interests than those of the parties seeking to revoke were there existing, and might even be said to be involved.

I am not aware of any decision, other than those which I have mentioned, which can be urged as authority against Mrs. Ramsay's demand. The cases of Annandale, June 9, 1847, 7 D. 1201; Robertson *v.* Davidson, Nov. 24, 1846, 9 D. 152; and L'Amy *v.* Nicolson's Trustees, Dec. 5, 1850, 13 D. 240; and Pretty *v.* Newbigging, March 2, 1854, 16 D. 667, may be referred to as explaining the effect on the trust administration of the husband's renunciation of his liferent. On that point there is little difficulty here, as his liferent is not an existing right, but only a contingent right emerging on his surviving his wife.

The result of my consideration of the case, on principle, and with reference to our Scottish authorities, is that Mrs. Ramsay, with the concurrence of her husband, is entitled to demand and obtain conveyance of the trust-property in so far as now claimed. I have only to add that I concur with your Lordship in your concluding remarks, guarding the judgment in this case from application to proper marriage-contract provisions to which other persons are parties, or in which other persons are interested. I do not think that there are any parties here so interested as to entitle them to interfere and resist Mrs. Ramsay's demand.

LORD KINLOCH.—By the marriage-contract of Admiral and Mrs. Ramsay a sum of £5000, part of Mrs. Ramsay's fortune, was vested in trustees, to be held by them for the spouses in liferent, and the children of the marriage in fee,—"And with regard to the remaining property conveyed by the said Sarah Frances Robertson as aforesaid, the same shall be held by the said trustees for behoof of the said Sarah Frances Robertson, her heirs, executors, and assignees whomsoever, altogether exclusive of the *jus mariti* of her husband, as regarding both the capital and the interest or annual produce arising from the said property, excepting only that, in the event of the said George Ramsay surviving the said Sarah Frances Robertson, he shall be entitled to the liferent of one-half thereof."

[128] There is no proposal made to interfere with the trust in so far as it concerns the £5000 provided to children. But in regard to the residue, Admiral Ramsay now proposes to renounce his contingent liferent; and the question which arises is, whether Mrs. Ramsay is entitled, with his consent, to put an end to the trust of the residue, and demand a conveyance from the trustees.

In principle, I think this demand well founded. I must look at the case as it

would have existed if no liferent to Admiral Ramsay had been mentioned at all, for his renunciation places matters exactly in the same predicament. I then find no interest for which the trustees are to hold, except that of Mrs. Ramsay, as proprietrix in absolute fee. The trust is only a trust for administration; or it may be a more delicate mode of giving practical expression to the exclusion of the *jus mariti*, but in nowise necessary to the vitality or force of the exclusion. There is no restraint on Mrs. Ramsay's absolute proprietorship, and no suspension of its exercise till the dissolution of the marriage. Mrs. Ramsay is not debarred from exercising her proprietary right till any specified period. She may at any one moment draw on the trustees to the full extent of the residue, doing with the amount drawn entirely what she may please. She can assign the whole fund to whom she pleases, thereby giving her assignee power to demand an immediate conveyance from the trustees. All this I consider to follow from the unqualified constitution of a trust on behalf of "Sarah Frances Robertson, her heirs, executors, and assignees whomsoever." In point of principle, I can see no ground whatever on which Mrs. Ramsay, the absolute and unlimited proprietrix in fee of this residue, can be denied a conveyance by the trustees.

It has been suggested that the accession of Mrs. Ramsay's father and mother to the marriage-contract may imply that the trust is to be maintained as one of the conditions in the contract stipulated for by them. Undoubtedly they were in one sense contracting parties; and any contract made with them must be observed. But the question always returns, to what effect can they be said to contract? When the answer is, to the effect of Mrs. Ramsay being constituted absolute and unlimited fiar,—then to allow Mrs. Ramsay to exercise the power of such a fiar, by obtaining a conveyance, is not to frustrate, but to follow out, the stipulations for which they contracted.

But it is said that a difficulty is created by some prior decisions of the Court, and particularly by the case of Torry Anderson *v.* Buchanan, 2d June 1837. I consider the decision in that case, particularly as approved of in the after case of Pringle *v.* Pringle's Trustees, as of binding authority to the extent to which it goes, but not as a decision the principle of which is to be strained beyond its own precise scope. And it differs from the present case in more than one particular. The trust-conveyance in that case was of the liferent interest of the wife in an entailed estate, the rents and produce of which, during her life, were to be drawn by the trustees, and paid over to her exclusive of the *jus mariti*. The trust to this effect was declared to be irrevocable "on any ground or in any form whatever"; and this clause of irrevocability weighed greatly with the majority of the Court by which the judgment was pronounced. This irrevocable trust for a lifelong administration (so long at least as the marriage subsisted) is evidently a very different thing from the trust in the present case, which applies to a property at once alienable by the wife, has attached to it no clause declaring it should not be revoked, and is the mere form in which a presently disposable fee is vested absolutely in the wife. This difference between the two cases warrants me, as I conceive, in not holding myself compelled to follow in the present case the course followed in Anderson *v.* Buchanan, but in applying to the case the sound legal principle by which I consider it to be ruled.

The same observation is applicable to the after case of Pringle *v.* Pringle's Trustees, 3d July 1868, which is in substance a similar case to that of Torry Anderson, and with the same clause of irrevocability attached to the trust in the marriage-contract.

The case of Hope *v.* Hope's Trustees, 15th March 1870, is a case entirely different from the present. In that case the marriage-contract provided a certain annuity to the lady in the event of her husband's decease, for which security was [129] given by a joint obligation granted by the bridegroom's father, afterwards commuted for a disposition by the husband, who obtained right to the father's estate, of a house in Edinburgh in favour of trustees, to hold for the lady's benefit. The Court held that the husband could not revoke this trust, and deprive his wife of this security, even with the wife's consent. They held, in other words, that he could not use his wife's consent, procured presumably by his influence over her as her husband, to validate an act performed by him for his own benefit, to his wife's clear prejudice, and thereby not to carry out, but to frustrate the right given her by the marriage-contract. The trust was in that case reasonably held constituted for the very purpose of protecting the wife against marital influence to this very effect; and to admit of her consent as sufficient to revoke the trust would be to hold the very act against which the trust

was to guard to be an act capable of destroying it. It is clear that no sound deduction can be drawn from that case to the present.

I am therefore of opinion that the question put to us should be answered in the affirmative.

LORD DEAS.—I agree with your Lordships in what I understand to be the leading doctrine upon which you proceed,—I mean that a destination in an antenuptial contract of marriage may be evacuated as regards all parties, beyond the contracting parties themselves and the issue of the marriage, unless there be something very special and unusual to prevent that result. Where, failing issue, the wife's property is destined to her heirs and assignees, or simply to her heirs (it being unnecessary to mention assignees), I do not doubt, any more than your Lordships do, that, if there be no issue, the fee of the wife's property must be held to be at her absolute disposal. I further agree with your Lordships that the mere existence of a trust will not prevent such a result. The trustees, in such a case, are trustees for the wife, and she may exercise over her estate the same power of disposal as if there were no trust.

If, therefore, this had been an antenuptial marriage-contract between the gentleman and the lady alone, I should have been disposed to come to the same conclusion with your Lordships. But my difficulty arises from this,—that the father and mother of the lady are parties to this contract. It is quite true that they are described in the outset as being consenting or concurring parties only, but I rather think that is the usual form in which parents are represented as becoming parties to such a contract, whatever they may be contributing for the purposes of the contract. At all events I hold it as quite settled that whoever becomes a consenter to a deed is just a party to it. Now, I am humbly of opinion that, when parents become parties to the marriage-contract of a daughter, they are contracting parties with respect to everything in that contract which relates to the interests of their daughter. I think, therefore, that in this case they were parties to the exclusion of the husband's *jus mariti*, both from capital and interest, and that the destination in this deed of the portion of the lady's fortune now in question could not be revoked except with consent of the whole contracting parties, father and mother included. This is a peculiarly strong case for insisting on such consent, because the father and mother are not nominal parties merely without taking much part in the provisions, but they are parties who had a most substantial interest in these provisions. As parties to that contract they agree irrevocably to give to their daughter one-fourth share of £8000, provided to their children under their own marriage-contract, and of which sum, having the power of apportionment, they might have given her only a very small share. In the same way Mrs. Robertson, having the power of apportionment, gives her irrevocably one-fourth part of a legacy of £20,000, left by Mr. Andrew Strachan. Moreover, the great bulk of the fortune which has come to Mrs. Ramsay is fortune which, at the date of the contract, her father and mother had full power over, and which she afterwards got through the predecease of her brothers and sisters. We cannot assume that the father and mother would have made the apportionment they did make if they had not had it in view that the daughter was to convey, as she did convey, to certain trustees, her whole property to be held for her behoof, altogether exclusive of the *jus mariti* and administration of her husband, both as to capital and [130] interest, excepting only that he was to have the liferent of one-half, in the event of his surviving her. Now, if that conveyance is allowed to take effect as it stands, the husband is excluded both from principal and interest, and the only importance of the liferent in his favour is, that it shows that the deed contemplates that the trust shall be in force at the dissolution of the marriage, which is favourable to the view that the object was to preserve this sum as a provision for the lady in case of her surviving her husband. The object was, if I may so express myself, that a restriction should be made by herself in favour of herself, to prevent her from afterwards yielding too much to conjugal influence or affection. I by no means say, however, that that would have been enough to prevent her from removing the restriction had her parents not been parties to the contract. But when her father and mother became parties to the contract, and made provisions for their daughter, it must be held that they entered into the contract and made these provisions on the faith that the restriction in question could not be removed without their consent. It seems to be assumed that the lady might gratuitously assign the whole of her property to a stranger under burden of the husband's eventual liferent. I am not prepared to say she could do anything of the kind. That would be defeating the very purpose of the contract contemplated by the parents, that the capital should remain intact.

I can place no weight on the distinction taken between this case and the case of Torry Anderson, that there was there a clause in the contract declaring the restriction irrevocable, for all such clauses of restriction in marriage-contracts are in their nature irrevocable, and do not require to be so declared. It is here proposed to revoke and put an end to the trust. Now, most unquestionably the trust is necessary to give effect to the exclusion of the *jus mariti*, and if Mrs. Ramsay's property is to be conveyed over to her I do not see how the exclusion is to be maintained in questions or transactions with third parties, whatever personal responsibility the exclusion may continue to infer against the husband and his representatives. No doubt, if we can construe the contract as placing everything at Mrs. Ramsay's own disposal (subject to her husband's eventual liferent), the difficulty is removed. But I am unable so to read the contract, and, consequently, I cannot hold that Mrs. Ramsay is entitled to revoke the trust and obtain the conveyance she demands.

The following interlocutor was pronounced:—"Find and declare that in consequence of the renunciation by Admiral Ramsay of his contingent liferent right, Mrs. Ramsay is entitled, with the concurrence of her husband as her administrator-in-law, to demand and obtain from the trustees, parties of the second part, payment, or a conveyance in her favour, exclusive of the *jus mariti* of her husband, of the whole trust property vested in them under the conveyance in their favour by the said Mrs. Ramsay contained in the contract of marriage between the parties of the first part, other than the sum of £5000 therein directed to be held by them for behoof of the spouses, or the survivor in liferent, and the children of the marriage in fee, and decern."

MACKENZIE & KERMACK, W.S.—W. H. & W. J. SANDS, W.S.—Agents.

[*Commented upon*, Menzies *v.* Murray, 1875, 2 R. 507; Standard Property Investment Co. *v.* Cowe, 1877, 4 R. 695; Laidlaws *v.* Newlands, 11 R. 481; Williamson *v.* Boothly, 1890, 17 R. 927. *Followed*, Newlands *v.* Miller, 1882, 9 R. 1104. *Referred to*, Higginbotham's Trs. *v.* Higginbotham, 1886, 13 R. 1016; Halkett *v.* Halkett's Judicial Factor, 1890, 17 R. 719; Reid *v.* Reid's Trs., 1899, 1 F. 969; Watt *v.* Watson, 1897, 24 R. 330. *Approved*, Simon's Trs. *v.* Neilson, 1890, 18 R. 135. *Distinguished*, Peddie *v.* Peddie's Trs., 1891, 18 R. 491.]

No. 31. X. MACPHERSON, 130. 24 Nov. 1871. 1st Div.—Lord Mackenzie, B.

WILLIAM BRUCE AND MANDATARIES, Pursuers.—*Lord-Adv. Young—Monro—Robertson.*

MRS. JANE BRUCE OR SMITH AND OTHERS, Defenders.—*Sol.-Gen. Clark—Scott.*

Proof—Presumption of Life.—In a question raised in 1871 as to whether *A. B.*, who had not been heard of since 1825, had survived 16th July 1849, a proof established the following facts:—*A. B.* was born in 1768. He served in the army from his fourteenth to his forty-first year, when he was discharged on account of a wound in the leg. In his forty-third year he again enlisted, but was [131] rejected as unfit for service, and eight weeks after he was apprehended on a charge of horse-stealing, and was subsequently subjected to penal servitude for fourteen years at Botany Bay. At the expiry of his sentence in 1825, when he was in his fifty-seventh year, he wrote to a wealthy brother in this country, asking £50 to bring him home. This letter was not answered, and no further intelligence was received from him, although he had a wife and child in this country. Before his imprisonment he was a man of reckless habits, much given to drink.

Held that the death of *A. B.* prior to July 1849 was to be presumed from the facts proved.

In January 1865 William Bruce, a private in the seventh company of Sappers and Miners, raised this action against Mrs. Jane Smith or Bruce and others, to reduce an agreement which had been signed by him in February 1862, and by the other parties

thereto at various dates betwixt 6th November 1848 and 31st July 1849, at which last date it had been signed by the pursuer's elder brother, James Bruce, who died in October 1851 without issue.

The agreement in question related to certain property in India which had belonged to James Bruce of Broomhill (who died in 1835), the younger brother of Alexander Bruce, the pursuer's grandfather.

The pursuer alleged that he had right to this property, as heir of his grandfather, Alexander Bruce, and that he had signed the agreement under essential error.

The defenders pleaded, *inter alia*, that the pursuer was barred from suing this reduction, being bound by the subscription of his brother, James Bruce junior, to the agreement, alleging that he (James) was, at the date of his subscription in July 1849, the heir to the said Indian property, through whom alone it could be claimed.

The pursuer averred that at that date Alexander Bruce, his grandfather, the elder brother of James Bruce senior, and his heir by the law of India, was alive, and that he was alive at and after 13th October 1851, when James Bruce junior died.

A proof was led as to the date of Alexander Bruce's death. The facts established by the proof are stated in the Lord Ordinary's note, and in the opinion of the Lord President.

On 4th July 1871 the Lord Ordinary found "facts and circumstances proved sufficient to presume that Alexander Bruce, the grandfather of the pursuer William Bruce, was dead before 26th July 1849, when his grandson, the pursuer's elder brother James Bruce, signed the deed of agreement sought to be reduced." *

[132] The pursuer reclaimed.†

LORD PRESIDENT.—The Lord Ordinary has found that Alexander Bruce was dead before 26th July 1849, and therefore he did not require to pronounce any judgment with regard to his survivance in 1852. But if we differed from his Lordship with regard to 1849, it might be necessary for us to give judgment with regard to 1852. I am, however, of opinion that the true result of the evidence is, that Alexander Bruce

---

* "NOTE.—The pursuer's grandfather, Alexander Bruce, was in 1811 transported for fourteen years for horse-stealing. In his declaration, emitted before the Sheriff at Edinburgh, on 16th March 1811, he states that he was then about forty-three years of age; that he had served about twenty-seven years in the army, from which he was discharged in 1809, in consequence of a wound in the leg received in Spain, so that he must have enlisted when he was about fourteen years of age; and that, having again enlisted about eight weeks before his apprehension, he was rejected by the surgeon as unfit for service. It is clearly proved that he was a reckless, hard-living man, much given to drink. His sentence expired on 25th April 1825, and in or about 1825 his wealthy brother, Mr. James Bruce of Broomhill, received a letter from him stating that his sentence had expired, and that he was in bad health, and asking £50 to enable him to return home. Mr. James Bruce never answered that letter, and since that time no further intelligence has been heard of or from Alexander Bruce. On 26th July 1849, when his grandson, James Bruce, signed the deed of agreement sought to be reduced, he must have been, if alive, about eighty-one years of age.

"The answer to the question whether a person is to be presumed alive or dead at any particular time depends entirely upon the circumstances of each [132] case. Having regard to the age, character, and habits of Alexander Bruce, to his previous history, to the fact that he was in bad health when he wrote home for money in 1825, and that nothing has been heard of or from him since that time, although he had a wife and family in this country, the Lord Ordinary is of opinion that the presumption is that he died previous to 26th July 1849.

"The opinion of the relations who were examined as witnesses on the point is that he died shortly after writing home for money, as no further letters were received from him."

† *Pursuer's Authorities.*—Bankton, ii. 6, 31, vol. ii. p. 667; Stair, 4, 45, 17; cases in Skelton's Dickson on Evidence, sec. 299 *et seq.*; Campbell *v.* Lamont, June 17, 1824, 3 S. 145; Kennedy *v.* M'Lean, Feb. 18, 1851, 13 D. 705; Fife *v.* Fife, June 16, 1855, 17 D. 951; Barstow *v.* Cook, March 14, 1862, 24 D. 790.

Defenders' Authorities.—Bankton, vol. ii. 668 (iv. 34, 5); case of Carstairs, *ibi cit.*; Dickson on Evid. secs. 303, 308; Hay *v.* Corstorphine, 1663, M. 5956; Forrester *v.* Boucher, 1670, M. 11,674; Sands *v.* Her Tenants, 1678, M. 12,645; Halhead, *ibid.*

was dead before 1849. The defenders admit that the onus lies upon them, and I think that it does. Before 1849 Alexander Bruce was not more than eighty-one years of age, and therefore there was a presumption of his being still alive. But that presumption is in any case capable of being rebutted. The history of Alexander Bruce is peculiar, and there is also this specialty that we have to determine, not whether he is now alive, but whether he was alive in 1849. This is not, however, the same question as if it had been decided in 1849, for there is now this important additional element, that Alexander Bruce has not been heard of since 1849. If we had pronounced in 1849 that he was then dead, he might have turned up the next year, which would have been a very awkward thing in such a case. His reappearance now is, however, impossible; and that is a very material consideration. But we must look also at the other circumstances. The first important fact in the case is that Bruce was transported in 1811; but before that it is proved that he was distinguished by very irregular, drunken habits. It is also proved, by his own declaration emitted before the Sheriff, that he had been a soldier, and had been wounded in or before 1809, when he was discharged. Further, he stated that in 1811 his wound was so far from being healed that when he had offered to enlist again, eight weeks before, he had been rejected as unfit for service. Such things affect a man's health more or less, and therefore it cannot be said that in 1811 Alexander Bruce was likely to live long. Everything then seemed against him, except perhaps that he had naturally a strong constitution. He was sent to the hulks, and suffered great hardships there. He was then sent to Botany Bay, and endured a long term of penal servitude, at the end of which he was suffering from fever—all circumstances very unfavourable to the presumption of long life. No doubt he lived to endure the whole period of his transportation, for we have evidence of his being alive in 1825. But we are entitled to consider what was likely to be his condition after fourteen years' penal servitude in Botany Bay. The letter he then wrote to his brother has unfortunately not been preserved, but we are told that in it he stated that he had been very ill of fever. From 1825 downwards all is a blank, and he is no more heard of. It is not very likely that having once applied to his wealthy brother for money to bring him home, a man of his character should never renew the application, or apply to any one else. But so it is. For twenty-four years down to 1849 there is no trace of him; and that consideration is strengthened by the fact that there has been no subsequent news, down to a period when it [133] is impossible that he can be alive. I think that is a very strong case against the presumption of life; and therefore, although there is some delicacy, as in all such cases, in the question, I have no hesitation in concurring with the Lord Ordinary.

LORD DEAS.—The law undoubtedly holds that there is a presumption in favour of life, even although it is proved that a party has gone to a distant region, and has not been heard of for a considerable period of years. This presumption admittedly ceases entirely at the end of a hundred years from the date of the birth. But there is no rule requiring that the hundred years shall actually have elapsed before it shall be inferred from facts and circumstances that the party is dead. The presumption of life is stronger or weaker during that century according as more or less of the period has elapsed, and according as more or less time has elapsed since the party was heard of. The onus which lies on the party alleging the death may shift or vary in degree from time to time. I agree with your Lordship that it is important, in the question whether Bruce was alive in 1849, that it is quite certain he is not alive now. In the case of Fairholme, in March 1858,* the lapse of time was not such as to make it impossible or even improbable that the party might be alive. Yet it was there held that the party was dead, and the Court proceeded upon that footing without demanding caution. This shows that in all such cases the Court will inquire into the whole circumstances as in a jury question. The question really always is, whether any reasonable doubt exists of the death. There is no such doubt here. I do not go over the circumstances; but I may observe that it is far from immaterial that in 1849 all Alexander Bruce's relatives believed him to be dead. Further, since 1825, when he wrote for money, and stated that he was in bad health, there has never been another letter asking for money. It would be very unfortunate if any rule of law required stronger proof to

* Fairholme *v.* Fairholme's Trustees, March 18, 1858, 20 D. 813.

overcome the presumption of life than we find in this case, and I am of opinion that there is no such rule.

LORD ARDMILLAN.—I hold it quite clear that there is no inflexible presumption on the subject, and that there is no fixed period to which the presumption that exists applies. There is a presumption in favour of life, and of that the pursuer in this case has the benefit. But that presumption is capable of being overthrown, and I think the defenders have succeeded in doing so. It appears that the pursuer himself is in the belief that his grandfather did not survive till 1849. That is by no means conclusive against him, but at the same time must not be left out of sight. I agree that it is likewise a very important circumstance that since the year 1849 there have been no tidings of Alexander Bruce, and now, at any rate, the presumption is that he is dead.

The only other remark I have to offer, besides expressing my entire concurrence in the opinion of your Lordship, is, that looking at the case without considering the letter of 1825, we have a very weak presumption in favour of life. That letter states that the writer was then in bad health. But supposing we had no proof of that letter ever having been written, what would be the state of the case. The last thing, then, heard of him would have been in 1812. Here was a man not originally robust, who had acquired most vicious habits, who had been rejected as unfit for military service, in consequence of the results of an old wound received in battle, and who had once at least been ill of fever in the hulks; who was always in want of money, and when in want very urgent in his demands. If such a man had not been heard of from his forty-third year down to a period when, if alive, he would have been upwards of eighty years of age, the Court would, I think, have held that there was reasonable proof that he did not survive that period, and therefore did not live till 1849. But did that letter improve the pursuer's case? It shows indeed that Alexander Bruce survived until 1825, but it gives a very indifferent account of his condition. He was ill and in want, and he makes a request for money, which he does not at any time [134] repeat, and he is not again heard of from that day to this. The result of my examination of the evidence is, that, acknowledging a presumption in favour of life, and holding the defenders bound to overcome it, I must hold also that they have satisfied every demand that could be made upon them in that respect.

LORD KINLOCH.—This case presents the peculiarity that we are not called upon to dispose of the rights of Alexander Bruce himself, who must be clearly held to be now dead. The question we are to dispose of regards entirely the rights of other parties, and, with reference to these rights, is in effect whether Alexander Bruce died anterior to a certain period or not. Now, that question we must determine by the application of reasonable practical inferences. We must otherwise go upon some inflexible rule, and there is none such in existence. After carefully considering the circumstances of the case I have came to the conclusion that the Lord Ordinary has rightly applied the practical inferences to be brought to bear upon the question. Here is a man who, by his own confession, was unfit for military service in 1811, when he was forty-three years old, whose health had been undermined by dissipation and the hardships of military service, and had certainly not been improved by life in the hulks. We have him afterwards undergoing a sentence of transportation, and hear of him finally in 1825; and all we then hear is to the effect that he was in life and no more. He was ill and in destitution, and desired the means of reaching home. From that date to the present, a period of forty-six years, he is not again heard of. I quite agree that we must take into consideration not only the years that elapsed before 1849, but those also which have since passed. Then we have the unanimous opinion of his family, the current belief among them that he had died shortly after writing home to his brother in 1825. Such family opinion is of the utmost possible importance. There are a hundred things which may combine to found a unanimous family opinion, which cannot be embodied in evidence produced before the Court. William Bruce himself candidly acknowledges that he held this opinion as to Alexander's death. I am not going to use that fact as conclusive against him, but it forms a strong argument in this case.

This interlocutor was pronounced:—"Adhere to the interlocutor, and refuse the reclaiming note: Find the pursuers liable in expenses," &c.

FERGUSON & JUNNER, W.S.—WOTHERSPOON & MACK, S.S.C.—Agents.

No. 32. X. MACPHERSON, 134. 24 Nov. 1871. 2d Div.—Lord Mure, I.

JANE KIPPEN, Pursuer.—*Sol.-Gen. Clark—Balfour.*
ANDREW BUCHANAN YUILLE, &c. (Kippen's Trustees), Defenders.—*Watson—Lees.*

Trust-disposition—Revocation—Annuity—Alimentary Provision.—A father by trust-disposition and settlement directed his trustees to purchase an annuity for his daughter, the same to be exclusive of the *jus mariti* of any husband she might marry, his debts or deeds, or the diligence of his creditors. After the father's death his trustees, under an arrangement with the daughter, paid a sum equivalent to the price of the annuity to certain trustees, in order that they might hold the money for behoof of the daughter on conditions similar to those imposed on the father's trustees. *Held* (*rev.* judgment of Lord Mure), that the daughter, being the only person interested, would have been entitled to have had the price of the annuity paid to her by her father's trustees, and that she was entitled to revoke her own trust-deed, and to receive the whole sum paid to her trustees.

By trust-disposition and settlement, executed in 1849, the late William Kippen, Esquire of Busbie, conveyed his whole estates to trustees. A codicil, dated 7th January 1853, after revoking certain bequests in favour of his daughters Misses Jane Dennistoun Kippen and Elizabeth Kippen, contained this direction,—"I direct my said trustees immediately after my death to purchase or provide from my means and estate an annuity of [135] £120 sterling in favour of each of my said daughters, payable at the usual terms, the same to be exclusive of the *jus mariti* of their respective husbands in the event of their marriage, and of their debts and deeds, and of the diligence of their creditors, which annuities hereby directed to be provided to my said daughters shall be in lieu of any former bequest in their favour, and in full of all other claims legally competent to them upon my means and estate."

The testator died in 1853. The trustees proposed to purchase an annuity of £120 sterling in favour of Miss Jane Kippen in implement of the provisions contained in her father's settlement and codicils, but Miss Kippen having objected, it was arranged that the pursuer should grant, and accordingly on 14th April 1856 she did grant a trust-deed, whereby she appointed her brother, Richard Kippen, Andrew Buchanan Yuille, and James Keyden, and certain others, trustees for her behoof, with full power to them to uplift, receive, and discharge from her father's trustees such sum of money as should be deemed by them to be an adequate price or value for the annuity of £120 sterling, according to the tables provided by the Act 10 Geo. IV. c. 24. The second purpose of the trust gave powers of investment to the trustees, and declared that the trustees should have full power and authority at any time thereafter to invest the trust-funds in whole or in part in the purchase of an annuity for the pursuer's behoof, seclusive of the *jus mariti* of any husband whom she might marry, and in no way affectable by her own facts and deeds, or by the facts and deeds of such husband, or by the diligence of creditors. In the third place, it was declared that the trustees should make payment to the granter, during all the days and years of her life, and that also seclusive of the *jus mariti* or right of administration of any husband she might marry, of the whole free annual interest and profits of the trust-funds thereby committed to them, and in the event of her trustees at any time thereafter purchasing an annuity of £120 for her, and of there being a surplus of the fund remaining after making said purchase, it was declared that it should be lawful for them to make payment to the pursuer, or otherwise to apply for her behoof, the surplus of the principal sums of money thereby intrusted to them, it being thereby declared to be the granter's intention that the trustees should have as full powers in every respect over the surplus of money as what any person otherwise unfettered enjoyed or possessed in the management of his own affairs, and that neither Miss Kippen herself, nor any husband whom she might marry, should have any right or title to interfere with the management of the funds thereby entrusted to them, or to control the trustees in the application of the same, or the annual profits and proceeds thereof, otherwise than as above provided for; and that all receipts for annual profits by Miss Kippen alone should be full and

ample discharges and acquittances therefor, without the concurrence of any such husband, any law or custom to the contrary notwithstanding. Lastly, the trust-deed provided that after the death of the granter her trustees or trustee should denude themselves of the trust thereby created, and should pay over the sums of money then remaining in their hands to Miss Kippen's heirs, executors, or assignees whomsoever, in such manner and way as she should at any time of her life, and even on deathbed, by any writing under her hand, direct, and failing such appointment, to her own nearest heirs whomsoever.

In May 1856 a discharge was executed in favour of the testamentary trustees by Miss J. D. Kippen and her brothers, the residuary legatees. The discharge contained an obligation by Miss Kippen and her brothers to relieve their father's trustees of all responsibility, and a declaration by the trustees under the pursuer's trust-deed, with her consent, that they [136] held the money paid to them for the purposes of the trust, and the further declaration, that in the event of the pursuer effectually challenging the discharge of the annuity thereby granted, and repudiating the same, and calling upon the trustees of William Kippen still to make payment of the said annuity, the trustees under her trust-deed should be bound to apply the sum in the purchase of an annuity.

In 1871 Miss Jane D. Kippen raised this action against Richard Kippen, Andrew Buchanan Yuille, and James Keyden, trustees under the trust-deed executed by her, and against James Hill Kippen, the only surviving trustee under her father's settlement. The summons concluded for declarator that the trust-deed by the pursuer herself was revocable, and that the trustees under it should denude in favour of the pursuer, or otherwise for declarator that the trust-deed was revocable, "in so far as there are thereby settled funds, subjects, securities, or others in excess of the amount or value requisite now to purchase or obtain an annuity of £120 sterling in favour of the pursuer," and that the trustees should be decerned to pay to the pursuer the trust-funds, so far as they were in excess of the amount necessary to purchase an annuity of £120.

The only defenders who appeared were A. B. Yuille and James Keyden, two of the trustees under the pursuer's trust-deed, and they made this statement,—"Explained that the defenders are quite willing to pay the capital sum in their hands to the pursuer on receiving the authority of the Court to do so. Explained further, that they offered, by letter of this date (April 29, 1871), to pay to the pursuer the balance remaining, after purchase of an annuity of £120, but this has been declined. Explained also, that Mr. James Hill Kippen, the trustee under Mr. Kippen's settlement, has stated to the defenders' agent, that in the event of their paying over the money as now required he will hold them liable under the obligation in the pursuer's deed of discharge."

The pursuer pleaded;—(1) The pursuer being the granter of the foresaid trust-deed, and the sole party having interest in the funds thereby settled, is entitled to revoke the same, and to demand payment or conveyance of the said funds, or the securities in which the same are invested, as concluded for. (2) At all events, the pursuer is entitled to demand that the said trust-funds shall be made over to her, in so far as the same are in excess of what is requisite to purchase or obtain an annuity of £120 in her favour, and the pursuer is entitled to have such annuity purchased, if and when she shall require it. (3) In respect of the deeds, and in the circumstances above condescended on, the pursuer is entitled to have decree in terms of one or other of the conclusions of the summons, with expenses, as concluded for.

The defenders pleaded;—(1) The defenders are not bound or entitled to pay the entire capital sum to the pursuer, or at least without judicial authority and exoneration, or the consent of the trustee under Mr. Kippen's settlement. (2) *Separatim*, the action should be dismissed, with expenses, in respect that the defenders offered to convey to the pursuer the balance remaining after purchase of an annuity of £120. (3) In any event, the defenders are entitled to their expenses out of the trust-funds, in respect that they were justified in refusing to denude without judicial authority, or the consent of the trustee under Mr. Kippen's settlement, and being relieved of all obligations undertaken by them as trustees foresaid.

On 14th July 1871 the Lord Ordinary pronounced this interlocutor:—"Finds that the trust-deed in question is revocable, and may be revoked by the pursuer in so far as funds are thereby settled in excess of the amount necessary to secure an annuity of £120 of the nature specified in [137] the said trust-deed, and that upon such an annuity

being purchased the defenders will be bound to make over to the pursuer any trust-funds which may be in their hands in excess of the sum necessary to purchase the said annuity; and to that extent repels the defences, and decerns in terms of the alternative declaratory conclusions of the summons: Appoints the case to be enrolled with a view to further procedure, and reserves all questions of expenses." *

* "NOTE.—Under the trust-deed of the late Mr. Kippen there is, in the opinion of the Lord Ordinary, a clearly expressed intention on the part of the truster that the provision made in favour of his unmarried daughters should be secured to them for their own use by way of liferent or annuity. In the clause by which the original intention of settling a capital sum on each daughter is declared, the trustees are directed to invest and secure that sum for each of the truster's daughters in liferent, exclusive of the *jus mariti* of her husband, for her liferent use allenarly, and for the children in fee, in any way and manner which may seem best to his trustees, while power is at the same time given to any daughter surviving the truster, who should die without leaving lawful issue, to test upon her share. In the subsequent codicils again, by which the direction so to settle a capital sum on each daughter is changed, the trustees are directed, in lieu of that bequest, to purchase or provide from the trust-estate an annuity of £120 in favour of each daughter, exclusive of the *jus mariti* of her husband, and of her debts and deeds and the diligence of her creditors.

"Such being the nature of the provision made in favour of the pursuer, it appears that when the trustees, some time after the death of Mr. Kippen, were proceeding to purchase an annuity, an application was made to them on the part of the pursuer to abstain from doing so, and in lieu thereof to allow her to execute a trust-deed by which the capital sum required to purchase the annuity was to be made over to the trustees to be held and applied for behoof of the pursuer. The main ground of the application, as explained in the narrative of the trust-deed, seems to have been in order that the capital required to provide for the annuity might not be lost to the pursuer, but preserved entire, or otherwise made available for the purchase of an annuity on more advantageous terms at a later period of the pursuer's life. To this request the trustees of Mr. Kippen assented, on the understanding and under an arrangement that the trust-deed now sought to be revoked should be executed, which was accordingly done.

"By this deed full power is given to the trustees to invest the trust-funds in whole or in part in the purchase of an annuity for the pursuer, 'seclusive of the *jus mariti* of any husband whom she might marry, and to be in no way affectable by her own facts and deeds, or by the facts and deeds of such husband, or by the diligence of creditors.' It was declared by the third purpose of the trust that until the annuity was purchased the trustees should pay to the pursuer the free annual proceeds of the trust-funds, and the deed then provides that in the event of the trustees at any time thereafter purchasing an annuity of £120 for the pursuer, and of there being a surplus of the funds remaining after making the purchase, 'it should be lawful for them and in their power to make payment to the pursuer, or otherwise to apply for her behoof, the surplus of the principal sums of money thereby entrusted to them, it being thereby declared to be the pursuer's intention that neither the pursuer herself, nor any husband whom she might marry, should have any right or title to interfere with the management of the funds thereby entrusted to them, or to control the said trustees in the application of the same, or the annual profits and proceeds thereof, otherwise than as above provided for'; and the deed also contains a provision to the effect that on the death of the pursuer the trustees were to pay over the money in their hands to the pursuer's heirs and assignees, according as she should direct, and failing such direction, to her own nearest heirs whatsoever.

"Subsequent to the execution of the trust-deed a discharge was granted by the pursuer, with the special advice of her trustees, and of her brothers, the defenders, Mr. Richard Kippen and Mr. James Hill Kippen, to her father's trus-[138]-tees, by which the pursuer relieved them of all responsibility incurred by them in paying over the money to trustees instead of purchasing an annuity, the same having been done with a view to the preservation of the funds, and which contains a declaration to the effect, that in the event of the pursuer, or any one claiming through her, effectually challenging the discharge of the annuity, and calling upon Mr. Kippen's trustees to make payment of it, the trustees under the pursuer's own trust-deed should be bound to apply the trust-funds in the purchase of an annuity for the pursuer.

[138] The pursuer reclaimed, and argued;—The pursuer was entitled to have the whole funds paid over to her. She would have been entitled to demand this at her father's death. Her own deed was granted for her own benefit, and was gratuitous, and therefore it was revocable. If the trustees purchased an annuity for her she could sell it, and so defeat the intention of her father. The trustees were not entitled to do what could be undone by the beneficiary.*

[139] The respondents argued;—The direction was to "purchase or provide from my means and estate," and if the trustees gave Miss Kippen the interest to the amount of £120, they might retain the capital. In Tod's Trustees the direction was to purchase the annuity only if the trustees thought fit, and the annuitants were the only parties interested. Here there were residuary legatees. Revocation of the trust-deed would cause the trustees to repay the capital to Mr. Kippen's trustee, as indeed they were bound to do for their own safety. The provision was intended to be alimentary. A truster could not revoke a trust-deed granted to guard against a specific risk—Balderston v. Fulton, Jan. 23, 1857; or where the restrictive terms of the deed were a condition of its being granted. Even if the pursuer was entitled to revoke the trust-deed she should have called her brother, not merely for his own interest, but as trustee under her father's settlement.†

"The transaction thus entered into in 1856 the pursuer now wishes to revoke, in order that the trust-funds may be placed at her absolute disposal, and with this view has raised the present action, which is to that extent resisted by the trustees under the deed of 1856; and although Mr. Hill Kippen, the surviving trustee under the original trust-deed, has not appeared as a defender, he seems to have intimated to the other defenders that, in the event of their paying over the money to the pursuer absolutely, as now required, he will hold them liable under their obligation in the pursuer's deed of discharge.

"Such are the leading circumstances in which the action has been brought, and the ground on which the pursuer contends that the trust-deed is revocable is that no other person than herself has any direct interest in the funds, and that, as she has right both to the present use and ultimate disposal of them, she is entitled to immediate payment of the whole trust-estate; and in support of this claim reference was made to several cases, and in particular to those of Murieson, 10th February 1854, 16 D. 529, and Gordon, 2d March 1866, *ante*, vol. iv. 501.

"The question thus raised is not free from difficulty, but after considering these authorities and others bearing upon it the Lord Ordinary has not been able to come to the conclusion that he would be warranted in giving effect to the pursuer's claim. The case of Murieson was a very special one, in which a party, the day after she came of age, executed a trust-deed disposing of her property, and a few days afterwards revoked that deed, and by an antenuptial contract of marriage made a different disposition of the property, which, in the special circumstances of the case, and on the ground, apparently, that the execution of the first deed was a voluntary and gratuitous act on her part, she was held entitled to do. But the trust-deed in the present case cannot, it is thought, be dealt with as a mere voluntary and gratuitous act of the pursuer. It was a transaction deliberately entered into by her with her father's trustees, who consented to the execution of the trust-deed as a means of securing the pursuer's annuity, and of better preserving her interests under her father's settlement. In the case of Gordon, again, the judgment appears to have proceeded mainly upon the ground that as the entail which the trustees were directed to make would in reality settle the estate in fee-simple, and so place it at the disposal of the pursuer, he was entitled to have the residue of the trust-estate conveyed to him at once. But in that case several of the Judges in the majority indicated their opinion that a different rule might be applied in the case of a provision for alimentary purposes, which, in the opinion of the Lord Ordinary, the one now in question substantially is, and he does not therefore think that the defenders can now be called to make over the trust-estate to the pursuer beyond what may be in excess of the amount required to secure an annuity for her of the description specified in the second purpose of the trust, and which the defenders have intimated their readiness to do."

* Gordon v. Gordon's Trustees, March 2, 1866, *ante*, vol. iv. p. 501; Stokes v. Cheek, 29 L. J. (Ch.) 923; Tod v. Tod's Trustees, March 18, 1871, *ante*, vol. ix. p. 728.

† Balderston v. Fulton, Jan. 23, 1857, 19 D. 293.

At advising,—

LORD COWAN.—I was not present at the case of Tod's Trustees, but I feel satisfied it was a sound decision. The principle settled in that case was a very important one in the law of trusts—that where there are no parties interested, other than those to whom the funds are left, they are entitled, in the ordinary case, and where no special circumstances exist, to disregard the fetters that have been imposed on the bequest. Taking that case as establishing a principle, is there any room for the application of a different principle here? Practically, there is here no ulterior interest. The interest of Miss Kippen, as regarded her portion, was exhaustive of all interests in the trust-estate. The residuary legatees have none; and the judgment the Court is about to pronounce will effectually protect Miss Kippen's trustees and her father's trustee from any liability. It is simply carrying out the principle of the English case of Stokes v. Cheek, and the cases in this Court of Tod's Trustees and Gordon's Trustees.

The restrictive words of the codicil were to apply to the truster's daughters, if they were married before his death, but if they were unmarried then, the annuity was given absolutely. I hold that she was entitled at her father's death to have demanded the capital sum of this annuity; and therefore, if she was entitled to it at her father's death, she is entitled to revoke her trust, and have it now. She is marriageable, and may wish to marry, and if so, and she were to get only an annuity, her children would have nothing.

I wish to say further, that if the father's trust-deed had made the daughter's interest purely alimentary, the case might have been different.

LORD BENHOLME.—I think the conclusions of the summons were well calculated to bring out the rights of the lady. The conclusion was double—not merely that her trust-deed was revocable, but that (being revocable) she was entitled to have payment of the whole sum in the hands of her trustees; and this called her father's trustee into the field. The English decisions have gone ahead of the views of the Court in the case of Torry Anderson.* They go far in preventing anything being done which will clearly turn out useless and ineffectual. Latterly our law has been carried in the direction of English law upon the subject. I agree with Lord Cowan in the opinion he has given.

LORD NEAVES.—I hold that the citation of Mr. Kippen's trustee keeps the pursuer's trustees free from risk; and the conclusions of the summons are sufficient to develop the meaning of the pursuer, that she is entitled to claim the money, and not that it should be paid back to her father's trustee. If he meant to say the revocation of this deed should make the money revert to him, he should have appeared in the case. He has been called, and he is the proper contradictor. But he has not appeared, and therefore the Court has the real point at issue properly before it.

[140] The first case in this direction was the case of Gordon's Trustees, and in it the Court held that there was no use to do what could be undone. It is immaterial how the exclusion of the *jus mariti* is construed. The provision is not alimentary, and Miss Kippen is entitled to the capital of it.

LORD JUSTICE-CLERK.—I entirely concur. Even had the trustee under Mr. Kippen's settlement appeared and objected, his contention would have been fruitless. The principle underlying the cases of Gordon and Tod's Trustees is that, where there is no conflicting or further interest, the beneficiary is entitled to the trust-estate unrestrictedly. The case of Tod had, no doubt, another element in it, but the decision rested on this ground, and in this case the question is raised very fairly.

THE COURT pronounced this interlocutor:—"Alter the said interlocutor: Decern in terms of the first conclusion of the summons: Find the respondents entitled to expenses out of the trust-estate, and remit," &c.

DALMAHOY & COWAN, W.S.—RONALD & RITCHIE, S.S.C.—Agents.

[*Commented upon*, Dunbar *v.* Scott's Trs., 1872, 10 M. 982. *Distinguished*, Cosens *v.* Stevenson, 1873, 11 M. 761. *Principle applied*, Dow *v.* Kilgour's Trs., 1877, 4 R. 403.]

* Anderson *v.* Buchanan, 15 S. 1073.

No. 33. X. MACPHERSON, 140. 25 Nov. 1871. 2d Div.—Sheriff-substitute of Midlothian, I.

ANDREW BLAIKIE, Petitioner and Respondent.—*Mair—Rhind.*
DONALD SMITH PEDDIE, Respondent and Appellant.—*Orr Paterson.*

Bankruptcy—Discharge—Alimentary Provision—19 & 20 *Vict. cap.* 79, *sec.* 146.—A bankrupt, a married man, who was in receipt of an alimentary provision of 30s. a week under his father's settlement, and was unable to work on account of bad health, presented a petition for discharge under sec. 146 of the Bankruptcy Act of 1856. *Held* that the bankrupt's refusal to pay any part of the alimentary provision to his creditors was not a good ground for withholding his discharge.

Question, Whether, if the alimentary allowance had greatly exceeded the necessities of the bankrupt, his refusal to make any allowance therefrom for behoof of his creditors would have been a valid ground for withholding his discharge.

The estates of Andrew Blaikie were sequestrated in 1862, and Mr. Peddie, C.A., was appointed trustee.

A petition for discharge was presented to the Lord Ordinary on the Bills, and refused *in hoc statu* on 16th July 1870.

The bankrupt subsequently presented another petition for discharge to the Sheriff of Edinburgh, under sec. 146 of the Bankruptcy (Scotland) Act, 1856. The trustee gave the following report:—"In terms of the Act of Sederunt, 6th June 1839, section 10, the trustee begs to certify that the aforesaid Andrew Blaikie has complied with the provisions of the Bankrupt Statute, and that he believes the said bankrupt has made a fair discovery of his estate, and has surrendered the same, with the exception of his liferent interest in the estate of St. Helen's, near Melrose, which is declared to be an alimentary provision under his father's settlements, the free rents of which are about £130 per annum. The trustee has further to certify that the said bankrupt duly attended the diets of examination, and has not, so far as known to the trustee, been guilty of any collusion. Further, the trustee has seen no evidence tending to shew that the said Andrew Blaikie's bankruptcy has arisen otherwise than from innocent causes, or losses in business, or that it had been caused by culpable or undue conduct. His books indeed shew neither profits nor losses, and are not intelligible; and he kept no cash-book. But the trustee, under the circumstances, and at this distance of time, does not consider himself justified in withholding his concurrence to the bankrupt's application, either for discharge from debts contracted previous to 25th February 1862, the date of the sequestration, or for the benefit of the process of *cessio bonorum*; [141] seeing, however, that no funds have hitherto been recovered sufficient to pay any dividend to the creditors, and that such dividend must not only be still deferred, but be of very small amount, he submits it for the consideration of your Lordship whether the bankrupt should not be required, in the first place, to execute a deed surrendering to the creditors some portion of the alimentary provision above alluded to."

The amount actually paid to the petitioner under his father's settlement was about 30s. a week. None of the creditors appeared to oppose the granting of the discharge; but the trustee appeared and maintained that, as a condition of the discharge being granted, the bankrupt should secure him one-half of the alimentary provision.

The Sheriff-substitute (Hamilton), on 28th October 1871, pronounced the following interlocutor:—"For the reasons stated in the subjoined note, finds the petitioner entitled to his discharge: Finds the trustee, Donald Smith Peddie, liable in expenses, which modifies to the sum of £5, 5s., and decerns against him for payment of said sum accordingly."*

* "NOTE.—The application is not opposed by any of the creditors in the sequestration, but the trustee maintains that, as a condition of his discharge, the petitioner, who carried on business as a merchant in London, should secure him in one-half of an alimentary provision, which he (the petitioner) enjoys under the trust-settlement of his father, consisting of rents drawn from the estate of St. Helen's, near Melrose. The gross amount of these rents is about £140 a-year; but the petitioner states, and the

The circumstances in which the bankrupt stood at the date of the application are set forth in the note of the Sheriff-substitute.

The trustee appealed.*

LORD JUSTICE-CLERK.—The appellant has not been able to point out any case in which the Court found that a bankrupt was bound to make payment to his creditors out of an alimentary fund, secured in the way which occurs here. We must be satisfied that the bankrupt has done all he can for the creditors. In this case, I do not think that the course he has taken is at all unreasonable. It is beyond our power to attach the alimentary fund.

LORD COWAN.—The annuity to which the bankrupt has right, and his refusal to assign which, even partially, is argued as the ground why he should be refused his discharge, is by his father's settlement declared to be alimentary, and not attachable for debt. In the whole circumstances, I think the Sheriff-substitute has exercised discretion in granting the prayer of the bankrupt's petition. The circumstances of each case must be considered in such a case as the present. Had the alimentary fund been of a large amount, and beyond what was reasonable in the circumstances, such as £1000 a-year, as put in the argument, I do not say that the Court would not have taken into view the refusal of the bankrupt to deal fairly by his creditors by assigning some portion of it, in deciding whether the discharge ought to be granted. We must consider all the peculiarities of the bankrupt's position. Here, besides this alimentary provision of £130 [142] a-year, other sums of money and property came to the bankrupt from his father, and have come into the hands of the trustee. And it is of no consequence, for this is not the fault of the bankrupt, that these funds have been taken to meet claims of creditors whose debts were preferably secured. Then the report by the trustee is favourable to the bankrupt; and we have it certified that he is in a bad state of health. The case now is in a different position from what it was when the Lord Ordinary refused the application in 1870. Further, the lapse of time is not an unimportant consideration. On the whole, therefore, I concur that, in the special circumstances of the case, we should grant the discharge.

LORD BENHOLME.—I concur. No precedent has been given for the course recommended to us. I find no case in which a discharge has been refused because the bankrupt has the enjoyment of an alimentary fund. It would require a very strong case to induce us to take so exceptionable a course. We have not a strong case here. Bad health is a very important element. I think we should adhere.

LORD NEAVES.—I am of the same opinion. A mere declaration that a fund is alimentary will not make it so. We have to consider whether, looking to the rank and circumstances of the bankrupt, this could reasonably be held to be a proper provision. This is by no means an extravagant one. The bankrupt is a married man, and has been accustomed to live as a gentleman. It would have been different if any of his debts had been incurred by his own misconduct, for in such a case he would not be entitled to his discharge. But we cannot make a resolutive condition that unless he pays a part of this alimentary fund to his creditors he is not to get his discharge.

THE COURT dismissed the appeal, with expenses.

LAWSON & HOGG, S.S.C.—J. & A. PEDDIE, W.S.—Agents.

---

accuracy of the statement is not disputed, that the free proceeds actually paid to him by his father's trustees do not exceed 30s. a-week, a sum which he maintains is not more than sufficient for the maintenance of himself and his wife. Having regard to the position in life of the petitioner, to his age, and to the fact, which is sufficiently instructed by the medical certificate of Dr. Anderson, produced with the present proceedings, that he is disabled by a complication of maladies from working for his livelihood, it does not appear to the Sheriff-substitute that he would be justified in refusing the petitioner his discharge merely because he declines to make over any part of the provision referred to for behoof of his creditors."

* 1 Bell's Com. (5th ed.), p. 127; A. B. *v.* Sloan, June 20, 1824, 3 Sh. 195; Scott *v.* Macdonald, March 5, 1823, 1st Sh. Appeals, 365; Learmonth *v.* Paterson, Jan. 21, 1858, 20 D. 418.

No. 34. X. MACPHERSON, 142. 27 Nov. 1871. 1st Div.—Sheriff of Renfrewshire, M.

WILLIAM WATSON AND COMPANY, Pursuers and Respondents.—*Watson—Burnet.*

ROBERT SHANKLAND AND OTHERS, Defenders and Respondents.—*Sol.-Gen. Clark—Balfour.*

Ship—Advance to account of Freight—Charter-party.—Held (1) that an advance by the charterers of a ship to account of freight is, on the loss of ship and cargo, recoverable from the shipowners, where the charter-party contains no stipulation to the contrary, express or clearly implied, the law of Scotland upon this point, although contrary to that of England, being in conformity with the law merchant of every other trading community; but (2) (by a majority of seven judges, *diss.* the Lord Justice-Clerk and Lord Kinloch) that a clause in a charter-party, whereby "sufficient cash for ship's ordinary disbursements to be advanced the master, against freight, subject to interest, insurance, and 2½ per cent. commission," exempted the shipowners from liability for repayment of such advances by giving the charterers an insurable interest in the freight to the extent of the sums advanced, so that not having insured, as they might have done, at the expense of the shipowners, they were in the position of being their own insurers, taking upon themselves the risk of the safe arrival of ship and cargo.

On 20th August 1863 a charter-party was entered into between James M'Kirdy, master and part owner of the ship *Janet Cowan* and Ralli Brothers of Bombay, where the vessel then was, in terms whereof the ship was to proceed to Calcutta, there to be loaded by the charterers or their agents with a cargo for the United Kingdom, "the freight to be paid on unloading and right delivery of the cargo."

The charter-party contained the following clause:—"Sufficient cash for ship's ordinary disbursements to be advanced the master against freight, [143] subject to interest, insurance, and 2½ per cent. commission; and the master to endorse the amount so advanced upon his bills of lading."

On 2d October 1863 Ralli Brothers transferred their rights and interest in this charter-party to Messrs. Grant, Smith, and Company, by whom it was endorsed to Messrs. William Watson and Company on the 13th of the same month.

The vessel, in terms of the charter-party, proceeded to Calcutta, where she was loaded with a cargo for the United Kingdom by Watson and Company, who, between the 7th November and 17th December 1863, while the ship was preparing for the voyage, made various cash advances to or on the order of the master, for the ship's ordinary disbursements, to account whereof M'Kirdy, the master, granted a bill to Watson and Company for £500, drawn upon Mr. Robert Shankland, merchant in Greenock, the managing owner of the vessel. This bill was presented for acceptance on the 17th December 1863, but Mr. Shankland refused to accept it, on the ground that the master had no power to grant it, and that, under the charter-party Watson and Company should have effected an insurance upon the freight for the amount of their advances. No such insurance, however, was made by Watson and Company, although they had time to do so after receiving intimation of Shankland's refusal to accept the bill.

The ship sailed from Calcutta on the 9th of November 1863, and was with her cargo totally lost on the 7th of April 1864.

In these circumstances Watson and Company raised this action in the Sheriff-court of Renfrew against Shankland, M'Kirdy, and the other registered owners of the ship, for recovery of £596, 0s. 3d., the alleged amount of their advances against freight for the ship's disbursements while preparing for the voyage, with interest, and 2½ per cent. commission on the total amount of the freight, which they claimed as having acted in the capacity of shipping agents for the vessel.

This action was not founded on the bill for £500 granted by the master, which, not being stamped, was invalid under the Act 17 & 18 Vict. cap. 83, section 5, but the bill was referred to as evidence of the nature of the transaction.

The pursuers pleaded;—(1) The defenders are liable for the obligations of the defender M'Kirdy incurred in his character of master and part owner of their ship. (2) The defender Robert Shankland, as managing owner or ship's-husband, having authorised the defender M'Kirdy to pass drafts on him for the ship's debts, was bound to accept the bill, and is liable therefor, and for the loss caused by his non-acceptance. (3) The whole defenders are liable for the acts of the master and part owner, and of the managing owner or ship's-husband. (4) The defender M'Kirdy is liable individually for the sum in the bill granted by him, and dishonoured.

The defenders pleaded;—(1) The advances by the pursuers for the ship's disbursements at Calcutta being a payment, and not a loan, cannot be recovered back from the defenders. (2) The pursuers, as the charterers of the vessel, or the transferees or indorsees of the charter-party, were not entitled to take, and the master of the vessel was not entitled to grant, a bill of exchange for repayment of a sum of money that the pursuers themselves under the charter-party were at the time indebted to the master and owners of the vessel. (3) The master of a vessel has no power in a foreign port to bind his owners in a bill debt, even for the ordinary disbursements of the vessel; and more especially, he has no power to bind his owners in such a debt to the charterers of the vessel when such parties are themselves bound to provide, by means of a payment on account of freight, the master of the vessel with the funds necessary to pay such disbursements.

[144] After a proof, in taking which there was very great delay, partly occasioned by the absence of the defender M'Kirdy, who was a material witness, the Sheriff-substitute (Tennent) pronounced an interlocutor, which, after various findings in regard to the facts set forth in the foregoing narrative,—"In point of law finds that the money thus paid by the pursuers was not a loan made by them to or for behoof of the defenders, or of the master of the *Janet Cowan*, but that it is to be held as having been made in terms of the clause of the charter-party in regard to cash for ship's disbursements, to which the pursuers were parties: Finds that by the terms of said clause the pursuers were bound to furnish sufficient cash for ship's ordinary disbursements as an advance against the freight, which it was expected would be earned at the conclusion of the voyage; and that the defenders are not bound to repay to the pursuers the sum thus advanced to them in terms of the charter-party: Finds that the pursuers are entitled to receive interest, the premium of insurance, and a commission of 2½ per centum upon the advances made by them; and of consent of parties decerns for the same, amounting to the sum of : Finds that it has not been proved that the pursuers were agents for the ship at Calcutta, and therefore finds that they are not entitled to the commission charged by them in the account appended to the summons: With the exception of the sum of above mentioned, assoilzies the defenders from the conclusions of the summons, finds the defenders entitled to expenses," &c.

On appeal against this decision, the Sheriff (Fraser) allowed the pursuers to add the following plea in law to the record:—"(6) The sums sued for having in any view been made as an advance against freight, and no freight having been earned, the defenders are obliged to repay the same, and commission thereon, to the pursuers, with interest, as libelled."

Thereafter the Sheriff, by interlocutor dated 13th February 1871, recalled the judgment of the Sheriff-substitute: "Finds that the money paid by the pursuers to the captain was not a loan made by them to or for behoof of the defenders, or of the master of the *Janet Cowan* as representing the defenders, but was an advance as against freight for ship's ordinary disbursements, subject to interest, insurance, and 2½ per cent. commission: Finds in law that the defenders are bound to repay to the pursuers the sum of £441, 4s. thus advanced to the captain, with interest thereon at the rate of 5 per cent. from the last date of the advance, together with commission of 2½ per cent. upon the advances: Finds that as the pursuers did not effect insurance upon the advances so made by them, they are not entitled to recover from the defenders any sum under this head: Finds that the pursuers were not agents for the ship at Calcutta, and that they were not entitled to charge commission as such: Decerns against the defenders for the said sum of £441, 4s., together with interest thereon at the rate of 5 per cent. from the 17th day of December 1863 till payment; and also for the sum of £11, 0s. 6d. sterling, being commission of 2½ per cent. upon the said advances, together with interest on said sum of £11, 0s. 6d. at 5 per cent. from the said 17th day of

December 1863 and till payment: Finds no expenses due to either party, and decerns." *

* "NOTE.—The Sheriff is unable to concur in the interlocutor appealed from, although it is prepared with all the usual care of the Sheriff-substitute, and supported by a clear and able note of the grounds of judgment. Although the Sheriff has arrived at a different conclusion, he has done so upon grounds that were not pleaded to the Sheriff-substitute, and upon authorities which he had not the opportunity of consulting. Had the law been pleaded to him according to the authorities now to be stated, the Sheriff has little doubt that he would have been of the same opinion as himself.

[145] "If the only question were whether the advance was to be considered as a loan, and not an advance as against freight under the charter-party, it is thought that there could be no room for difference of opinion, and in the interlocutor now issued the finding to that effect in the Sheriff-substitute's interlocutor has been repeated. Further, if it were the law, as conceded on both sides to the Sheriff-substitute, and to the Sheriff on appeal, that if it were proved that the money advanced was an advance under the charter-party, then, when the ship was wrecked, the charterers making the advance lost their money, the conclusion arrived at by the Sheriff-substitute was quite correct. But after the best consideration given to this case, the Sheriff is of opinion that the law is different from this, and that the shipowners are bound to pay back to the charterers the monies that they advanced to the captain, no freight ever having been earned.

"The question thus raised is one that never has been decided in the Supreme Courts of Scotland. It has frequently been raised in England, and it is admitted that although the decisions of the English Courts are difficult to be reconciled with each other, yet those more directly applicable to the present case, and to a charter-party couched in terms like this one, are contrary to the view which the Sheriff has adopted. On the other hand, the decisions of the Courts of America are all, without exception, against those of the Courts of England, and these American decisions were given after consideration of the grounds upon which the English decisions went. In like manner, both the older and modern law of France concur with the doctrine of the American Courts—both the law as laid down by Pothier, and the law of the Code de Commerce. It is in these circumstances that the Sheriff is compelled to decide this case without the authority of Scottish precedent. The judgments of an English Court not carried to the House of Lords are no more binding upon a Scottish Court than the judgments of any foreign Court; and while giving his opinion with the utmost diffidence upon the question here raised, the Sheriff is constrained to say that the reasons upon which the American decisions rest are, to his mind, more satisfactory and more consistent with legal principle than those assigned by the English Judges.

"The clause in the charter-party in question is one of old standing, at all events the practice of the freighter or charterer making advances as against freight in a foreign port is so. The reason of it is very obvious. The shipowner very seldom has an agent at the foreign port to supply advances to the captain for the ship's disbursements there, but the charterer or freighter always has. Instead of putting £200 or £300 in the captain's possession when the ship leaves the United Kingdom, which during the outward voyage would be bearing no fruit, the shipowner very naturally stipulates that the charterer shall make an advance to the captain against the freight, which the charterer is ultimately to pay if the ship arrive safe home. This advance is for the convenience of the shipowner, but it is an advance of freight; and the question simply is, whether the general rule that freight is not due unless the cargo be delivered is in this case to have an exception, and that the loss of an uninsured advance for freight is to fall, not upon the shipowner, for whose convenience it was made, but upon the freighter or charterer who made it.

"The decisions of the English Courts are all traceable to this short note of an anonymous case, reported by Sir Bartholomew Shower, and decided by the King's Bench in England in the time of Charles II.—'Advance paid before, if in part of freight, and named so in the charter-party, although the ship be lost before it came to a delivering port, yet wages are due, according to the proportion of freight paid before, for the freighters cannot have their money' (2 Shower, p. 283). The point here decided seems to have been, that if the sailors had been paid beforehand they cannot be obliged to restore the wages so paid them in advance, a doctrine recognised in those

[145] The defenders appealed, and, after hearing counsel, the Court, on 14th July 1871, appointed the cause to be re-argued in the presence of three Judges of the Second Division.

---

systems of law which say that advances made by freighters for ship's use to the captain may be recovered back if the ship be lost (see Code de Commerce, 259).

[146] "In the year 1807 the point was raised in England at Nisi Prius. Goods were to be carried from London to Lisbon, and the shipper bound himself to pay the freight on the shipment of the goods. They were shipped, but the money was not paid at the time, and the ship was lost on the voyage. The shipowner claimed payment of the money, on the special contract between the parties that freight should be paid on the shipment of the goods, without any reference to the voyage being completed. The words of the bill of lading were, 'freight for the said goods being paid in London.' Lord Ellenborough held 'these words only meant that the freight should be paid at London instead of at Lisbon, and that they by no means dispensed with the performance of the voyage.' He added, that 'if the defendants had paid the freight on the shipment of the goods they might have recovered every penny of it back again' (Mashiter *v.* Buller, 15th December 1807, 1 Camp. 83).

"The next case is more to the point, and is the leading case on this subject in the English law (De Silvale *v.* Kendall, 4 Maule and Selwyn, p. 36). There was in this case a charter-party. The voyage was from Liverpool to Mahranham, in South America, and thence back to Liverpool. A certain freight was agreed upon, 'such freight to be paid as follows, viz. £120 British sterling for freight of the outward cargo to Mahranham, and as much cash as may be found necessary for the vessel's disbursements in Mahranham, to be advanced by the plaintiff, his agents, or assigns, to the defendant, when required, free from interest and commission, at the current exchange of the place, and the residue of such freight to be paid on the delivery of the cargo in Liverpool, in good and approved bills on London, not exceeding three months' date.' Advances were made at Mahranham for the necessary disbursements of the vessel, and during the voyage home she was captured, and never arrived at Liverpool. The Court held that the charterer who made the advances was not entitled to recover them back from the shipowner. Lord Ellenborough rested his judgment very much upon the special terms of the charter-party, which he held to mean that the advances so made were not to be repaid in the event of the vessel being lost, but were absolutely paid, concluding, however, with this general statement—'I therefore think, that inasmuch as it is freight, the plaintiff is not entitled to recover in this action.' Le Blanc, J., gave his opinion as follows:—'There can be no doubt that it is competent to parties to stipulate for part payment of the freight before it can be known whether any freight will accrue or not. And have they not so stipulated by this charter-party? If it was intended that what was advanced at Mahranham should be returned in the event that has happened, the parties might have provided for it by their contract. That this question has not yet come before the Courts can only be accounted for by supposing that persons have not been advised to attempt the question, because undoubtedly there must have been many cases before this in which the parties have stipulated for a payment of freight in advance; indeed, such cases are very common, and it must very often happen that the ship has not arrived. And what has happened still more often is that wages have been stipulated for and paid in advance at a particular period of the voyage, which is similar to the present case; and yet I believe no action has ever been brought to recover back such wages from those capable of paying, on the ground that no freight was earned, and therefore wages were never due.' With deference to the learned Judge, it does not follow that because sailors getting their wages paid in advance were not (under the general maritime law) obliged to return them if the vessel were lost, a similar rule should be applied to a charterer who, for the accommodation of the shipowner, makes an advance of freight which was never earned. It has been already seen that the law of France recognises the distinction between the two cases. Indeed, the general rule of the maritime law that freight is the mother of wages has been in the United Kingdom altered by statute (17 & 18 Vict. cap. 104, sec. 183). Bayley, J., stated his opinion as follows:—'Wherever there is an express stipulation that the party who is to be [147] entitled to freight shall be paid any portion of it in advance, there ought also to be an express stipulation that the party paying it shall be entitled to recover it back if freight be not earned, if such be the intention of the

[146] Argued for the appellants (defenders);—It is settled in the law of England that a prepayment of freight cannot be recovered in the event of a [147] total loss of

---

parties to the instrument. For without some provision of that sort how are we to raise a new implied contract to that effect?' The raising of the implied contract simply would be justified by this, that it was freight that was advanced, and the general rule is that freight is never due unless the voyage be accomplished.

"In the next case which occurred (Mansfield *v.* Maitland, 23d June 1821, 4 Barn. and Ald. p. 582), De Silvale *v.* Kendall was treated as a special case, turning upon the particular words of the charter-party. 'In that case,' said Abbott, C. J., it appears that the instrument was studiously framed so as to make the freighter lose the money advanced by him, unless the owner reap the benefit by the ship coming home safe. The present charter-party is, however, in a very different form.' The form was this—'The captain to be supplied with cash for the ship's use,' and the judgment of the Court was that this was a loan, and not an advance of freight, and that therefore the freighter who had made the advance had no insurable interest in it.

"In Saunders *v.* Drew (3 Barn. and Adol. p. 445), it appears that there had been paid by the freighter four months' hire of the vessel in advance, and it was held that he could not claim a return of any part of this advance on the vessel being lost within that time, but that the advance being in respect of freight was absolute. Lord Tenterden, C. J., said,—'I am of opinion that the defendants are entitled to judgment. The law is thus laid down by Saunders, C. J., in an anonymous case, 2 Shower, 283' (and then his Lordship quotes the report of the anonymous case above recited). 'This is the ground of the doctrine which was acted upon in De Silvale *v.* Kendall, that money paid in advance for freight cannot be recovered back.' The other Judges concurred in this view; and thus the rule is referred back to the case in Shower, and upon the concluding sentence of that short report, 'for the freighters cannot have the money.' There was no argument as to whether the rule was consistent with principle. The law was assumed to be settled by the anonymous case, and no other authorities seem to have been quoted.

"Then came the case of Hicks *v.* Shield, 1st May 1857, 26 L. J. Q. B. 205. The clause in the charter-party was 'Cash for ship's disbursements to be advanced to the extent of £300, free of interest, but subject to insurance, and £2, 10s. per cent. commission.' The ship was lost, and it was held that 'stipulated advance was taken to be as prepayment of freight, and not as a loan, and that, therefore, the charterer could not receive back his advance.'

"The captain, in the case of Hicks, as in the present case, drew a bill upon his owners for the advance in favour of the charterer, which the owners refused, as in the present case, to accept. The facts in the two cases are therefore identical; and if the Sheriff were bound to follow the judgment as a precedent, he must come to a different conclusion—different from the one he has formed. The law was assumed as settled. The C. J. (Lord Campbell) stated the question as follows:—'The only question is whether the money disbursed at Bassein by the plaintiff's agent was a mere loan or an advance of freight. The facts as to the bill of exchange and the rest of the case may be thrown altogether out of the question, the liability of the defendant to refund the money to the plaintiff depending entirely upon the construction to be put upon the charter-party. I am of opinion that this sum of £300 is to be taken as payment of freight.'

"These are the whole of the English cases dealing with this point, and it must be confessed that they are not very satisfactory. On the other hand, the American Courts, having before them the decisions of the English Courts, have given effect to the general rule of the marine law, that if the voyage be not performed no freight shall be paid, or, if it has been paid, shall be returned. 'The foreign marine law,' says Chancellor Kent, 'allows freight paid in advance to be recovered back, if the goods be not carried nor the voyage performed by reason [148] of any event not imputable to the shipper. The reason is that the consideration for payment, which was the carriage of the goods, has failed. But the marine ordinances admit that the parties may stipulate that the freight so previously advanced shall at all events be retained. In Watson *v.* Duykinck (3 Johns. Rep. 335) the rule of the marine law was recognised, though it was not applied to that case, because the contract there appeared to be that the freight was paid for receiving the passenger and his goods on board; and in such a

the vessel, and this rule, although perhaps not the best in an abstract point of view, is nevertheless not unreasonable in itself, and has [148] been recognised as the law of

---

case the payment is retained, though the vessel and cargo be lost on the voyage. The general principle of the marine law was admitted in the fullest latitude in Griggs *v.* Austin (3 Pick. Rep. 20), and whether the freight previously advanced is to be retained or returned becomes a question of intention in the construction of the contract. The French ordonnances require a special agreement to enable the shipowner to retain the freight paid in advance; and Valin says (Com., tom. i. 661) that many authors on maritime jurisprudence, as Kuricke, Loccenius, and Straccha, will not allow even such a special agreement to be valid.' In a note to this passage Chancellor Kent says:—'In Saunders *v.* Drew (3 Barn. and Adol. 445) the doctrine of the case of De Silvale *v.* Kendall was admitted, that freight paid in advance could not be recovered back without an agreement to that effect. The rule in this country is more reasonable, and it requires a stipulation that the freight paid in advance is not to be returned if the voyage be not performed, otherwise the shipper may recover back' (Kent's Commentaries, vol. iii. p. 314).

"In the case of Watson, referred to by Chancellor Kent, which was decided in the Supreme Court of the State of New York, in August 1808 (3 Johnson's Reports, p. 335), the judgment was delivered by Chancellor Kent himself, who was at that time Chief-Justice of the State of New York. He said,—'The general rule undoubtedly is, that freight is lost unless the goods are carried to the port of destination. The rule seems also to go further, and to oblige the master in case of shipwreck to restore to the shipper the freight previously advanced. The English books are almost silent on the subject, and afford little or no information. But if we resort in this, as we are obliged to do in many other instances, for light and information to foreign compilation and distinguished writers on maritime jurisprudence, we shall see the point before us to have been considered and decided.' The Chief-Justice then refers to the foreign authorities on maritime law. At the time when this judgment was pronounced the case of De Silvale had not occurred; but he deals with the anonymous report in Shower as follows:—'I ought to observe that there is a dictum of C. J. Saunders stated in an anonymous case in 2 Shower, p. 291, which would seem to imply that money advanced for freight was in no event to be refunded; but I do not place reliance upon that very imperfect report, in opposition to the explicit opinion of the writers which have been mentioned.' He added,—'The general principle undoubtedly is that freight is a compensation for the carriage of goods, and if paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it then forms the case of money paid upon a consideration which happens to fail.'

"The point was again raised in the most direct form (Griggs *v.* Austin, 3 Pick. p. 20), before the Supreme Court of Massachusetts in the year 1825, when the English decisions were again brought under review. The judgment of the Court was delivered by C. J. Parker, who, after referring to the prior authorities, said, 'that it will be found to be the law of maritime countries on the Continent of Europe, that freight is the compensation for the carriage of goods, and if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid unless there be a special agreement to the contrary.' It is needless to multiply other American authorities. The whole [149] law upon the subject has been digested by Mr. Justice Story in a note to his edition of Abbott, which is referred to by C. J. Parker, p. 408; and in the case of Pitman *v.* Hooper, the same learned Judge (Story) said,—'I am aware that some of the English cases look the other way, and while they admit the doctrine, fritter it away with very nice distinctions.' The doctrine referred to was the general rule of the marine law, that freight not earned cannot be claimed, and must be repaid if advanced. The latest work in America upon this subject is by Parsons (Professor of Law in Harvard University), who states the American doctrine thus,—'It is now quite certain that if the payment be merely a payment of freight in advance it must be repaid if freight is not earned' (vol. i. p. 210); and for this doctrine he cites several decisions of the American Courts besides those here mentioned.

"In the whole series of English decisions there will not be found a single reference to those writers on maritime law who had systematised the science before it had become the subject of much discussion in Courts of law. The only authority cited has always been the dictum in Shower's anonymous case and in citing this the

Scotland both by Professor Bell,* and by the Court in a recent decision.† The advances made by the charterers [149] were not without consideration. The master had

English Courts seem to have considered themselves absolved from supporting the rule by reference to principle. In order to reconcile the rule with the doctrine that freight is never due unless the voyage be performed, the English Courts have held that if the shipper undertake to pay the 'freight' on the delivery of the bill of lading, although the voyage be not ended, the shipowner cannot sue for the money 'as freight' on tendering the bill of lading. Nothing, said Lord C. J. Eldon (then C. J. at the Common Pleas) 'could be due on delivery of the bill of lading but by special contract; for *prima facie*, the freight is not due until the arrival of the goods' (Blakey *v.* Dixon, 2 Bos. and Pull. p. 321). Professor Bell says (vol. i. p. 573), in reference to this decision, that this was in consequence of 'the strictness of English proceeding' (pleading?). This does not seem to be the ground of judgment. It was, that as the money was payable before the goods were delivered, it could not be regarded as freight, but as a sum of money payable under a special contract. The learned professor echoes the opinion of Mr. Justice Story in reference to the English decisions, by saying that 'some difficulty has occurred in settling the lines of distinction.'

"The authorities of writers on maritime jurisprudence, and the rules of foreign codes, are all contrary to the English rule. The lawyers of all other countries have give an opposite opinion. In the well-known ordonnance of 1681, regarding the marine, issued by the King of France, there is this law in cap. 26, No. 18,—'Freight is not due for goods lost by wreck or stranding, pillage by pirates, or capture by enemies; and the master will, in that case, be bound to restore what shall have been advanced to him if there be no agreement to the contrary' (Pardessus' Colln. de Lois Maritimes, vol. iv. p. 363). In a note to this article, Pardessus states the source from which it was borrowed, and carries it up to a high antiquity. The article itself has been embodied verbatim in the Code de Commerce (No. 302), and now is law in France.

"Pothier approves of the doctrine, and states it as the law in his time (Traité des Contrâts des Louages Maritimes, No. 63). It is sanctioned by the authority of Valin, in his Commentary on the Ordonnance of 1681, vol. i. p. 627; by Franciscus Roccus, a Florentine lawyer, in his Treatise de Maribus et Nauto, published in 1655, and republished at Amsterdam in 1708 (note 80, p. 79 of the Amsterdam edition); by Cleirac, an advocate at Bordeaux, in his Treatise on the Usage and Custom of the Sea, published in 1647 (see the edition of 1671, p. 42); and by John Loccenius, a Swedish lawyer, in his Treatise on Maritime Law, published in 1652, p. 274, No. 11. It is needless giving the citations from these books, the import of them is as stated, and they are thus summarised by Emerigon in his Treatise on Insurance (p. 179),—'No freight, says the Ordonnance, is due for merchandise lost by shipwreck or stranding, pillaged by pirates, or taken by enemies. In such case the shipper is dispensed from payment of the freight, and if he has paid it in advance he has a right to reclaim it.' [150] This article, after having decided that no freight is due on merchandise lost, and that the master is bound in this case to restore the freight paid to him in advance, adds, if there is no agreement to the contrary. 'An agreement then is valid (says Pothier) that the freight shall be due in every event.' Valin does not approve of this: 'Were it only (says he) on account of the malversations which the certainty of gain of the freight may occasion on the part of the master.' Cleirac feared the same abuses; but, as Valin himself says, the fear of crime should not prevent us from holding to the rules of justice. These rules are to keep to agreements once made; *pacta servabo* when injurious neither to good manners nor the essence of the contract, nor any prohibitive law. The agreement in question is permitted by the Ordonnance, and approaches the rule established by the Roman law,—'*Qui operas suas locavit, totius temporis mercedem accipere debet, si per eum non stetit quominus operas præstet.*'

"Such being the state of authority and precedent, the Sheriff must find in law for the pursuers. The question is referred to by Professor Bell; and if he had given a decided opinion on it, this would have amounted, in the Sheriff's estimation, almost

* Com. (5th edit.), vol. i. pp. 569–573.

† Leitch *v.* Wilson, Nov. 20, 1868, *ante*, vol. vii. p. 150.

cleared the vessel, and her subsequent loss was by the act of God, and through no fault of the [150] master or owners. But whatever may be the rule of the common law, there is no rule which can prevent parties from stipulating that an advance against freight shall not be recoverable from the shipowners. That such was the meaning of the parties was evinced by the terms of the contract, according to which the charterers were to insure the freight for the amount of their advances. This implied that there was a risk incurred by the charterers which they were to avoid by insurance, and for that purpose they acquired an insurable interest in the freight to the extent of their advances. Having neglected to insure, they must be held responsible for the risk, which was not intended to be recoverable from the owners, but from the underwriters.

Argued for the respondents (pursuers);—By the law of every mercantile community, except England, an advance against freight is recoverable from the shipowner in the event of freight not being earned, except where the contrary is expressly stipulated. The English legal authorities have expressed regret at the contrary rule which has now become law in England.* The advance is made entirely for the benefit and convenience of the shipowner, and it is reasonable, therefore, that he should bear the risk. Even in England, according to the older cases (such as Mashiter *v.* Buller, referred to by the Sheriff), an advance to account of freight, if not earned, might be recovered back, although in some of the recent cases the English Courts have inferred from expressions in the contract that the parties to it intended that the advance should not in special circumstances [151] be repayable. In the contract in this case no such inference can be drawn. The advances were to bear "interest" and "commission," which shows that a loan was intended; and the expression "against freight" shows that the advances were made on the security of the freight, which would become payable when earned. The stipulation as to "insurance" is not inconsistent with this, for the charterers had an insurable interest to the extent of their advances, but an obligation on them to insure is not to be inferred from the words used. The bill for £500 granted by the master, who was himself one of the owners, and acting for the owners when the charter-party was entered into, proves that only a loan was contemplated.

At advising,—

LORD PRESIDENT.—The decision of this case depends on the construction of a charter-party made between the master of the ship *Janet Cowan* of Greenock, and Messrs. Ralli Brothers at Bombay, on the 20th August 1863.

By this contract the master undertook and agreed that the ship should proceed to Calcutta, and there load a cargo of general merchandise from the charterers or their agents, and carry the same to a port in the United Kingdom, and deliver the same on being paid freight at the rate of 85s. per ton.

The clause regulating the payment of freight is in the following terms:—"The freight to be paid on unloading and right delivery of the cargo in cash two months from the ship's report inwards at the custom-house, or under discount at the rate of 5 per cent. at freighter's option."

After various other usual clauses, the following occurs:—"Sufficient cash for

---

to the authority of a judgment of the Supreme Court. But it is quite evident from the mode in which he has expressed himself that he had not made the point the subject of any particular consideration, relying merely on the case of De Silvale, and drawing from it simply the conclusion that if there be no special agreement to that effect the freighter cannot recover his advance (1 Bell, Com., p. 573). The point is also cursorily noticed by Brodie (Brodie's Stair, p. 1001).

"A question may be raised as to what is the law according to which this charter-party must be construed, although no such point has been raised on the record. The charter-party was made at Bombay, and it may be said that it must be construed according to the law of the country where it was made. The Sheriff, however, thinks that this is erroneous, and that the document must be construed according to the law of the nation of the ship (which was Scotch), and in this opinion he is fortified by the decision of the Court of Queen's Bench in Lloyd *v.* Guibert (L. R. 1 Q. B. 115, and 35 L. Journal, Q. B. 74). But whether this opinion be right or wrong the Sheriff has no other course but to adopt the law of Scotland, seeing that there is no proof of what is the law of Bombay."

* *Per* Cockburn, C. J., in Byrne *v.* Schiller, 40 L. J. (Exch.) 177.

ship's ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent. commission, and the master to indorse the amount so advanced upon his bills of lading."

This charter-party was transferred by Ralli Brothers to Grant, Smith, and Company, on the 2d October, and by Grant, Smith, and Company to the pursuers on the 13th October of the same year.

Between the 7th November and the 17th December, while the ship was preparing for her voyage from Calcutta to the United Kingdom, the pursuers made advances in cash to the master for ship's disbursements to the extent, as they allege, of 4532 rupees, in terms of the undertaking of the charterers in the charter-party.

The said advances were not, in terms of the clause of the charter-party, indorsed on the bills of lading by the master. But in place thereof the master drew a bill of exchange for £500 on his owners in favour of the charterers. This bill the owners refused to accept, and it may be thrown aside as of no importance in the case, as the master had plainly no power to make such a draft on his owners. The case must be taken as if the master had, in terms of the charter-party, indorsed the amount of the advances on the bills of lading.

The ship sailed from Calcutta on her homeward voyage, but was, with her cargo, totally lost in course of the said voyage.

The charterers have raised this action to recover the amount of the advances made to the master at Calcutta in terms of the charter-party, which, with interest and 2½ per cent. commission, they state at the aggregate sum of £596. They charge nothing for expense of insurance (though they were entitled to insure at the owner's expense), because they did not effect any insurance.

The defence is, in substance, that by the terms of the charter-party the cash advanced by the charterers was not intended to constitute a loan, but was a prepayment of freight, which, according to the intention of the parties and the true construction of the contract, was not to be repaid though the vesssel was lost and the freight never earned.

In the proper freight clause of this charter-party it is stipulated that the freight is to be paid on the unloading and right delivery of the cargo, which, in the absence of any other clause, means that no freight is to be paid except in consideration of and in return for the right delivery of the cargo. But the other [152] clause which I have quoted binds the charterers to advance against freight sufficient cash for ship's disbursements at the port of loading. It is, in my opinion, of no consequence whether such advances are called advances against freight, or advances on account of freight, or advances of freight. But I think the term "prepayment of freight" used by the defenders is unjustified by the phraseology of the clause, and calculated to mislead, as being equivocal. A stipulation for payment of freight at the port of loading, or at a time necessarily antecedent to the completion of the voyage and the earning of the freight, may be easily construed into an agreement to dispense with the rule of maritime law, that no freight is due unless earned by the right delivery of the cargo. Of this kind of special contract good examples are to be found in a recent judgment of the Second Division of the Court, Leitch *v.* Wilson, *ante*, vol. vii. 150, and in the well-known American case, Watson *v.* Duykinck, 3 Johnson's Reports, 335. But in the present case there is no stipulation for payment of the freight, or any part of it, before the term stipulated in the proper freight clause, viz., the right delivery of the cargo at the port of discharge. All that the charter-party contains qualifying the principal and proper freight clause is a provision that sufficient cash for ship's disbursements at the port of loading shall be advanced by the charterers against freight. It is needless to insist on the material and clear distinction between advance and payment or prepayment. An argument on the construction of a contract of affreightment, or any other contract of *locatio rei* or *locatio operarum*, which assumes that an advance of a portion of the *merces* or contract price is a payment or prepayment, is based on an obvious fallacy.

The general principles of law applicable to the contract of affreightment are not essentially different from those applicable to other similar contracts, such as contracts of land carriage, or building contracts, or any others, in which one party agrees to pay a certain price as the return for materials furnished or work done, or services rendered by the other party. No doubt maritime contracts are *juris gentium*; and if the custom

of the mercantile community of nations has impressed on certain words or phrases in a contract of affreightment a special meaning and effect, different from what they would bear if construed according to the ordinary legal rules of construction, the consuetudinary rule of the maritime law must prevail. But to establish such a rule of maritime law there must be the general consent of the maritime nations of the world, expressed in the prevailing practice and understanding of the traders of these nations.

There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this—that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration. In the Roman system the demand for repayment took the form of a *condictio causa data causa non secuta*, or a *condictio sine causa*, or a *condictio indebiti*, according to the particular circumstances. In our own practice these remedies are represented by the action of restitution and the action of repetition. And in all systems of jurisprudence there must be similar remedies, for the rule which they are intended to enforce is of universal application in mutual contracts.

If a person contract to build me a house, and stipulate that I shall advance him a certain portion of the price before he begins to bring his materials to the ground, or to perform any part of the work, the money so advanced may certainly be recovered back if he never performs any part, or any available part, of his contract. No doubt, if he perform a part and then fail in completing the contract, I shall be bound in equity to allow him credit to the extent to which I am *lucratus* by his materials and labour, but no further; and if I am not *lucratus* at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been.

There seems no ground in reason or general legal principle why the rule should not apply to an advance made by a charterer to the master of a ship of a part of the stipulated freight, the consideration of the advance being the performance of the contract work of carrying and right delivery of the cargo. If the considera-[153]-tion on which the advance is made fail by the non-completion of the voyage, the advance is *pari ratione* repayable to the charterer. I speak of the case of a total failure, as here, when there is no claim for freight *pro rata itineris*, or for right delivery of a part of the cargo. The voyage, indeed, has been begun, and in part performed; but there is no claim for freight, because no benefit has accrued to the charterer from the voyage having been begun and in part accomplished, till interrupted and terminated by shipwreck and total loss.

Does, then, the maritime law attach a meaning and effect to an advance of freight different from that which, according to ordinary legal principle, is the true meaning and effect of a stipulation for an advance of a portion of the contract price in any ordinary contract of *locatio operarum*?

On this question we have had the benefit of a very able and exhaustive argument, in the course of which all the authorities, Scottish, English, Continental, and American, have been brought under notice. It would be a mere waste of time to examine these in detail, for the result of them may be stated in a very few sentences. All the nations of the trading world, with the exception of England, concur in holding that an advance of freight by the charterers for ship's disbursements at the port of loading, in terms of an obligation to that effect in a charter-party, is, in the event of the loss of the ship and cargo, recoverable by the charterers from the owners, unless the parties contract expressly or by clear implication that it shall not be recoverable. By a series of judgments of the common-law Courts of England, it has been, on the contrary, settled that an advance of money by the charterers to the shipmaster at the port of loading, in terms of an obligation in the charter-party, is not recoverable if it be an advance of freight, but only in the event of the parties contracting expressly or by clear implication that it shall be treated as a loan, independent of freight.

Such a state of the authorities places the Judges of this Court in a position of embarrassment; for it is, on the one hand, in the highest degree expedient that the mercantile law of the United Kingdom should be harmonious, and if possible identical, for which reason, in ordinary circumstances, we always pay the greatest deference and

respect in such questions to the rules which have been settled in the Courts of England, unless they are in conflict with our own authorities and precedents; and it cannot be said that the broad question under consideration has been directly determined in the Courts of Scotland. But, on the other hand, in proper maritime questions there is almost as great an expediency, and indeed necessity, that trading nations should be at one, as that the citizens of different parts of the United Kingdom should be at one. And we must not forget that in such questions the decisions of English Courts and the practice of England are no more binding on us than the laws and customs of France, Germany, Italy, and America. I feel, therefore, bound to say that the law and practice of the other nations of the great trading community is in my judgment in accordance with sound legal principle, and that the English rule is not.

If, indeed, it were true that an advance of cash by the charterers to the master at the port of loading must be either a payment of freight or a separate and independent loan of money, the reasoning of the English judgments would be more satisfactory. But I apprehend that an advance against freight, or an advance on account of freight, or an advance of freight without further condition or stipulation, is neither a payment of freight nor an independent loan. It is an advance made on the faith of the master and owners performing their contract, and in consideration of their subsequent performance. If it were a separate and independent loan, it could be recovered from the owners immediately, and the charterers would be entitled, contemporaneously with the advance, to draw on the owners for the amount. If it were a payment of freight made in terms of the contract at the port of loading, it could never be recovered back at all. But an advance of freight or against freight stands in a different position from either of these two. It cannot be recovered immediately as a loan, but must be allowed to remain in the hands of the owners or master till the termination of the voyage. But being an advance on the credit of the owners, it creates a debt due by them, though with a postponed term of payment. If the freight be earned by delivery of the cargo, the advance, with interest, will form [154] a deduction from the gross amount of freight. But if the freight were payable in part at the port of loading no interest ought to run on the amount so paid in the interval between that partial payment and the final settlement of freight. And yet by this and other similar contracts of affreightment the freight is declared to be payable at the port of discharge on delivery of the cargo. It follows that the money given to the master at the port of loading as an advance against freight bears interest (without any express stipulation) from the date of advance till the date of payment, and therefore cannot in any proper sense be called a payment, but is simply an advance, repayable with interest.

I arrive at the conclusion already stated with the less reluctance, because it appears from the recent case of Byrne *v.* Schiller in the Exchequer Chamber, that the English Judges are fully alive to the inconvenience produced by the departure of their law and practice from the rule observed by other maritime nations. In these circumstances it cannot, I should think, be doubtful that the error will be redressed either by a judgment of the House of Lords or by legislation.

But the question still remains, whether there are any specialties in this charter-party, or in the circumstances of the case, to prevent the application of the general rule.

The cash advanced to the master by the charterers is declared to be "subject to interest, insurance, and 2½ per cent. commission." The stipulation for interest indicates nothing inconsistent with the nature of a proper advance against freight. On the contrary, the advance would have borne interest without this express stipulation. The commission is the usual charge for negotiating any loan or advance at the port of loading. But what is the meaning of the provision that the advance shall be subject to insurance, and what is its effect on the nature of the transaction and the construction of the contract?

The meaning of the words is not doubtful, and was not made the subject of controversy. The charterers are to be entitled to deduct from the advance, not only interest and 2½ per cent. commission, but also so much money as is necessary to effect an insurance on freight for the amount of the total advance, consisting of the money actually received by the master, interest, commission, and premiums of insurance.

But if the advance was repayable with interest by the owners, whether the freight was earned or not, it is difficult to see how the charterers could have an insurable interest in so much of the freight as corresponded to the amount of the advance. The charterers had no assignment to the freight or any part of it, and they held no security

over it for the amount of their advance, in any proper sense of the term "security." No doubt, if the freight was earned, they would be entitled to set off the amount of their advance *pro tanto* against the amount of freight payable to the owners; but so they could if they had been ordinary creditors of the owners on some other account. Or if the money advanced to the master had been distinctly stated in the charter-party to be a loan of money, the charterers would, just as much as in the present case, have been entitled to a set-off in settling for the freight at the termination of the voyage. But in this latter case it is manifest, and indeed has been adjudged (Mansfield *v.* Maitland, 4 B. and Ald. 582), that the charterer has no insurable interest, "because," as it has been well expressed, "he runs no risk of losing his debt by the perils insured against."—Arnould on Insurance, i. 261. But the charterer who makes an advance against freight repayable with interest, whether the freight be earned or not, in like manner runs no such risk, and has, therefore, in like manner, no insurable interest. By the loss of the ship and the non-earning of the freight, both the one creditor and the other loses the opportunity he would otherwise have had of setting off the amount of his advance against the freight. They are thus precisely *in pari casu* as regards security, and if one has no insurable interest in respect thereof, just as little has the other.

If, then, by the operation of the charter-party, the insurable interest on so much of the freight as corresponds to the amount of the advance is transferred from the owners to the charterers, it would seem to follow of necessity that the advance cannot be repayable in the event of ship and cargo being lost. In short, it seems impossible to reconcile those words of the charter-party, which describe [155] the cash given to the master as an advance against freight, with the provision that the charterers shall be entitled to insure the interest thereby created to them at the expense of the owners.

It was suggested in the course of the argument that the insurance to be made by the charterers might be for the benefit of the owners; but this is in the highest degree improbable. The owners would of course insure the freight in this country, or so much of it as they retained their interest in. And there could be no object in dividing the insurance on freight, unless the insurable interest in the freight were also divided.

In point of fact, the owners did not insure the gross freight, but deducted the probable amount of ship's disbursements at Calcutta, thus indicating, by their conduct in a matter of serious importance to themselves, their understanding of the meaning of the charter-party.

On the other hand, the charterers did not effect the insurance which they were entitled to make at the expense of the owners. But this omission is not of much significance, for they were not (on the assumption that they had an insurable interest) bound to insure. They might choose to be their own insurers, and still charge the premium against the owners. And that they have not charged it in the account sued for may be easily explained by the exigency of their case as they now maintain it, in consequence of the loss of the ship and cargo.

On the whole, I think it is impossible satisfactorily to explain this contract, or reconcile it with itself, except on the footing that both parties understood that the charterers thereby acquired an insurable interest on the freight to the amount of their advances, and consequently could have no claim for repayment in the event of the freight not being earned; or, in other words, that the charterers were content with the double or alternative securities afforded to them by the right of set-off if the freight should be earned, and by the stipulated insurance if ship and cargo should be lost, and in respect of these securities gave up the right they would otherwise have had to recover their advances in any event.

I feel, in common I believe with all your Lordships, that this is a somewhat narrow ground on which to determine the construction of the charter-party. But the result is all the more likely to be consistent with the truth and justice of the case, from the inevitable prevalence in Indian ports of ideas regarding the effect of such clauses derived from the judgments pronounced by English Courts.

I am for altering the Sheriff's judgment, and assoilzieing the defenders.

LORD JUSTICE-CLERK.—As I entirely concur in the exposition from the chair of the general principles of the law merchant on this subject, I shall not detain the Court with many observations on the English authorities. The earlier decisions in the English Courts would probably not have ruled the present case. They appear

to establish only the doctrine that if, in a charter-party, it is covenanted that the freight shall be payable at a period antecedent to the completion of the voyage, the Court may presume, from the terms employed, that the payment was not intended to be repaid if the vessel should be lost. Such was the case of De Silvale, the leading one on this subject, in which the Court inferred, from the fact that the advance was to be free of interest and commission, that it was intended not as the constitution of a debt, but as an absolute payment of freight. On the same principle the case of Leitch *v.* Wilson in the other Division of this Court may be fairly defended. But the later English decisions have gone much further; and it must now be held as settled in the English Courts that any advance against freight stipulated for in the charter-party is paid absolutely, and cannot be recovered back. If, therefore, this case were to be ruled by the English precedents our judgment must be for the defenders. But I concur with your Lordship and indeed with the latest English authorities in thinking that they proceed on a principle which is artificial and unsound.

I cannot, however, coincide in the result at which your Lordship has arrived, and I shall shortly state the reasons on which I think our judgment should be for the pursuers, assuming that the presumption of law is, that an advance against freight is to be repaid if the voyage be not performed.

[156] On the face of this charter-party there is no doubt whatever as to the period at which the freight is to be paid. That is fixed in the appropriate clause which deals with the obligations of the charterer as the hirer of the vessel. It is to be paid on the completion of the voyage and on the terms which are there expressed. The subsequent clause in relation to advances, out of which the present action has arisen, does not deal with the period at which the freight is payable, or with the conditions under which it is to become due. So far as it refers to freight at all, it refers to the charterer's obligation to pay at the time, and on the conditions previously expressed. Neither does it relate to the charterer's obligations as hirer of the vessel. It is a contract for an advance of money by the hirer for the benefit of the owner, to enable him to fulfil the obligations which he has undertaken by his contract of affreightment. The owner undertakes, provided the charterer will disburse at the port of loading the sums necessary to enable his vessel to fulfil her engagements, that he will not only deduct the amount advanced in settling for the freight, if freight should be earned, but will be responsible also for interest and commission, and will allow the cost of insurance to cover the risk of the voyage. He engaged also that the master should indorse these sums on the bills of lading, and so to that extent relieve the cargo. He agreed that the freight should stand pledged for all these things as first charges on it. We have, therefore, no question here as to a mere loan. That was the substance of what the charter-party expressed, and I can find nothing more in its terms. It was a very reasonable and convenient arrangement, but one entirely for the owner's benefit, under which the charterer did not act as the hirer of the vessel, but as the hand or banker of the owner, stipulating only for indemnity, and having no further interest in the transaction.

The money was advanced, and the vessel sailed and was lost on the voyage, and it is now contended by the owner in defence to an action for repayment, that the consequence of his non-fulfilment of his contract of carriage, and of the loss by the charterer of the security over the freight, is, that although he received the money and applied it exclusively to his own purposes, he is entitled to retain principal, interest, commission, and premium of insurance. What inducement or advantage the charterer had in entering into such a contract, or what equivalent the owner gave for this money, the owner has not been able even to suggest; but he says such is the legal interpretation of the words used.

I can find nothing in the words used which is even consistent with such an interpretation. They seem to me to express only a loan of money advanced on an impignoration of the freight, with such a stipulation for indemnity as the owner had it in his power to give; and I find nothing to suggest that the charterer took any risk beyond that. Two or three tests may be suggested, any one of which appears to be conclusive. In the first place, for whose benefit was the contract concluded? for the law will infer that the risk lay with the party who has the benefit. Now, it is certain that the owner had the whole benefit, and the charterer had none. The owner had an equivalent for his risk, while it is not said that the charterer had any. In the second place, if this were a loan of money, its fundamental and essential characteristic

is the borrower's personal obligation to repay. But the advance was to bear interest until paid; which, as was found in De Silvale's case, is a criterion which distinguishes the constitution from the payment of a debt. In the third place, the very stipulation in regard to premium of insurance proves the same thing; for as this was manifestly a contract for indemnity, unless the premium was to be repaid in any event, the charterer could not have been kept safe.

It seems to be thought that the words "subject to insurance" of themselves imply that the charterer, without any equivalent, undertook the risk of the voyage. This seems rather a violent inference from very simple words. The words, I think, mean no more than this, that as the owner had nothing but a contingent security to offer, he was willing to be at the cost of insuring the freight to the amount advanced, if the charterer thought it necessary to insure for his own protection. Beyond this I do not think that their meaning can be stretched. As the security would be unavailing if the vessel was lost, the borrower undertakes to put the lender in funds to insure against that contingency; [157] just as any other borrower who raises money on an expectancy may keep his creditor in funds to insure his life in case his expectancy should be defeated. In neither case can the acceptance by the creditor of the intermediate security operate a conditional discharge of the debt.

It has, however, been maintained that a specific meaning has been attached to these words, and that it has been fixed in the case of Hicks *v.* Shield, and confirmed in the recent case of Byrne, in the English Courts, that these words necessarily imply an undertaking by the charterer of the risk of the voyage. I think this view proceeds on a misconception of what these cases decided. Hicks *v.* Shield decided two points,—first, that an advance in anticipation of freight could not be recovered back; and, secondly, that a stipulation that the charterer might insure at the owner's expense implied an advance in anticipation of freight, because otherwise it would have been an ordinary loan, and the charterer would have had no insurable interest in the voyage. This result, although refined, is thoroughly logical. But the moment it is conceded that this advance, although in anticipation of freight, might be recovered back, the logic entirely fails. There is no authority for holding that an advance made on the security of expected freight does not give an insurable interest if it can be recovered back on the loss of the vessel. In my opinion the reverse is clear law. An advance against freight stipulated in the charter-party constitutes an impledging of the freight by the owner to the extent of the advance. It is as complete an assignment of that amount of freight to the charterer as if it had been contained in a separate instrument, and along with the assignment of the freight it carries of course the insurable interest. It is true the debt is not discharged. Neither is the debt of a mortgagee discharged, yet he has unquestionably an insurable interest. Freight is assignable; and may be assigned in security as well as absolutely; and it is matter of decision that an assignee of freight has an insurable interest. It has been said by some of the English Judges, that, according to their rule, such a clause as this would operate a conveyance or a purchase of so much of the freight as the advance amounted to. But according to the law which your Lordship proposes we should adopt, it only amounted to an assignment in security.

I find the view which I have suggested very clearly stated in a judgment by Chief-Justice Jones in the American Courts, which I take from a note to Mr. Parsons' book. It is in the case of Robins *v.* The New York Insurance Company. It was an action on an insurance effected by the plaintiff, who was an assignee to a charter-party under which he was to advance part of the freight. He made the advance, and insured the freight; and the question was whether he had an interest to insure. The Chief-Justice says,—"The advance of the freight gives no right to insure beyond the amount of the advance; and where the owner of the vessel is liable to refund in case of loss resulting, the lien the charterer has upon the freight for his security requires that proof should be made of the actual payment of the money alleged to be advanced. In most cases the charterer will have a lien upon the freight for the advances he makes the shipowners as his security against their inability to refund. That lien gives him an interest under the charter-party as, or in the nature of, a mortgage, which he may insure; and the better opinion seems to be, that he may insure it in general terms, under the name of freight, without describing it as a mortgage interest." I take this to be a sound statement of the law, and in conformity with the whole current of American decision. There are some ambiguous passages in Mr. Parsons' book, but

they seem to apply only to cases where there has been no such stipulation in the charter-party. This last sentence of his chapter on this subject puts the matter beyond doubt:—"So, too, money lent to the master payable out of freight creates no insurable interest in the freight, unless it is payable only out of freight, and would therefore be lost if the freight were lost, or unless the freight is assigned or pledged as a security for it. In that case we should say that the lender has the same insurable interest in the freight that he has in any interest or property held by him as security for a debt." That the freight in this case was pledged by the charter-party in security of this advance appears to me to admit of no doubt whatever, and therefore, as the charterer had [158] an insurable interest either way, the words "subject to insurance" give no support to the defence.

I am therefore of opinion that the lender of the money ought to be repaid, and should prevail in this suit. I was much impressed by the consideration that the pursuer neglected to insure,—the only one of the pleas of the defender that had any show of justice; I have found that question by far the most difficult of those raised by this case. But I am satisfied that the provision on this subject was a privilege in the lender's favour, not an obligation laid on him; and there was nothing to have prevented the defender from protecting himself by an insurance to the full amount.

LORD COWAN.—The claim made in this action is for repayment of a sum of £441, 4s., the amount of advances made for ship's disbursements at Calcutta, on the ground that no freight was earned, the ship having been lost on her voyage home. The advances were made under express stipulation of the charter-party entered into between the pursuers, who were the charterers of the vessel, and the defenders, the shipowners. The freight was stipulated to be at the rate of 85s. per ton, "to be paid on unloading and right delivery of the cargo in cash two months from the ship's report inwards at the custom-house, or under discount at the rate of 5 per cent. per annum at freighter's option."

By a subsequent clause it is provided—"Sufficient cash for ship's ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent. commission, and the master to indorse the amount so advanced upon his bills of lading." The master was taken bound to sign bills of lading at any freight required by the charterers, without prejudice to the charter-party; and it was also provided that the charterers should have the option of under-letting the whole or part of the vessel. The question is, whether the advances claimed, having regard to the special terms of the charter-party, can be recovered from the shipowners on the ground stated.

The Sheriff, in the full and elaborate note annexed to the interlocutor under review, has cited various decisions in the English and in the American Courts; and from his examination of them correctly deduces the inference that there is a material difference in the law of the two countries as regards the principle to be applied in the construction of the terms of the charter-party in questions like the present; and approving of the American rule, as more consistent with sound principle and more in consonance with the law of other maritime States, in which opinion I entirely concur with him, the Sheriff has recalled the judgment of the Sheriff-substitute, and decerned for repayment to the charterers of their advances. In arriving at this conclusion, however, I think too little regard has been paid to the very special stipulations contained in this charter-party.

There is no doubt that freight is legally due only on the completion of the voyage and due delivery of the cargo at the port of discharge. But while this is true, and will have effect when the charter-party is silent, it is competent for the parties to stipulate by express words, "or by words not express, but sufficiently intelligible to that end, that a part of the freight should be paid absolutely by anticipation, and not depend on the performance of the voyage."—Shee's Abbott on Shipping, 406. By this charter-party payment of freight is to be made on arrival of the vessel and delivery of the cargo, but the subsequent stipulation as to advances must be read in connection therewith, to the effect of qualifying the stipulation as to the term of payment. The obligation imposed on the charterers is to make advances for ship's disbursements at Calcutta, whither the vessel was to proceed from Bombay to take in cargo for the United Kingdom; and the important inquiry for the solution of this case regards the meaning and effect of the terms on which the advances were to be made. They were to be made "against freight." In other words, the amount was to be stated as against the claim for freight on the settlement between the parties. Interest was to be

allowed the charterers on the amount of their advances when the account was settled, and also commission. But besides these conditions it is further stipulated that the advances were to be "subject to insurance,"—that is, that the charterers were to be entitled to insure the amount at the expense of the ship-[159]-owners. No other meaning can be attached to the terms employed; and having thus stipulated for the means of guarding themselves against loss by insurance, the legitimate inference is that, holding the advances to be against or on account of freight, the payment was to be absolute, and not dependent upon the performance of the voyage.

Were the advances to be viewed in the light of a mere loan of money to the shipowners, or on their account, as occurred in the English case of Mansfield, and in the case in our own Courts of Gilkison *v.* Cochrane in 1854, 16 D. 548, the only remedy for the charterers, in the event of the ship being lost, must have been an action for repayment against the owners personally. In such case the charterers could not protect themselves by an insurance on the freight, for in it they had no interest, notwithstanding that, had the ship arrived, and the freight being earned, the amount would have been a good deduction from the charge for freight by the owners. It is otherwise where the advances are stipulated to be absolute, or where such terms are employed as imply that such is the character of the payment and the agreement of parties. For then the charterers having, to the extent of their advances, an interest in the freight to be earned, are in a situation to protect themselves by insurance. They have an insurable interest which they would not have in the event of the advances being of the nature of a loan, and conferring only a right of personal action against the owners. Now, in this case the agreement of parties was to impose the duty and consequent obligation on the charterers to insure for their protection, if they chose to do so, having stipulated that the cost was to be paid to them by the shipowners. Had they effected such insurance they would have suffered no loss. That they did not insure was at their own peril, and ought not to subject the shipowners to a claim which might have been covered by insurance had the charterers done what they had undertaken to do. Their not doing so indeed left them in the position of being their own insurers, and on them alone must the loss fall.

This view of the special charter-party in the present case appears to me conclusive of the question without deciding the important point referred to by the Sheriff. It is not necessary to determine whether, to entitle the shipowner to retain advances on the freight, when redemanded by the charterer upon the ship being lost, there should be an express stipulation to that effect. That seems to be the rule in the American Courts, contrary to the principle which has been acted on in England, where the rule prevails, that the charterer, to entitle him to reclaim freight which has been advanced pending the voyage, must show a stipulation to that effect in the charter-party. Taking the view of a special contract in this case which I have explained, it is not necessary to enter on the conflict of principle which appears thus to exist. In both countries effect will be given to express stipulation and contract, and it appears to me such a stipulation as we have here to deal with would receive even in the American Courts that effect which, as I think, it ought to receive in this action.

In Parsons' Treatise on Shipping (p. 211)—the latest American work on this subject—in stating the doctrine that loans to be paid out of the freight may be recovered from the owners where no freight becomes due, the author states,—"It is quite as certain that the parties may make a different agreement. The shipper may say, If you will take my goods, I will pay you now so much money, and you may keep it whether you carry the goods to their destined port or not. This would, strictly speaking, not be an agreement for freight, but it would be an agreement the parties had a right to make, and it might be proved by or inferred from circumstances." And in a note to this passage, in the last edition of this work (Boston, 1869), reference is made to the various decisions on this point, and specially to the English case of Hicks *v.* Shield, where Lord Campbell stated that an obligation on the charterers to effect insurance at the owner's expense was conclusive that the money could not be treated as a loan in advance, but must be held to be on account of freight; and to the case of Jackson and Isaacs, where the same words "subject to insurance" where employed. Reference is also made to Frayes *v.* Worms, 1865, 12 Law Times, N. S., 547, decided in the Common Pleas, with reference to a stipulation thus expressed,—the freight to be paid by bills "at six months' date from date of sailing, less cost of insurance, to be effected by the charterers [160] at ship's expense." In that case, in the course of the

argument, Willes, J., said, "Has it not been decided that where the charterer is to insure the freight paid in advance is not to be returned?" And again, in giving his opinion, he says, "the charterers were to insure, and it is clear from that that the advance was not to be returned if the ship did not arrive at her destination." To the same effect the other Judges intimated their opinion, holding, from the terms of the charter-party, that the advance was not, under any circumstances, to be returned. It may be that, underlying the inference drawn in these cases as to the agreement of parties, from the words "subject to insurance," there was in the mind of the Judges the rule of the English law that all which required to be established was, that the advance made by the charterer was to account of freight, and that, for that reason, it was held not recoverable, there being no stipulation for repayment. This would leave open the point, whether the one principle of construction or the other should be adopted. But I cannot so read the decisions referred to, or hold that their import can be in this way obviated. The words imposing the obligation on the charterers to insure were held, as I think, to have a broader meaning by the Judges who pronounced these decisions, and in this I am confirmed by the case of Byrne in 1870 in Exchequer. The action related to two sums, one of them being for £1200, made subject to insurance by the charterers, and the other for £779, as to which there was no stipulation to insure. The former was held to be too clear for argument, and the discussion was confined to the latter, as to which, on being held to be an advance of freight, it was contended that the principle of the prior cases should be disregarded. This it was which led to the expression of regret that the rule should have been fixed so firmly that only the Legislature could alter it. But such regret, be it observed, had reference to the case of advance on freight without stipulation as to insurance. But whether this be so or not, the words of this charter-party, in my opinion, will not receive their just and true effect as between the parties to this contract unless it be held that the advance as against the freight was absolute, and not to be reclaimed from the owners, in the event of the ship being lost.

The case of Leitch *v.* Wilson, decided by the Second Division in 1868, raised, in principle, a similar question; and in concurring in the judgment proposed by the then head of the Court I may explain that on referring to the notes on my papers I find that my opinion was formed in that case, as in this case, upon the special terms of the charter-party. It was therein stipulated that payment of freight was to be made at a date before the vessel could possibly arrive at her outward bound port, and hence the agreement of parties was held to mean that it was to be treated as an absolute payment, to be made by the charterers to the owner, whether the ship was lost or not lost; and the reference made by me to Phillips for the American law, and to Arnould for the English rule, was in order to show that in both systems of jurisprudence the like effect would be given to the agreement of parties embodied in that charter-party. The decision cannot be viewed, therefore, as an authority on the general question. And further, it may be observed that in Gilkison's case, had the Court held that the arrangement as to freight made by the master with the charterers had been adopted by the owner, in place of being repudiated as beyond his power, the judgment, as I read the opinion of the Court, would have been different.

LORD DEAS.—On the general question, whether the rule adopted in England or that adopted in America and the Continent, is consistent with the law of Scotland, I entirely concur with your Lordship in the chair. In America they are understood to hold that, in order to prevent the charterer from having a claim to repayment of an advance against freight, there must be express stipulation, or implication so clear as to be equivalent to express stipulation, that the advance is not to be recoverable in case the ship is lost. In England the rule is different. The general question has never been decided in Scotland. The ground of decision in the case of Leitch *v.* Wilson was, that there was a stipulation that the freight should be paid one month after the ship had sailed, whereas the ship could not be expected to reach the port of delivery under six weeks. That was held to be clear implication that the freight was not to be demanded [161] back again. Whether the decision was right or not, in the particular case, may admit of difference of opinion, but it certainly did not decide the general question as to whether the English or the American rule should be adopted. On that question I am of opinion that the sound rule is that so clearly stated by your Lordship. A great principle lies in the expediency of giving to shipowners the deepest possible interest in the preservation of ship and cargo. This important principle is much better given

effect to by the American rule than by the English. On this I so entirely concur that I need say no more.

With respect to the construction of this charter-party, I also arrive at the same result as your Lordship. It appears to me that if the Lord Justice-Clerk is right in thinking that the charterer had an insurable interest in the portion of freight corresponding to the advance, it is so much easier to arrive at the result that he was bound either to insure or to stand his own insurer. According to the view of the Lord Justice-Clerk, either the shipowner or the charterer might have insured the freight to the extent of the advance. The only question then is, which of them undertook to insure? The insurance was to be made at the expense of the shipowner, who was to be debited with the sum necessary to effect the insurance, just as he was to be debited with the interest and commission. They were coupled together. Does not that imply that the charterer was either to insure or take the consequences?

I have only one additional observation. If there had been any difficulty about the charterer having an insurable interest, he might, under this contract, have insured in the name of the owner. The security would not perhaps have been quite so good as an insurance in his own name—still it would have created a security available to both parties. That we are putting the fair and reasonable construction on this contract is confirmed by what followed on it,—the shipowner insured to the extent of £4000 of the freight, leaving the other £500 to be insured by the charterer.

LORD NEAVES.—The natural and normal effect and meaning of a contract of affreightment is that freight is not due till the goods are carried. Laying aside the peculiar case of the sale of a special subject, this is the general rule in mutual contracts; the one obligation is the condition of the other.

It seems to follow that, in a proper case of affreightment, any prepayment or advance of the freight or a part of it, in anticipation or expectation of the performance of the contract to carry, must be subject to repayment if that contract is not performed. The nature of the obligation is not changed by the mere prepayment, and on the ultimate failure of the consideration the right to retain the money would seem to be resolved.

But these results may be affected by a change in the inherent nature of the contract, and it is in the power of the parties to make such a change if they choose to do so. They may make a contract under the name of affreightment or whatever name they please, by which the shipper may pay a sum down or at an early date, which is not truly freight, but is an irrevocable advance for the chance of the goods being carried. This, I think, was the case of Leitch *v.* Wilson, *ante*, vol. vii. 150, which is easily explained on the principle just stated, and the same will be the rule as to a partial advance of money if given on a similar footing. I adhere generally to the views I there expressed.

The question here is, under which of the two heads does the present case come. This point, I think, must be decided, not upon any arbitrary rule of law, but upon the opinion we may form as to the true meaning of the parties in point of fact.

In trying to arrive at that conclusion, several considerations occur, which tend in opposite directions.

1. The freight here generally is only made payable on delivery of the goods, and the clause to that effect is favourable to the shipper, as implying that the freight is not to be due without delivery, and that any part prematurely paid may be recovered.

2. There is another clause as to advances for the ship's use, which, as being manifestly vague and indefinite, and for the convenience of the shipowner, does [162] not, without some specialty, infer a change on the natural state of things. If that clause stipulated merely that such advances might, with interest, be set off against the freight when earned I should think it insufficient to exclude the claim for repayment on the failure to accomplish the voyage. The prepayment would, I should think, be recoverable back for failure of consideration.

3. But there is here another stipulation, that seems to me to constitute a specialty, and to preclude the shipper's claim to repayment. That is the stipulation as to insurance. That stipulation, though shortly expressed, amounts to this, that the shipper is authorised by the shipowner to insure the amount of the advances, and that this is to be done at the shipowner's expense; for it seems clear that as the interest and commission are to be charged against the shipowner so also is the insurance. This is a most material element.

The result is, that it is in the power of the shipper to reimburse himself in one of two ways, which, alternatively operating, give him an absolute security.

1. If the ship arrives, and the freight is earned, he retains his advance, with interest, insurance, and commission, out of the freight.

2. If the ship is lost, or does not earn freight, he can recover under the insurance in that case provided.

In correspondence with these effects, the shipowner's interest in the freight was diminished in a corresponding degree.

Now, it seems to be unreasonable, that over and above these two complete or complementary remedies the shipper should have a third, by a personal claim against the shipowner in the event of the ship's non-arrival. That obligation seems to be superseded by the authority to insure, which is equally efficacious.

It seems plainly not intended that the shipper shall recover both under the insurance and under the personal obligation. This seems scarcely deniable. But it is as little reasonable that it should be optional to the shipper to insure or not insure as he pleases, without consulting the shipowner, who is liable for the insurance.

Without saying that the shipper here incurred a specific obligation to insure, it seems fair to say that if he did not actually insure he ought to be held as becoming his own insurer, which is the same thing as if he had insured and recovered.

Lastly, it seems reasonable to say that the power to insure seems to infer the creation of an insurable interest, which apparently can only be given, or clearly given, by excluding the personal claim. I rather think, in a case like this, the shipowners were thereby authorised not to insure more than the balance of freight, trusting that the freight to the extent of the advance would be insured by the shipper at the shipowner's expense.

I think we are much indebted to the Sheriff-depute for his very learned and able note, in which I think he has truly expounded the general rule of maritime law, though he has unduly overlooked the specialty by which I think the decision must be determined.

LORD ARDMILLAN.—The learned and instructive note of the Sheriff in this case is very valuable.

I think he rightly considers that the money advanced by the pursuers was an "advance against freight," and that an "advance against freight," made for the ship's disbursements, is just an advance on freight, and not a mere loan; but a loan on a specific security. I have, in the first place, considered, on principle and with reference to the high authorities quoted, the question, whether such an advance on freight,—apart from the specialty raised in regard to insurance,—is recoverable from the shipowners, if the vessel is lost, and the freight not earned.

On this very interesting and important question in mercantile and maritime law I have come to concur in the views explained so clearly and ably by the Sheriff. I shall not state in detail the grounds on which I concur in the Sheriff's opinion, 1st, that freight is not due till it is earned; 2d, that an advance on freight must be held as made on the consideration that the voyage is to be performed and the freight is to be earned; and, 3d, that, if the consideration fails [163] by reason of the freight not being earned, the advance can be recovered by the charterer.

In the class of questions to which this belongs, involving principles of commercial and maritime law, uniformity of principle is important, and it appears to me that we should ascertain, as far as possible, the equities recognised by maritime customs, by the laws of all maritime countries, and after doing my best to reach that ascertainment I am of opinion that the view taken by the Sheriff is in accordance with such equities, and is sound on legal principle.

I think that the English decisions which have been founded on by the shipowner have proceeded sometimes on a tacit, and sometimes on an explicit recognition of a doubtful and imperfect report of a decision in the reign of Charles II., and that the principle announced and enforced in the American decisions, especially the judgment of Chancellor Kent in 1808, is more consistent with equity, and more in accordance with the laws of other maritime countries. To the same effect as Chancellor Kent's opinion is the authority of Mr. Parsons and of Mr. Justice Story; and this also appears to be the law of the maritime States of Europe. Pothier especially leaves no doubt as to his opinion, and he is on such a matter a very high authority. I do not wish to dwell on the case of Leitch *v.* Wilson in this Court. I am disposed to agree with Lord

Deas in viewing it as a decision on a special contract. Accordingly, were it not for the specialty in regard to insurance, to which I shall now advert, I would be of opinion, concurring with the Sheriff, that the charterers would be entitled to recover. On this part of the case I have nothing to add to the observations of the Sheriff, and to the exposition of the law which your Lordship in the chair has given.

But, in the second place, the relative rights and liabilities of the parties may not stand on the general law. They may be affected by their contract. I need not again explain or even read the terms of the charter-party. It has been already sufficiently explained. If it was the contract in this case that the charterer who made advance on freight should insure for his protection, and that the shipowner should supply to the charterer the means of insurance, then the charterer, being thus enabled to insure, was bound to insure, and so protect himself, and, if he did not insure, he must take the risk, for he must be held as being his own insurer. I think that he had an insurable interest, an interest to strengthen the specific security on which he had made an advance, and of which he is assignee to the extent of his advance, and on that particular point I agree with the Lord Justice-Clerk. I think he might have insured in his own name. But at all events the charterer was entitled to insure in the name of the shipowners. Being by contract armed with the means of protecting himself by insurance against the loss of the vessel, to the extent of his interest in the freight, I cannot avoid the conclusion that the charterer was bound to insure, or to run the risk. I have felt this point to be one of great difficulty, of even more difficulty to me than the broader question decided by the Sheriff; because, if the charterer's advance was made on a security, and if the shipowner's obligation was to repay, then nothing but a transaction or stipulation plain could set the shipowner free. If, however, there was a contract that the charterer should insure for his interest, the shipowner giving him the means of doing so, then such a contract would, I think, impose a duty on the charterer, and his failure would release the shipowner from his obligation. I have, after much hesitation, and with difficulty, come to concur in the opinion expressed by Lord Deas, that, by the terms of this transaction, the charterer was, as matter of contract, bound to insure, or to take the risk of non-insurance. I think he may have had an option, but if so, then on his option must depend his own interest and not that of the other party. His choice lay between effecting an insurance and standing the risk. But in making that choice the risk must be his own. Therefore I am of opinion that the judgment of the Sheriff, sound on the first and more general point, should be altered on the ground that, by the terms of the charter-party, the charterers were entitled to insure, and were enabled to insure, and that, not having done so, they must be held to have been their own insurers.

LORD KINLOCH.—I am of opinion that in this case the Sheriff has arrived at [164] a right conclusion, though I am not prepared to adopt all the views expressed by him.

The action is not one for repayment of freight. It is an action for reimbursement of advances made by the pursuers at Calcutta, on account of the owners of the *Janet Cowan*, and for their accommodation. In ordinary circumstances there would be no doubt of the pursuers being entitled to this reimbursement. But the defenders maintain that by the contract of parties the advance was to be put on the footing of a prepayment of freight, and a prepayment of which no recovery was to be had if the vessel was lost, and no freight earned. Their conclusion is, that the vessel having been lost, the advance is lost to the pursuers. The question thus arises on the defence, and the onus lies on the defenders to establish their case.

I conceive that this question is to be determined by a sound interpretation of the charter-party, which constitutes the contract between the parties. This is a maritime contract, to be interpreted according to the general maritime law, as administered in the Scottish Courts. The vessel was further of Scottish nationality—a circumstance often thought important, if not conclusive. The case is not to be decided by the application of rules recognised in other Courts, except in so far as these quadrate with our own, or are sound deductions from our own recognised principles of maritime jurisprudence.

I am of opinion that the charter-party in the present case forms in no sound sense a contract for prepayment of freight,—unquestionably, not a contract for prepayment of freight, in the sense of an advance which was to be lost to the party making it in the event of the vessel being lost. I consider it to be simply a contract for an advance

of money to the owners, with the charterers secured in repayment by the power of setting the amount against the counter claim for freight, when freight should come to be payable. The advance was a loan with a security. Such, and such only, I consider to be the meaning of the words "sufficient cash for ship's ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent. commission; and the master to indorse the amount so advanced upon his bills of lading." I cannot interpret this stipulation into one for a prepayment of freight, to be lost to the charterers if the vessel should be lost. If this meaning has been put on such words by the Courts of England I cannot adopt the construction. I interpret the contract for myself according to my own best lights; and I view it as a contract for an advance of money, to be repaid by the shipowners in all circumstances, with the further security to the charterers that they were entitled to deduct the sum from the freight due by them when that freight came to be payable. The inference at once holds, that if, by the loss of the vessel, no freight ever became due, the charterers lost the security which the right of retention gave them, but the shipowners remained, not the less, personally liable for the sum advanced on their behalf

There would not, so far as I can understand, be much difference of opinion as to this being the true result, if the word "insurance" had not occurred in the charter-party, in the part where it is said that the advance was "subject to interest, insurance, and 2½ per cent. commission." It is said that the introduction of this word infers that the charterers were to insure the advance, the shipowners paying the premium of insurance; that there was no insurable interest except on the supposition that the advance was to be lost if the ship was lost; and that the contract must therefore be held to have been engaged in by both parties on the understanding that such should take place.

I cannot adopt this view. If, independently of this single word, the contract is such as I have assumed it, I cannot hold its construction altered, merely because I find this word in it, without any further explanation of the meaning of the parties in introducing it. I think it fairly to be inferred, from the occurrence of the word in the charter-party, that the charterers had the option given them of insuring the advance, and that, if they did so, the shipowners were to pay the premium. But I think it is a wide step to make, to deduce that, in the understanding of the parties, the shipowners were not to be personally liable for the advance if the ship happened to be lost. I am not prepared to hold that there [165] was no insurable interest in the charterers, except on the assumption of the loss of the ship inferring the loss of the advance. The loss of the ship was, beyond all doubt, the loss to the charterers of a security; the security, namely, that they held over the retained freight. But there is nothing incompetent in insuring a security which is exposed to loss through the perils of the seas; and this appears to be in substance that which was contemplated. At all events (and this is the true point at issue), I see nothing to convince me that the parties to this contract mutually understood that there was no insurable interest unless the advance was lost if the vessel was lost; and that, therefore, in the event of the loss of the vessel, the advance was irrecoverable. I think it far easier to infer that they proceeded on the assumption that the security might be insured by the creditor, if he chose to do so, without his recovery of his advance being affected one way or other. In point of fact, no insurance was made, which would scarcely have happened if the creditor's whole reimbursement knowingly depended on the safe arrival of the ship. I cannot safely put on this word any further meaning than that it bound the shipowners to bear the expense of the premium, if insurance should be made,—that is, if insurance was competent, and should be actually effected. In short, I think the introduction of the word merely infers a provision as to expense,—namely, that the shipowners became bound for the expense of any competent insurance. Beyond this I cannot go. I do not find myself warranted in drawing, from the introduction of this word into the charter-party, a conclusion altogether at variance, as it appears to me, with the plain words of the rest of the document. This would be to give an inference from a single unexplained word, occurring in a contract, an effect in overruling the general terms of the contract, which I consider quite inadmissible.

I may perhaps be permitted to add, that I could not arrive at an opposite conclusion without, as I think, indirectly sanctioning those decisions in the English Courts which I cannot apply directly. I think it scarcely open to doubt that it is because of its being found by these Courts that such an advance is a proper prepayment of freight,

of which repayment is not recoverable if the ship be lost, that insurance has come to be thought a precaution appropriate to the case. What I am asked to hold in the present case amounts in substance to this, that the parties to the charter-party, adopting the English rule of law that the advance was irrecoverable if the vessel was lost, inserted the stipulation about insurance for the purpose of meeting that case, and on the express ground that such was the understanding betwixt them. I cannot proceed on such a footing. Nothing, as I think, would be more perilous than to deduce the meaning of a contract from a speculation about the particular legal views of the parties, or a question whether they proceeded on a mutually admitted doctrine, or merely introduced a word by way of greater caution on either side. It would require very clear evidence to warrant its being held, contrary to the general meaning of the document, that the parties proceeded on a mutual adoption of the rules of the English Courts, more particularly where these Courts did not necessarily, or naturally, form the tribunal in which any dispute between them was to be decided. I cannot infer such an adoption from the unexplained insertion of the word "insurance" into the charter-party, all the rest of the document leading, as I think, to an entirely opposite conclusion.

After what I have said, it is scarcely necessary for me to observe that I give no concurrence to the position that by this charter-party the charterers undertook to effect insurance on the freight for behoof of the shipowners as well as of themselves, and, in consequence of a breach of duty in not insuring, must be held to lose the amount of their advance. To lay such an obligation on the charterers would, I think, require something much more distinct and unambiguous to be inserted in the contract. The sound inference, as it appears to me, is that it was left optional to the charterers to insure or not, as they thought best for their security, the effect of the clause simply being that, if they did insure, the shipowners were to bear the expense. To infer a forfeiture of the advance because insurance was not made would be to insert a penalty in the contract which its terms do not contain, and this I consider to be at variance with established principle. This option to the charterers to insure this special advance for their [166] own security did not in the least preclude an insurance by the owners for the full amount of the freight. It would only do so on the assumption of the advance being out and out payment of the freight *pro tanto*, leaving no interest in the owners but for the balance, to make which assumption would be to beg the question at issue. A policy on the whole freight effected by the owners, and a policy, if otherwise competent, on the special advance, effected by the charterers for their own security, would quite well stand together. This would no doubt be double policies on what in some sense was the same risk; but there is nothing incompetent in this. It is quite consistent that there should be multiplicity of policies, but only one recovery.

I would only, in conclusion, say one or two words regarding the decision in this Court of the case of Leitch *v.* Wilson, as supposed in some quarters to have adopted the rule of English law, that a prepayment of freight by a charterer is always irrecoverable in the event of the vessel being lost. In deciding that case as Lord Ordinary I did not proceed on any contrast between English and American authorities, or adopt either one or other of these. I proceeded simply on the ground that, by the terms of the charter-party, which made the freight of a voyage to Demerara, which usually took six weeks, payable in Glasgow within a month after the vessel sailing, there was a contract created for out and out payment of the freight, whether the vessel reached her destination or not, or, in the ordinary maritime phrase, "lost or not lost." I do not find that, in affirming my judgment, the Court adopted any other ground. I entertain no doubt that parties may so contract as to make payment of the freight by anticipation an absolute and irrecoverable payment, whether the vessel be lost or not; and any judgment, whether in England or here, which proceeds on the footing that such a contract has been made, proceeds on a sound principle of equity, whatever difference of opinion there may be as to the precise construction of the agreement. The same result may be arrived at, as to a partial advance on account of freight,—that is to say, parties may contract that such an advance shall not be repayable if the vessel be lost, though I think very clear words would be required to operate such a result. I do not think that a mere partial payment, made for the accommodation of the owners, without any stipulation on the subject, express or implied, is *eo ipso* irrecoverable; on the contrary, I think that this will just stand in the category of an advance for the creditor's accommodation towards a contingent debt, to be recovered back if the debt

does not become due through the non-emergence of the contingency. The rule which is said to be now settled in the English Courts, that every partial payment of freight is *eo ipso* irrecoverable, I cannot sanction or adopt; and I would consider it a most unsuitable season for its adoption, when the English Courts are expressing their regret for its now irretrievable establishment. We are here in no such predicament. We are not tied down to any such rule, but may decide the case on the principles which legitimately appy to it. The case is not to be determined by the application of any arbitrary or artificial principle. The true rule of decision is a sound regard to the terms of the individual contract. What I consider these to be in the present case I have already explained.

This interlocutor was pronounced:—"Recall the interlocutors of the Sheriff and the Sheriff-substitute, dated respectively the 13th February 1871 and 19th December 1870":—(Then followed a number of findings in point of fact, to the effect contained in the narrative of the case)—"Find that by this action the pursuers, as charterers, claim repayment of their advances to the master at Calcutta, besides interest at 5 per cent. thereon till payment, and 2½ per cent. commission; but find that they do not claim the amount of premiums that would have been required to insure so much of the freight as corresponds to the amount of their advances: Find in law that cash advanced against freight to the master of a ship by the charterers for ordinary ship's disbursements at the port of loading is not in ordinary circumstances equivalent to a pay-[167]-ment of freight, but is to be held as an advance in consideration of the subsequent performance of the contract by the owners and shipmaster by the right delivery of the cargo at the port of discharge; and that if there is a failure of the consideration by the voyage not being accomplished and the cargo rightly delivered at the port of discharge the charterers are entitled, in respect of such failure of consideration, to recover the amount of the said advance from the owners; but find that in the present case the charterers having stipulated that they should be entitled to insure freight at the owner's expense to an amount corresponding to the amount of their advances, must be held to have limited their security for repayment of the advances to the right of set off in settling with the owners if the freight should be earned, and to the amount of the said insurance if ship and cargo should be lost, and to have relinquished or discharged the personal obligation of the owners for repayment in the latter event: Therefore find that the pursuers have failed to establish their claim of repetition against the defenders; but in respect of the agreement and consent of parties, decern against the defenders for payment to the pursuers of £21, 17s. sterling, being the amount of the premium of insurance and commission stipulated by the charter-party to be paid to the charterers in respect of the advance made to the master at Calcutta as aforesaid, with interest thereon at the rate of 5 per cent. per annum from and after the 7th day of July 1864 till payment: *Quoad ultra* assoilzie the defenders, and decern: Find the defenders entitled to expenses both in this Court and the inferior Court; allow accounts thereof," &c.

WILLIAM MASON, S.S.C.—WILLIAM ARCHIBALD, S.S.C.—Agents.

[*Affirmed*, 1873, 11 M. (H. L.) 51.]

No. 35. X. MACPHERSON, 167. 27 Nov. 1871. High Court of Justiciary.—Justiciary Clerk.

JOHN ASHBURY BAILEY, Complainer.—*D.-F. Gordon—Thoms.*
THOMAS LINTON, Respondent.—*Lord-Adv. Young—M'Laren.*

Police Statute 30 *&* 31 *Vict. c.* 58 (*Edinburgh Provisional Order*), *sec.* 99—*Public Place—Jurisdiction.*—A person having been convicted by a Sheriff sitting as a Judge of Police, of a contravention of section 99 of the above Act, by wilfully obstructing a public thoroughfare, brought a suspension of the conviction, on the grounds (1) that the place was not a public thoroughfare, and (2) that as a question of heritable right was raised the Sheriff had no jurisdiction. Suspension *refused*, it being held that the Sheriff had power to decide what was a public thoroughfare in the sense of the Act, and that his judgment was final.

This was a note of advocation and suspension at the instance of John Ashbury Bailey, one of the partners of, and as representing the firm of W. and J. A. Bailey, china-merchants at Bristo Place, Edinburgh, against Thomas Linton, procurator-fiscal of the Edinburgh Police Court.

The note prayed for the suspension of a sentence pronounced by one of the Sheriff-substitutes of Edinburgh, sitting as a Judge of Police, in the Edinburgh Police Court, finding the complainer guilty of a contravention of the "Edinburgh Provisional Order," section 99, in so far as he had wilfully obstructed the public thoroughfare in Bristo Port, by means of six crates, four wooden boxes, and three barrels, and for repayment of a fine of 5s.

In the statement of facts annexed to the note, the complainer stated that the place where the articles complained of were lying was not a public thoroughfare, but a private space or lane, which was available for the purpose of packing and unpacking his goods, and the convenience and suitability of which for the carrying on of his business had been a great [168] attraction in causing him to select the neighbouring premises as his place of business.

The note was further supported on the ground that, as the point raised involved a question of heritable right, the Police Court had no jurisdiction to try the case.

The complainer pleaded;—(1) The proceedings in the Police Court, or at all events the sentence pronounced, was incompetent, in respect that the point determined involved a question of heritable right, and that the said Court had no jurisdiction to try a question of the kind. (2) The sentence complained of was incompetent, illegal, and unwarranted, in respect that the space on which the alleged obstructions were placed was not a public thoroughfare. (3) There being here not merely wilful deviation from the statutory enactments, under which the Police Court acts, but as these enactments do not warrant such a prosecution as that to which the complainer has been subjected, he should have advocation and suspension, and repayment as craved. (4) The complainer never having been guilty of wilful obstruction of a public thoroughfare as alleged should have advocation, suspension, and repayment, as craved.*

Lord Deas.—Under the terms of the Edinburgh Provisional Order the judgment of the Sheriff, sitting as Judge of Police in this case, can only be reviewed by this Court on the ground of malice or corruption on the part of the Judge, or incompetency, including defect of jurisdiction. The objection taken to the conviction is, that the Commissioners of Police dealt with the place libelled as public property, whereas it was private property, and that this involved a question of heritable right which the Judge had no jurisdiction to decide.

There is always a difficulty in interfering in such cases, on the ground of defect of jurisdiction in the inferior Court, where there is nothing on the face of the proceedings to indicate such defect. If, however, there had been gross overstepping of jurisdiction, the Court might have found means to reach it; but in the present case there is no ground whatever for objecting to the jurisdiction. It seems to be thought that the Police Commissioners have no power to regulate nuisances or obstructions upon any street, lane, or close the *solum* of which is not public property. The object of the regulation in the Provisional Order is the convenience and safety of the public, and if there be a street, lane, or close in the city, public, in the sense of being used by the inhabitants regularly, without hindrance, that is quite enough to entitle the police authorities to regulate it so that parties may not be injured by obstructions such as are here complained of.

Now, it is here admitted that the place in dispute has been used by the public since at least 1863. The Act defines "street" as including "thoroughfare," but I do not see that it is confined to "thoroughfare." It embraces also "passage or place." Besides, a very large number of persons may live in a place that is a *cul de sac*; and they are entitled to have their safety protected equally with the other inhabitants.

In place of anything appearing on the face of the procedure here to indicate want of jurisdiction it is rather the other way. One of the things to be proved was that the place where the obstructions were was a public thoroughfare, and we must presume that this was sufficiently proved within the meaning of section 99 of the Provisional Order. If in all cases where obstructions are complained of, and heritable right is

* M'Phail *v.* Nelson, Nov. 20, 1837, 1 Swinton, 583; Lochie *v.* M'Whirter, Feb. 15, 1849, J. Shaw, 161; Graham *v.* Moxey, Feb. 17, 1849, J. Shaw, 168.

pleaded, an investigation of the titles of the parties were to be gone into, the objects of the enactment would be entirely defeated. The suspender, if he is desirous to alter the present state of matters, may be entitled to bring an action in this Court, and have this lane taken out of the category of public places; but it is enough for us, in dealing with the question here raised, that it has been proved to the satisfaction of the Sheriff, as Judge of Police, that **[169]** the place was one which at present came within the description in the section libelled of the Provisional Order.

LORD ARDMILLAN.—My Lords, we are not called upon to decide as to the ultimate interest of the complainer in this matter, in regard to which he may have other opportunities of vindicating what he considers to be his right. All we have to consider is the police proceeding for removal of an obstruction, and, in the first place, whether, by his note of suspension, the complainer is entitled to challenge the decree of the Sheriff.

The Police Commissioners had a duty to discharge in removing obstructions, and had a right to raise before the Sheriff the question whether this lane or court was a public place in the sense of the statute. That question having been settled by the Sheriff, we have to decide whether this suspension is competent. In the case of the Leith Police Commissioners *v.* Campbell, 21st December 1866 (*ante*, vol. v. 247), where the rubric is, "Under the General Police and Improvement (Scotland) Act, 1862, the jurisdiction of the Sheriff as to whether a street is a public or a private street within the meaning of that Act is final and privative," it seems laid down that the Sheriff is entitled to consider such a question, and that his decision thereon is, for the purposes of the statute, conclusive. On a different question between the Leith Commissioners and Mr. Campbell the judgment of this Court was reversed in the House of Lords on 25th February 1870. But this judgment on the finality of the Sheriff's decision for the purposes of the statute was not reversed. Still the complainer may elsewhere, in some competent action, have it found that the court in question is his private property. In this case, however, we are only disposing of an appeal under the Police Act.

LORD NEAVES.—I concur. It would not be desirable that an obstruction, in a reputed public street, could not be removed merely on the allegation that it was a private street, and because the alleged proprietor produced a document in support of his title. The complainer says that the police have been encroaching upon his private rights, and "the last and boldest step taken by the police authorities was the complaint in which the sentence now complained of was pronounced." It is sufficient for the present question that this has been a lane up which many people go. The allegation that the police have for years been encroaching on the owner's rights cannot affect the matter. On the contrary, it is just an admission that the police have for years been treating this passage as a public lane without opposition from the party now objecting. A party should adhere to the maxim *principiis obsta*. It will not do for an alleged proprietor to allow the encroachment, and then to turn round and challenge an act which is the result of it.

As to the meaning of the word "thoroughfare," I am not sure that it is necessary to have an exit at both ends of a passage.

I think that the appeal should be dismissed upon the appellant's own statement.

LORD JUSTICE-CLERK.—I concur in the opinion expressed by your Lordships.

Two objections are brought against this conviction—(1) that in point of fact the place where this offence was said to have been committed is not a thoroughfare; and (2) that the Sheriff had no jurisdiction to try the case, in so far as it involved a question of heritable right.

It is impossible for us to entertain the first of these objections, as we would then be reviewing the judgment of the Sheriff upon a matter of fact. With regard to the second objection, it is plain that the question raised by the defence pleaded to him was one which it was necessary for the Sheriff to decide in order to exercise the powers conferred upon him. He must have the power of expiscating everything necessary to the carrying out of his jurisdiction. I think, therefore, that the appeal should be dismissed.

THE COURT refused the suspension.

LINDSAY MACKERSY, W.S.—JOHN RICHARDSON, W.S.—Agents.

No. 36. X. MACPHERSON, 170. 30 Nov. 1871. 1st Div.—Lord Jerviswoode, B.

BIRKETT, SPERLING, AND COMPANY, Pursuers.—*Shand*—*Trayner.*
ENGHOLM AND COMPANY, Defenders.—*Watson*—*A. T. Innes.*

Insurance—Contract—Sale.—An agreement for the purchase of a cargo of oats, to be shipped by the *Ems*, a German vessel, on her arrival at Archangel, stipulated that the seller should defray "cost, freight, and insurance to London, or the east coast of Great Britain, according to charter-party; . . . . payment to be made in London on handing invoice, and in exchange for shipping documents." Soon after the date of the agreement war was declared between France and Germany. The purchaser maintained that the seller was bound under the contract to insure against war risks, and the seller having repudiated the obligation, the purchaser withdrew from the agreement. *Held* (1) that the seller was bound to effect an insurance against war risks; and (2) that having refused to do so, the purchaser was entitled to rescind the contract.

On 23d June 1870 Messrs. Birkett, Sperling, and Company, merchants in London, acting for Messrs. Brandt, Sons, and Company, sold to Messrs. Engholm and Company, merchants in Leith, a cargo of Archangel oats. The contract was embodied in bought and sold notes in the following terms:—"Bought through Birkett, Sperling, and Co. of London, selling by order, and for a/c of their principals—A cargo of about 1100 quarters, or whatever the ship may carry, of Archangel oats, of fair average quality of the season, to be shipped by the *Ems*, 3/3, 1, 1, 110 tons register, on her arrival at Archangel, at the price of 23/, say twenty-three shillings, cost, freight, and insurance to London, or the east coast of Great Britain, according to charter-party, for every 304 lb. weighed out, sound or damaged, at port of discharge. Payment to be made by cash in London, on handing invoice, and in exchange for shipping documents, less interest at 5 per cent. per annum for unexpired portion of three months from date of bills of lading, and any surplus above or deficiency below the quantity provisionally invoiced to be settled after arrival of the oats at port of discharge. ENGHOLM & Co."

On 15th July 1870 war was declared between France and Prussia. In the meanwhile some negotiation took place between the parties with a view to an abandonment of the contract, which Engholm and Company offered to cancel for £100; and on 21st July Birkett, Sperling, and Company wrote to them—"When we can offer you £100 profit on the *Ems*, we will let you know. Utmost value 24s. 9d., 25s. less 10°/₀, and with war risk." On the day following, Engholm and Company wrote to Birkett, Sperling, and Company—"Your friends (Messrs. Brandt) will have to insure war risk on the oats per *Ems*, the cargo being sold c. i. f.,* and being shipped by a belligerent vessel, is not c. i. f. unless war risk be covered. Have you heard of the arrival of the *Ems*?"

To this letter Birkett, Sperling, and Company replied on the 23rd July—"Dear Sirs,—Your favour of the 22d inst. duly to hand. As regards the *Ems*, Messrs. Brandt are not at all bound to insure against war risk. They only sell as usual, including sea insurance, and not including risk of capture and seizure, &c."

On 28th July Engholm and Company wrote to Birkett, Sperling, and Company, saying—"We cannot look upon a German vessel (the *Ems*) as being covered by insurance unless war risk is included"; and on the 29th July Birkett, Sperling, and Company, in answer, wrote to say—"*Ems.*—These oats are sold as usual, without war risk being covered."

[171] Thereafter some further correspondence ensued, in which the negotiation to cancel the contract was renewed; but in the meanwhile the *Ems* arrived at Archangel, and after the cargo was shipped proceeded on her voyage to Great Britain.

On 1st September 1870 Birkett, Sperling, and Company wrote to Engholm and Company, enclosing the invoice for the oats, amounting to £1162, 4s. 2d., and requesting to be informed where they should apply for payment of that sum, as against

* Cost, insurance, freight.

shipping documents, in terms of the contract. To this letter Engholm and Company replied on 2d September saying—"We are in receipt of your letter of yesterday, enclosing invoice of cargo oats per *Ems*, regarding which our friends write thus:—We have yours of date, handing invoice of the cargo oats p. *Ems*; but as the sellers don't say they have covered war risk, we cannot pay till such is done. A sale c. i. f. covers all risk, and several policies we had current when the cargo per *Ems* was purchased had the war clause in, and completely covered capture, &c. When this is done we are prepared to pay; if not, we must only wait until the vessel arrives at port of destination. We notice bill of lading is dated 19th August, and in this case we do not consider documents have been forwarded in course of post, and we do not consider ourselves bound to accept the cargo now. We have sold the cargo oats upon exactly the same terms that we bought it from you. Please answer us about the insurance."

This letter Birkett, Sperling, and Company answered on 3d September as follows:—"Yours of the 2d inst. duly to hand, and, noting contents, we sent copy of your letter of that date respecting the *Ems* to the original sellers, Messrs. Brandt and Co., whom we have seen here to-day. As regards insuring the war risk, they maintain that they are not bound to do this; but they are willing to leave this question to be settled by arbitration, say by the decision of two London corn-factors, or their umpire; and as payment of invoice amount cannot be delayed any longer, we will thank you to telegraph us on Monday morning saying that you will agree to abide by such decision, and appointing some London factor to act on your behalf, in conjunction with the one whom Messrs. Brandt will appoint. In the meantime, we beg to give you notice that the cargo is entirely at your risk. Messrs. Brandt say that, with the present irregularity, letters from Archangel are generally twelve or thirteen days on the way, and the invoice was handed in the usual course. In reply to what you state, that you have had policies including war risk before the war broke out, this may be; but we do not think this is anything for you to go upon, as we know for a fact that a good many of the London insurance companies invariably stipulate in their policies 'free of war risk,' even in times of peace. As before mentioned, the documents must be taken up and invoice paid for without delay; and as we think Mr. Brandt's proposition is a very fair one, we await your telegram on Monday morning without fail (to say that you leave the question of war risk to be decided by arbitration, and that you will at once, after decision is given, take up documents); and, in conclusion, we can only say that we are sorry that in this our first transaction you should give us so much trouble and make any difficulties."

On 5th September Engholm and Company replied—"Your letter of 3d inst. to hand, and this morning telegraphed to you as follows:—'Are prepared to take up *Ems* documents when sellers insure war risk, being sold c. i. f., or on arrival at destination.' We bought the cargo c. i. f., so it must be insured against all risks, as at that time Lloyd's policies had war risk clause inserted. We agree to take up documents on war risk being covered by sellers."

[172] On the same day, Birkett, Sperling, and Company wrote to Engholm and Company, proposing that the question as to insurance against war risk should be referred to arbitration; and they also wrote to their principals, Messrs. Brandt, Sons, and Company, in these terms—"We beg to acknowledge receipt of your letter of 3d inst., and, noting contents, we are prepared to take up documents per *Ems* upon your presenting same, with policies covering war risk; and meanwhile we decline to acknowledge any responsibility on our part in case the vessel is captured. We have just received the following telegram from our buyers:—'Are prepared to take up *Ems* documents when sellers insure war risk, being sold c. i. f., or on arrival at destination'—which please note; and from inquiries which we have made to-day we believe our buyers are quite justified in the course which they adopt."

On 6th September Engholm and Company again wrote to Birkett, Sperling, and Company as follows:—"We have yours of yesterday, and note contents. Had there been any difference, we would most willingly have referred it; but we only ask what we stipulated for, viz. insurance; and if war risk is not covered, we hold the cargo is not insured. All we ask is a Lloyds' policy—same as those we held when the contract was entered into; and unless you give this by return of post we must decline to take the cargo. We regret that you should for a moment withhold war risk, and we decline any responsibility whatever about the cargo till the documents are handed over to us complete."

Thereafter, on the 8th September, Birkett, Sperling, and Company insured the cargo against war risk, and proposed that the premium (£60, 10s. 6d.) should be paid equally by both parties. This proposal, however, was declined, and Birkett, Sperling, and Company then offered to deliver up the shipping documents, including the policy of insurance against war risk, on receiving payment of the invoice price of the oats; but to this also Engholm and Company refused to agree.

The *Ems* arrived at Fraserburgh on 23d September 1870, and Engholm and Company having refused to take delivery of the cargo, it was agreed, reserving the legal rights of the parties, that the vessel should proceed to London, and that the oats should be sold there to the best advantage. The nett proceeds arising from the sale, after deducting freight, insurance, &c., amounted to £807, 9s. 3d., being £355, 1s. 11d. less than the invoice price, and to recover this sum Birkett, Sperling, and Company raised the present action, and pleaded;—(1) The defenders having wrongfully refused to take delivery of the said cargo, and pay the price thereof, are liable in the loss thereby occasioned. (2) The pursuers having suffered loss on said cargo to the extent of the sum sued for, through the fault of the defenders, are entitled to decree against the defenders for said sum.

The defenders pleaded;—(3) The pursuers, being themselves in breach of the contract libelled, are not entitled to maintain the present action. (4) The defenders were entitled to hold the said contract at an end in respect of the failure and refusal of the pursuers to implement the same in manner alleged by the defenders, to their loss, injury, and damage.

A joint minute was lodged in process, by which the parties agreed—"(4) That in the event of its being found that the pursuers are entitled to succeed in this case, and of decree being pronounced in their favour, the principal sum for which such decree shall be given is £294, 11s. 5d., which is held as the ascertained difference between the invoice price of the oats in question and the amount realised by their sale under the agreement of parties; and (2d) in the event of it being found that the sellers were not bound to tender a policy including insurance against takings at sea or [173] loss by hostile capture and belligerent seizure, then and in that event the said sum of £294, 11s. 5d. will fall to be increased by £30, 5s. 3d., being the amount of one-half of the premium on the policy. (6) That the words 'cost, freight, and insurance,' occurring in the contract, signify that the price includes freight and insurance on the cargo to its port of discharge, and that the policy of insurance falls to be effected by the sellers, and tendered to the buyers along with the shipping documents. (7) That the market for oats of the description contracted for fell during the period betwixt 1st and 22d September 1870."

The Lord Ordinary pronounced this interlocutor:—"Finds (1st) that the defenders have failed to establish that the pursuers were bound to effect an insurance of the nature and description specified in the answer for the defenders to the third head of the condescendence for the pursuers, of the cargo of oats shipped on board the *Ems* at Archangel, as set forth on the record; or that the pursuers, by their failure to effect such insurance when the same was first demanded by the defenders, committed any breach of the contract of sale of said cargo between the said parties, as the same is contained in the bought and sold notes referred to in the second head of the said condescendence, and in the answers thereto: Finds (2) that the defenders were, notwithstanding such failure to insure on the part of the pursuers, bound to take delivery of the said cargo in terms of the said contract; and that the defenders, having refused so to take delivery, are liable for the loss arising to the pursuers upon the sale of the said cargo, which was eventually carried through by them in terms of arrangement between the parties: Therefore, and with reference to the foregoing findings, and to the terms of the said joint minute, Finds (3d) that the defenders are resting and owing to the pursuers in the sums of £294, 11s. 5d., and £30, 5s. 3d., which are set forth in the fourth article of the said minute, amounting together, the said sums, to the sum of £324, 16s. 8d. sterling, together with interest thereon at 5 per centum per annum from the 19th of November last 1870, and decerns against the defenders for said sum and interest accordingly: Finds the defenders liable to the pursuers in expenses," &c.

The defenders reclaimed, and argued;—By the contract between the parties the sellers were bound to insure the cargo, and although the agreement was entered into in time of peace, they must be held to have undertaken the risk of future war, that being a risk which is incidental to every policy of insurance, unless excepted. Reference was

made to the forms of policy in the English books on marine insurance; to an American case, Levy, 4 Greenleaf's Rep. 180; and to *dictum* in Eden *v.* Parkison, Doug. 732, *per* Lord Mansfield, cited in Marshall on Marine Insurance (5th edit.), p. 310.

The pursuers argued;—The contract having been entered into when there was no war risk, they were not bound to insure against it. But even if the pursuers' obligation did extend so far, the correspondence showed that the defenders had passed from their objection. At all events, the pursuers were not obliged to transmit the shipping documents and policy of insurance to the defenders prior to the arrival of the vessel. The right to demand payment of the cargo before delivery, and on transmission of the invoice and shipping documents, was a privilege in favour of the sellers; and having offered to deliver the oats on the arrival of the vessel, along with the documents and policy of insurance, the defenders were bound to take delivery. It was admitted that the cargo was in all respects conform to contract.

At advising,—

LORD PRESIDENT.—The summons in this action concludes for payment of [174] £355, 1s. 11d., which is the difference between the contract price and the sum realised by the sale of a cargo of grain, of which the pursuers maintain that the defenders refused to take delivery in violation of the contract between them. The action, therefore, is practically an action of damages for breach of contract, and this is made very clear by the terms of the pursuers' first plea in law, viz., that "the defenders having wrongfully refused to take delivery of said cargo, and pay the price thereof, are liable in the loss thereby occasioned." The loss has been ascertained by the sale of the cargo by consent of both parties, and, as I already said, is the difference between the contract price and the sum actually realised.

The contract itself, which is dated 23d June 1870, bears that the defenders have bought through the pursuers "a cargo of about 1100 quarters, or whatever the ship may carry, of Archangel oats, of fair average quality of the season, to be shipped by the *Ems*, 3/3, 1, 1, 110 tons register, on her arrival at Archangel, at the price of 23/, say twenty-three shillings, cost, freight, and insurance to London or the east coast of Great Britain, according to charter-party, for every 304 lb. weighed out sound or damaged at port of discharge. Payment to be made by cash in London on handing invoice, and in exchange for shipping documents, less interest at 5 per cent. per annum for unexpired portion of three months from date of bills of lading, and any surplus above or deficiency below the quantity provisionally invoiced to be settled after arrival of the oats at port of discharge." Now, the first thing to be observed is, that this is not an ordinary contract of sale and delivery, but a sale of prospective cargo to be carried by a vessel which had not at the date of the agreement arrived at the port of loading. But when a cargo is sold prospectively in this way there can, I think, be no doubt that it is the seller's duty, whenever the cargo is shipped, to transmit the bill of lading to the purchaser, in order that he may as soon as possible be vested with the property.

The seller's primary duty is not to deliver the cargo at the port of discharge, but to send the shipping documents to the purchaser, and that is made very clear in this case, because the contract expressly provides for payment of the price by cash in London, on receipt of the invoice of the cargo, and in exchange for shipping documents. The cargo was sold at 23s. a quarter, including cost, freight, and insurance to London, and it is perfectly obvious, therefore, that one of the shipping documents to be furnished *quam primum* by the pursuers to the defenders was a policy of insurance covering the risks of the voyage.

I have made these observations to dispose of what seemed to me a most untenable argument on the part of the pursuers, to the effect that the defenders were bound to take delivery on the arrival of the vessel, whatever might have become of the shipping documents.

Now, it so happened that at the date of this contract there was no war upon the Continent, but it broke out shortly afterwards, having been declared between France and Prussia upon the 15th of July 1870, and the pursuers seem to have thought that in consequence of this change of circumstances they were not bound to give the defenders a policy in the ordinary form, which would protect the cargo against all risks, including, of course, the risk of capture. This appears at a very early period of the correspondence which passed between the parties. The defenders had offered to cancel the contract for a profit of £100, and with reference to that proposal the pursuers on

21st July 1870 wrote to say—"When we can offer you £100 profit on the *Ems* we will let you know. Utmost value 24/9; 25/, less 10°/₀, and with war risk," clearly implying that they considered the interest of the defenders was diminished by not being protected against war risk. In answer to this letter Engholm and Company say—"Your friends (Messrs. Brandt) will have to insure war risk on the oats per *Ems*, the cargo being sold c. i. f."—*i.e.* cost, insurance, and freight—"and being shipped by a belligerent vessel is not c. i. f. unless war risk be covered." Here, then, a dispute arose between the parties, which, on the first statement of it, does not appear to admit of much doubt as to who was in the right. When a prospective contract of sale binds the seller to insure the thing sold, he must be held to guarantee indemnity to the purchaser against all risks ordinarily covered by insurance. [175] But all policies of insurance in the usual terms contain among others a specification of what are known as "war risks." No one can doubt that. There are occasionally, it is true, policies in which a variation is made upon the clause protecting against risk, but these are special cases, and all such variations from the usual style require express stipulation, and it would be just as reasonable for an underwriter to say that he was not liable for war risks, because he insured in time of peace, as it is for the pursuers to maintain that plea.

There was, therefore, a dispute before the cargo was put on board as to the duty of the pursuers, and in that dispute they were, I think, entirely wrong, and the defenders were quite right. Then what followed? On 23d July the pursuers wrote to the defenders—"As regards the *Ems*, Messrs. Brandt are not at all bound to insure against war risk. They only sell as usual, including sea insurance, and not including risk of capture and seizure."

There can be no doubt, therefore, about the proposition they were maintaining, even so early as at this date; but I think, at the same time, they came to feel they were maintaining what they could not make good, because they say on 5th September 1870—"We are prepared to take up documents per *Ems* upon your presenting same, with policies covering war risk; and, meanwhile, we decline to acknowledge any responsibility on our part in case the vessel is captured. We have just received the following telegram from our buyers:—'Are prepared to take up *Ems* documents when sellers insure war risk, being sold c. i. f., or on arrival at destintion,' which please note; and, from inquiries which we have made to-day we believe our buyers are quite justified in the course which they adopt."

But although they were aware of that, they nevertheless persist in their objection and refuse to fulfil their duty, and what they knew to be their duty under the contract.

It would appear that in the meanwhile the cargo had been shipped, and that notice of the fact was received by the pursuers on or before 1st September 1870, for we have a letter from them to the defenders of that date, in which they say—"We beg enclosed to hand you invoice of oats shipped per *Ems*, sold to you as per contract dated 23rd June 1870, amounting to £1162, 11s. 2d. due in cash here on Saturday the 3d inst., and will thank you to inform us where we shall apply for this amount here against documents." The invoice sent with this letter includes freight, cash advanced, and insurance against sea risk as deductions from the value of the cargo, and there is also a deduction of £12, 17s. 6d., being interest on the contract price at 5 per cent., to which the purchasers were entitled in terms of the agreement as discount for the unexpired period of three months from the date of the bills of lading. Now, the defenders acknowledged receipt of this letter and the invoice on the following day, the 2d September, saying—"We have yours of date, handing invoice of the cargo oats p. *Ems*, but as the sellers don't say they have covered war risk, we cannot pay till such is done." That is to say, of course, that in consequence of the dispute they required to be satisfied of the war risk having been covered before proceeding to implement their part of the contract. Then they go on to say—"A sale c. i. f. covers all risk, and several policies we had current when the cargo per *Ems* was purchased had the war clause in, and completely covered capture, &c." Then follows a passage, founded upon by the pursuers for two purposes, which is in these terms—"When this is done we are prepared to pay; if not, we must only wait until the vessel arrives at port of destination." The pursuers, in the first place, contend that these words show that their reading of the contract is that which the defenders put upon it at the date of this letter, and that the right to demand an immediate cash settlement on sending the invoice, and before delivery of the cargo, was a privilege in favour of the seller. But the very next

sentence shows that this was not the defenders' view of the matter, because they there say—"We notice bill of lading is dated 19th August, and in this case we do not consider documents have been forwarded in course of post, and we do not consider ourselves bound to accept the cargo now." Here then the defenders are maintaining that because the shipping documents had not been sent in course of post they were not bound to go on with the contract. That is, I think, too [176] strict a construction of the agreement, but still it completely disproves the pursuers' assertion that at this time the defenders were adopting their view of the matter, for it very plainly shows that they considered they were entitled to delivery of the shipping documents *quam primum*, and that until these documents, including a policy of insurance against war risk, were handed over to them, they did not hold themselves bound by the contract. The second purpose for which the pursuers found upon the passage in this letter which I last read, is to show that the defenders were willing to accept delivery of the cargo on the arrival of the vessel, as being fulfilment of the pursuers' part of the contract. But I do not think that is the fair meaning of the words used. On the contrary, I think the defenders evinced very plainly their intention either to rescind the contract altogether unless the pursuers affected an insurance against risk of capture, or to enforce it against them in the event of the vessel arriving safely at the port of destination. That this was their meaning is confirmed by a subsequent letter which they wrote to the pursuers on the 5th September, in which they speak alternatively either of taking up the *Ems* documents when the sellers insure against war-risk or on arrival at destination.

On the 3d of September the pursuers had proposed to refer the question between them and the defenders to arbitration, stating that "In the meantime we beg to give you notice that the cargo is entirely at your risk"; and in the same letter they say—"As before mentioned, the documents must be taken up and invoice paid without delay," &c. That, however, the defenders declined to do, and on the 6th of September they very distinctly intimate their intention to stand upon their legal rights under the contract—"Had there been any difference, we would most willingly have referred it, but we only ask what we stipulated for, viz., insurance; and if our risk is not covered, we hold the cargo is not insured; all we ask is a Lloyd's policy, same as those we held when the contract was entered into, and unless you give this by return of post we must decline to take the cargo. We regret that you should for a moment withhold war risk, and we decline any responsibility about the cargo till the documents are handed over to us complete." The only question, therefore, between the parties was whether the pursuers, having contracted to insure the cargo, were bound to insure against the risk of capture, and on that point I have already expressed my opinion. I hold that there was a clear breach of contract on the part of the pursuers, and that the defenders were consequently entitled to rescind the contract. But then the pursuers contended that the defenders afterwards consented to proceed with the contract. Of that, however, I can find no evidence. No doubt there were negotiations between the parties with a view to a settlement extra-judicially, but, as the pursuers themselves state on record, the defenders declined to recognise any obligation under the contract on the arrival of the vessel, and long before that time they had distinctly announced their intention to cancel the agreement. In these circumstances, if the defenders were, as I think, entitled to rescind the contract, I can see nothing which has occurred to prevent them from doing so, and I am therefore for altering the Lord Ordinary's judgment.

LORD DEAS concurred.

LORD ARDMILLAN.—I have no difficulty in this case. The words of the bought and sold notes are clear. I need not again read them. The meaning of them is admitted. The agreement of parties, which we must construe as now explained by the minute of admissions, was, that the policy of insurance was to be effected by the sellers, who are the pursuers of the action, and was to be tendered to the buyers, the defenders, along with the shipping documents. It is manifest that, there being no special stipulation in regard to the nature of the policy of insurance, it was intended to be an insurance of the usual character known in mercantile practice, and of the usual scope and comprehensiveness.

Now, I have no doubt that, according to sound principle, and to the settled equity of commercial and maritime law, capture by enemies in war is within the usual scope and comprehensiveness of a British policy of marine insurance. [177] War, with its incidents, is a risk within the policy; and the insurers take the risk of war arising after

the date of the contract. This is the law laid down by all the best authorities in this country and in America. But it is unnecessary to quote other authorities, for the authority of Lord Mansfield in the case of Eden *v.* Parkison is conclusive on such a point. There can be no higher exposition of the equities of commercial and maritime law than the judicial opinion of Lord Mansfield.

Therefore the pursuers, as sellers, were bound to insure, and to insure against the war risk as well as against the storm risk, or the other perils of the sea.

It is scarcely less unreasonable to say that war risk is excepted when the contract is made in time of peace than it would be to say that storm risk is excepted when the contract is made in time of calm.

On the refusal of the pursuers to effect this insurance, including the war risk, which they were bound to do, I think that the defenders were entitled to cancel the contract in respect of the pursuers' failure to fulfil one of the contract obligations; and they did declare the contract at an end.

It has been argued by Mr. Shand that the defenders afterwards agreed to an arrangement that an insurance against all perils, including war, should be effected at mutual expense, each party paying half the premium. I think that no such arrangement has been proved, and none such has been alleged. Indeed, in the 4th article of the condescendence, the pursuers distinctly allege the contrary; and in the pursuers' letter of 10th September 1870 they make the same averments. That view, taken ingeniously, but without foundation, by Mr. Shand, must accordingly be set aside.

The only remaining point to which it is necessary to advert is, that the pursuers plead that they were entitled to withhold the shipping documents till the arrival of the ship at the port of discharge, and they also pleaded that they were not even bound to indorse the documents. This is, in my opinion, a plea which raises a most serious question, on which important results might depend. I have given to it the deliberate attention to which Mr. Shand's argument was well entitled. But I have, without difficulty, arrived at the conclusion that it is not well founded. The transmission of the shipping documents was the first duty of the sellers. No authority in support of the pursuers' plea, either by institutional writers, or in decision, has been quoted; and it is, in my opinion, contrary to the true principles and the settled understanding of commercial law and practice. We have been referred, on both sides, to the correspondence. I have read this correspondence carefully. There is nothing in it which creates an exception—nothing which, to my mind, prevents the application to this case of the principles of law and equity to which I have adverted. At the same time I think that the defenders have also been somewhat too contentious.

Whether the pursuers were bound in a time of peace to insure against the war risk was a fair, though not a doubtful question, which has been well raised and argued. I think that the pursuers were bound so to insure. They failed to do so. But that question being once settled, this case is at an end. It can only be decided in favour of the defenders. There is no other ground stated or urged on which the pursuers can possibly succeed.

I am accordingly of opinion that we should recall the interlocutor of the Lord Ordinary, and assoilzie the defenders.

Lord Kinloch was absent.

The following interlocutor was pronounced:—"Recall the interlocutor: Sustain the third and fourth pleas in law stated in defence: Assoilzie the defenders from the conclusions of the summons, and decern: Find the defenders entitled to expenses, and remit," &c.

Scarth & Scott, W.S.—Murdoch, Boyd, & Co., S.S.C.—Agents.

No. 37. X. MACPHERSON, 178. 30 Nov. 1871. 2d Div.—Lord Mackenzie, R.

JOSEPH THOMPSON, Pursuer.—*Scott—Guthrie.*
THE PAROCHIAL BOARD OF INVERESK AND JOHN GEORGE MUIR, Defenders.
—Sol.-Gen. Clark—Macdonald—Asher.

Poor-Law Amendment Act, 1845, *sec.* 86—*Jurisdiction.—Held* by Lord Mackenzie, and acquiesced in, that an action of reduction of the election of an inspector of poor did not fall under the 86th section of the Poor-Law Act, enacting that "all actions on account of anything done in the execution of this Act shall be brought before the Sheriff-court, and every such action shall be commenced within three calendar months after the fact committed.

Mandate—Proof, Parole—Delivery—Reduction.—A., a candidate for the office of inspector of poor, obtained from certain members of the parochial board mandates to attend the meeting at which the election was to take place in favour of B., and in his absence of C., and in his absence of D. A. left these mandates with D., to be used for him, but he subsequently withdrew from the candidature. D. then became a supporter of X., another candidate. At the meeting for the election D. left the mandates with another person, to be used as votes for X. When the mandates were presented, B., who supported Y., a rival candidate, claimed the right of voting upon them, and voted as mandatary in favour of Y., who was declared duly elected. In a reduction of the election, upon the ground that it had proceeded upon mandates illegally and fraudulently obtained and used, the above facts were proved by parole, and the Lord Ordinary held that the mandates had been properly used. The pursuer having reclaimed, *held* that it was not competent to prove by parole that the mandates were granted for a special purpose, and that they had been improperly used by B.

Mandate—Writ—Erasure.—Held (1) that partly printed mandates, granted for a meeting of a parochial board to be held on 2nd August, "or any subsequent date to which such meeting may be adjourned, for the election of an inspector of poor in room of," &c., were validly tendered, and ought to have been admitted at a subsequent meeting of the board held for that purpose on September 5, although no meeting had been held on the 2d August, and no adjournment had then taken place; (2) That mandates bearing to be for a meeting to be held on August 16th were valid, although the "16" was written on an erasure, the date of the meeting not being essential.

Joseph Thompson brought this action of declarator and reduction against the Parochial Board of Inveresk, and against John George Muir, who had been declared duly elected inspector of poor and collector of poor-rates for that parish, concluding, *inter alia*, for declarator that the pursuer was duly elected inspector of poor and collector of poor-rates of said parish from and after the 5th September 1870, the date of a meeting of the parochial board at which he was duly and legally elected and appointed to the said offices; and also for reduction of the minutes of the meetings of the board on 5th September and 12th September 1870, in so far as they excluded or might be held to exclude the pursuer from obtaining decree in terms of the declaratory conclusions of the summons, and for reduction of the election of the defender Muir.

The pursuer averred;—In the course of taking the vote at the meeting of 5th September, twenty-five mandates, which had been obtained by a Mr. Bolton, who at one time had been a candidate for the office, for the purpose of being used in his own favour, "were illegally and fraudulently taken possession of by Dr. Sanderson, and recorded in favour of the defender, John George Muir. These mandates had been procured by Mr. Bolton, who retired from the contest on or before the 16th day of August 1870, and had been entrusted by him to Mr. Alexander Chalmers, manager of an asylum at Musselburgh. They were printed, and addressed to Dr. Sanderson, whom failing, to Bailie Peter Miller, whom failing, to Mr. Chalmers. Dr. Sanderson was a supporter of the defender, Muir, and [179] repudiated having given any authority to put his name on the mandates, both at this meeting and previously. Ex-Bailie Miller was not at the meeting. The said mandates had accordingly been delivered by Mr. Bolton to Mr. Chalmers, or obtained from the mandants by Chalmers, as acting for Bolton, for

the purpose of their being used in his (Bolton's) behoof. It was not intended by the mandants that they should be used in favour of any other than Bolton, and neither Mr. Chalmers nor any other person had any authority so to use them. Mr. Chalmers had occasion to leave the meeting, and handed these mandates to Mr. William Doleman, temperance hotel-keeper, Musselburgh, or to Mr. Richard Sandilands, plumber, Musselburgh, in order to get them recorded in behalf of the defender, John Fernie. Before the vote, Mr. Doleman handed them to Mr. Edwards, who was acting as clerk of the meeting, with an explanation of the circumstances, and a request that they should be recorded in favour of Fernie. Dr. Sanderson lifted said mandates off the table, and notwithstanding he knew, and was then and there informed that they were handed to the clerk by Mr. Doleman to be used for the defender Fernie, and that they had not been delivered to him, illegally and fraudulently used said mandates by getting them recorded in favour of Mr. Muir. Various members of the board, amongst others, Mr. Richard Sandilands, plumber, Mr. Doleman, and ex-Bailie Fearns, remonstrated and protested, before they were recorded, against the use of said mandates for the defender, Muir; but Mr. Edwards failed to record said remonstrance and protest."

A record having been made up and closed, a plea was added, on the suggestion of the Lord Ordinary, that "under section 86 of the said statute" (the Poor-Law Amendment Act) "the present action is incompetent." After hearing counsel, the Lord Ordinary (8th July 1871) repelled this plea, and, before answer, allowed the parties a proof of their respective averments, and to the pursuer a conjunct probation.*

Proof was accordingly led before the Lord Ordinary, in which the following facts were established:—A vacancy having occurred in the office of inspector of poor and collector of poor-rates of the parish of Inveresk, the pursuer and a number of others became candidates. Notice was given that the half-yearly meeting of the board would be held on August 2, 1870, when the vacant offices would be filled up. When the members of the board assembled on that day no business was transacted and no minute was written, because it appeared that an error had occurred in the publication of the notices. Notice was again given that the half-yearly meeting would be held, *inter alia*, for the said purpose, on August 15th; but a subsequent notice was issued fixing the meeting for the 16th August. A meeting was held on that day, when it appeared that there were eighty candidates. A committee was appointed to examine the [180] applications and testimonials, and to report to an adjourned meeting on September 5th. At that adjourned meeting the committee submitted a report which recommended a short leet, consisting of the defender Muir and another. Motions were made that four persons, the pursuer, the defender, John Fernie, and James Hooker, respectively, should be appointed. Three votes were taken, the persons having the lowest number of votes being struck off each time, with the following apparent result:—First vote—Muir, 50; Fernie, 45; Pursuer, 51; Hooker, 38. Second vote—Muir, 51; Fernie, 46; Pursuer, 87. Third vote—Pursuer, 97; Muir, 77. A committee of scrutiny was appointed to report to an adjourned meeting on 12th September. This committee made an elaborate report, the result of which was that they held the defender Muir to have had 54, and the pursuer to have had 49 votes, on the third and last vote. Muir was accordingly declared duly elected.

It further appeared that a number of mandates had been obtained by Mr. Bolton, who was at one time a candidate for the vacant appointments, to be used in his favour at the meeting of the board, if he went forward, but he never went forward, having retired before the beginning of August. These mandates were in favour of Provost Sanderson, or, in his absence, of Peter Miller, Esq., or, in his absence, of Alexander Chalmers, Esq. Chalmers

* "NOTE.—The Lord Ordinary is of opinion that the 86th section of the Poor-Law Act does not exclude reduction in this Court of the illegal election of a person as inspector of poor, which is averred to have taken place under colour, but contrary to the provisions of that statute; he considers that the section applies to actions for reparation on account of irregularity or wrongful proceedings done in the execution of the Act, which may be met, to use the words of the section, by a 'tender of sufficient amends,' and not to such an action as the present.—Fergusson *v.* Malcolm, Feb. 14, 1850, 12 D. 732; Mackay *v.* Beattie, July 19, 1860, 22 D. 1486.

"The Lord Ordinary is not prepared to sustain at present the defender's plea, that the pursuer has set forth no relevant or sufficient statement to warrant the conclusions of the action, and he thinks that a proof, before answer, should be allowed."

was a partisan of Bolton's, and had informed him that Provost Sanderson was favourable to him, in consequence of which Bolton got the mandates drawn out in the way they were framed. Bolton stated that he had left the mandates with Chalmers with the understanding that if he went forward as a candidate for the offices they should be used in his behalf, and that the mandates had been granted by the mandants for that purpose. Chalmers, having become a supporter of the candidate Fernie, brought these mandates to the meeting of the parochial board, intending to use them on his behalf. He left the meeting, however, having handed them to a person named Doleman, informing him that they were intended to be so used. They were by him handed to the clerk of the meeting, with a request that they should be used in favour of Fernie. Instead of recording them in favour of Fernie, the clerk (Mr. Edwards) informed Provost Sanderson that the mandates were addressed to him in the first place. Provost Sanderson took possession of them, amidst some confusion, and, in spite of remonstrances and protests from several of those present, got them recorded in favour of the defender Muir.

The pursuer maintained that the scrutiny committee had erroneously disallowed a number of votes tendered on his behalf, because the mandates were granted for a meeting to be held on 2d August 1870, or on any subsequent date to which said meeting might be adjourned. These mandates were partly written and partly printed, and were in the following terms:—"Sir,—You are hereby authorised to attend, vote, and act for me at a meeting of the parochial board of the parish of Inveresk, to be held on the 2d of August 1870, or any subsequent date to which said meeting may be adjourned, for the election of an inspector of poor and collector of poor-rates, in room of the late Mr. Andrew Symons, with the same powers as belong to,—Sir, your most obedient servant,

"To"

In the course of the proof an objection was taken by the defender to thirty-three mandates which had been used in favour of the pursuer, on the ground that the date of the meeting for which they bore to be granted was partly printed on an erasure. The mandates described the meeting as being called for the election of an inspector of poor—the date 15th August having been changed to 16th August.

The Lord Ordinary pronounced the following interlocutor:—"Finds [181] that the defender, John George Muir, is the duly elected inspector of poor and collector of poor-rates of the parish of Inveresk; assoilzies the defenders from the conclusions of the libel, and decerns: Finds the pursuer liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor to tax, and to report." *

---

* "NOTE.—According to the report of the scrutiny committee, appointed at the adjourned meeting of the parochial board of Inveresk, held on 5th September 1870, for the election of an inspector of poor and collector of poor-rates, the defender, Mr. Muir, had fifty-four votes, and the pursuer, Mr. Thompson, forty-nine. Of these fifty-four votes in favour of Mr. Muir the pursuer maintains that fourteen votes given by Dr. Sanderson on mandates—the four first votes stated in the second head of the list, No. 13 of process—and the vote of Mr. Spence, mentioned in article 13 of pursuer's condescendence, being in all nineteen votes, are illegal and invalid, and fall to be disallowed.

"The Lord Ordinary is of opinion that the pursuer has failed to establish that there is any good objection to the votes given by Dr. Sanderson on the mandates granted in his favour, in so far as sustained by the scrutiny committee. These mandates were obtained from the granters by Mr. Bolton, an intended candidate. They bear to be in favour of Dr. Sanderson, whom failing, Mr. Miller, whom failing, Mr. Chalmers. These mandates were delivered by Mr. Bolton to Mr. Chalmers, one of the mandataries. Mr. Chalmers took these mandates to the meeting for the election of an inspector and collector held on 5th September 1870, and as he was obliged to leave the meeting, he delivered them to a person of the name of Doleman, with instructions to hand them to the clerk of the meeting, and to get them recorded at the voting in favour of Mr. Fernie, one of the candidates. Mr. Doleman, after Mr. Chalmers left, handed these mandates to the clerk of the meeting when he called for mandates, with a request to that effect; but as he was not the mandatary, and as Dr. Sanderson, the mandatary first named in the mandates was present, this request was refused, and the votes on the mandates were recorded for the defender Muir, as directed by Dr. Sanderson.

"The Lord Ordinary is of opinion that neither Mr. Chalmers nor Mr. Doleman were

[182] The pursuer reclaimed, and argued;—The mandates obtained by Bolton, and addressed to Dr. Sanderson, had never been delivered to Dr. Sanderson, and had been improperly and fraudulently obtained and used by him. Chalmers had no right to use them in favour of Fernie; but neither had Dr. Sanderson any right to use them in support of Muir. Delivery was always a question of fact to be proved *prout de jure* (M'Aslan *v.* Glen, Feb. 17, 1859, 21 D. 511), and although it might be incompetent to add a qualification to a written mandate by means of parole proof, it was quite legitimate

---

entitled to act or vote on these mandates; that their request on behalf of Mr. Fernie was properly refused, and that Dr. Sanderson was entitled to vote upon them.

"The pursuer also objects to the act of the scrutiny committee in admitting four of these fourteen mandates, viz., those of Mrs. Boak, Thomas Moran, William Stewart, and John Slight, and maintains that they fell by reason of later mandates having been granted in favour of Mr. George Smith, who voted on them in his favour. But these four mandates in favour of George Smith do not bear the date of granting, and they all refer to a meeting to be held on 2d August 1870, or any adjournment thereof, except that of John Slight, in which the date of the meeting for which it was granted is written on an erasure. The meeting called for 2d August was not held, in consequence of a mistake made by the pursuer in calling the meeting, and there never was any adjournment thereof. Another meeting was called for 15th August 1870, but that also was abandoned, owing to another mistake in calling the meeting. The meeting of 16th August, being the first meeting held for the election of an inspector and collector, was duly called, and was an entirely separate and independent meeting from that of 2d August 1870. The mandates in Dr. Sanderson's favour are all dated, and confer authority to act and vote upon any matter relating to the appointment of an inspector and collector, not only at the meeting of 2d August 1870, but at any subsequent meeting. These four mandates were, it appears to the Lord Ordinary, rightly given effect to by the scrutiny committee.

. . . . . .

"There were ninety-seven votes given in favour of the pursuer. Of these forty-nine or thereby were struck off by the scrutiny committee for the following reasons. There were erasures in fifteen of the mandates of the date of meeting for which they bore to be granted. This, the Lord Ordinary thinks, [182] was a good objection. Ten were struck off from want of qualification. The pursuer has not proved that they had the requisite qualification. Nine were struck off on the ground that they fell under section 25 of the statute, as joint-owners or companies, and were not qualified as therein provided. Twelve mandates were disallowed on the ground that they were granted for a meeting to be held on 2d August 1870, or on any subsequent date to which said meeting might be adjourned, whereas, as already stated, there was no meeting held on that day, and consequently there was no adjournment thereof, so that the mandates fell. The vote of a *curator bonis* was properly disallowed. So also was the vote on a mandate in which the mandatary was not named, and the vote on a general mandate to attend and vote at all meetings of the parochial board, which was dated 6th May 1871.

"Deducting these forty-nine votes from the ninety-seven given for the pursuer, there remained forty-eight. But of these forty-eight votes there were no less than thirty-three given on mandates which are *ex facie* of the mandates invalid, in respect of the date of the meeting for which they bear to be granted being printed on an erasure. They were originally granted for 15th August, a day fixed for the election, but which had to be abandoned in consequence of some mistake in calling the meeting. The figure '5' was erased, and the figure '6' was printed in its place. In consequence of having been skilfully done and printed, it escaped the notice of the scrutiny committee. These thirty-three votes on mandates fall, the Lord Ordinary conceives, as vitiated and erased *in essentialibus*, to be rejected in the present inquiry, seeing that the pursuer concludes to have it found and declared that he was duly elected inspector and collector. Of these thirty-three mandates five are also objectionable, as not having been writings under the hand of the respective mandants, as provided by section 22 of the statute, but as having been subscribed in their names by third persons with their authority.

"According to the view taken by the Lord Ordinary there were given at the adjourned meeting of 5th September 1870, in favour of the defender, Mr. Muir, fifty-four valid votes, and there were given in favour of the pursuer, Mr. Thompson, only fifteen valid votes. . . ."

to show by such proof that any document had not been duly delivered, or had been obtained improperly and contrary to the intention of the granter.

LORD JUSTICE-CLERK.—Even if it were competent to prove by parole the alleged purpose for which the mandates were granted, that has not been established by proof of any declarations of the mandants.

Guthrie.—Here there was no doubt upon the proof that Provost Sanderson was well aware that the mandates in question were not intended by the mandants to be used in favour of Muir, and had not been given to him for that purpose.

LORD JUSTICE-CLERK.—I am of opinion that it is not competent to prove by parole that these mandates were granted for the special purpose alleged, and that they were improperly used by Chalmers and Sanderson, and therefore I think it unnecessary to hear further argument as to the import of the proof upon that matter.

The other Judges concurred.

[183] The scrutiny committee had held that as no meeting was held on that day, and there was therefore no adjournment thereof, the mandates fell.

The pursuer further argued, with reference to the mandates disallowed by the scrutiny committee and the Lord Ordinary, on the ground that the meeting of 5th September was not an adjournment of the meeting of 2d August, that it was too strict a reading of the mandates, in which the word "adjourned" did not bear a strictly technical meaning, but simply referred to any subsequent meeting at which the business for which the mandates bore to be granted might be transacted. The same reasoning applied to the mandates, which were in the same form, in which the date of meeting was written upon erasures. The erasures were not *in essentialibus*. The objection to the thirty-three votes given for the pursuer and sustained by the scrutiny committee, but which the Lord Ordinary in his note held to be invalid, had been only suggested in the course of leading the proof, and therefore had been made too late, but at all events, the erasures there also were not *in essentialibus*. Moreover, it had been proved that the alteration had been made before subscription.

The defenders argued, *inter alia*, that even among the forty-eight votes given for the pursuer and sustained by the scrutiny committee, there were thirty-three which ought to be disallowed in respect of vitiation by erasure, the date of meeting for which they bear to be granted being printed on erasure.

The court disposed first of the question as to the thirty-three mandates used for the pursuer.

LORD COWAN.—I think the objection ought to be repelled. The only question is, on what ground we ought to found our judgment.

There is the greatest force in the remark that if this objection was to be insisted in it ought not to have been kept up until now. A committee of scrutiny was appointed, and the parochial board adopted their report, and during all the discussion which took place this objection was never mooted; more than that, the case is brought before this Court, and in the record it is never hinted at, and parties went to proof on that record. It is said that in the course of the proof the pursuer led evidence to rebut this objection, in case it should be held that it was competent to bring it forward, but that does not obviate the objection that it is now incompetent. I am inclined to think there is no answer to the preliminary objection taken by Mr. Scott.

But I am unwilling to decide the point merely on this technical ground. I think these mandates were well tendered on the 5th of September. All that was done on the 16th August was to adjourn, and the mandates were granted for the meeting of the 16th August or any adjournment of that meeting. The objection is that the "16" is printed on an erasure, but the day of meeting was not *inter essentialia* of the document. It was not of the essence of these mandates that the meeting should be held on a certain day. The essential parts of the mandates were the names of the mandatary and the purpose for which the meeting was to be held. Suppose the mandates had run "on the day of August or at any adjournment thereof," would that not have been sufficient? The general rule applies that words written on an erasure are to be held *pro non scripto*, and the mandates must be read as if they had run "on the day of August." Further, it appears from the minutes that the mandates were not tendered or acted on till the 5th September, the date to which the meeting had been adjourned. So that on its merits this objection of erasure is not of moment.

But there is another ground leading to the same result, viz., that by the proof it is established that the date was altered anterior to the signatures. This appears from the

evidence of the printer, by whom the alteration was made of a date prior to that affixed to the mandates, and which is not disputed.

On the whole matter, I think the thirty-three votes are unexceptionable.

[184] The other Judges concurred.

Counsel having been further heard as to the twelve mandates disallowed by the Lord Ordinary as having been granted for a meeting to be held on 2d August, or any date to which such meeting might be adjourned, the following opinions were delivered:—

LORD NEAVES.—This is a question of general importance. It should be generally understood how members of parochial boards can vote at their meetings. They are not always acquainted with public business—for example, females and aged persons. It is therefore necessary that they should be allowed to vote by proxy, and I think we must uphold their proxies when it is clear that the parties who have their apparent, have also their real, authority.

What happened here was this: The mandates were granted for the 2d of August, or any adjournment of that meeting. There had not been sufficient premonition of the first meeting, and to avoid informality another meeting was called. It is said that that meeting was not an adjournment of the first, and that the mandates were not good for it. The word "adjournment" strictly applies to the postponement of the same meeting, but in a popular sense it simply means that another meeting has been arranged. The business has not been overtaken on the first day, and another has been fixed to proceed with it. That is a popular sense of the word. Now, the days here were so connected together that it would be gross injustice to hold that the mandants were not well represented at the several meetings. I am therefore for repelling the objections.

LORD BENHOLME.—I agree with Lord Neaves. It is too strict an interpretation of these mandates to make a meeting and regular adjournment of it necessary. When such mandates are granted they are meant to be used whenever the business which was to have been taken up at the meeting for which they are granted is being considered.

The other Judges concurred.

The points disposed of in these opinions being sufficient for the decision of the case, the other points argued and dealt with by the Lord Ordinary in his note did not become the subject of any judgment by the Court.

The following interlocutor was pronounced:—"Recall the interlocutor complained of: Find that at the meeting of the parochial board of the parish of Inveresk, held on the 5th of September 1870, for the election of an inspector of the poor and collector of the poor-rates for the said parish, the defender Muir had not a majority of legal votes, and was not duly elected to the said offices; and to that effect and extent declare and decern in terms of the reductive conclusions of the summons: Find and declare that at the said meeting the pursuer had a majority of legal votes, and ought to have been declared by the parochial board to have been duly elected; and ordain the said parochial board to take the necessary steps to declare the pursuer duly elected to said offices, and thereafter to proceed as accords of law: Find the pursuer entitled to expenses against the defenders J. G. Muir and the parochial board; and remit," &c.

W. K. THWAITES, S.S.C.—GILLESPIE & PATERSON, W.S.—Agents.

[*Affirmed*, 1876, 3 R. (H. L.) 1.]

No. 38. X. MACPHERSON, 185. 1 Dec. 1871. 1st Div.—Lord Mackenzie, B.

JOHN PALMER (Inspector of Poor of Stirling), Pursuer.—*Balfour—Mackintosh.*
JOHN RUSSELL (Inspector of Poor of Dunoon), Defender.—*Monro—Trayner.*
ALEXANDER ROSS (Inspector of Poor of Lochbroom), Defender.—*Millar—Burnet.*
MURDOCH MACDONALD (Inspector of Poor of Portree), Defender.—*Millar—Burnet.*
DONALD NICOLSON (Inspector of Poor of Bracadale), Defender.—*Pattison—Watson.*

Poor—Insanity—Lunacy Act, 20 & 21 *Vict. c.* 71, *sec.* 75.—An able-bodied man is not entitled to parochial relief, either for himself or for his family, and the confinement of a member of his family as a pauper lunatic under the provisions of the Lunacy Act does not render him a pauper.

Poor—Insanity—Lunacy Act, 20 & 21 *Vict. c.* 71, *sec.* 75.—*Held* (1) that the Lunacy Act fixes the permanent burden of a pauper lunatic's maintenance on the parish of the lunatic's settlement at the date of seclusion in the district asylum, even in cases where the settlement is derivative, and is lost during the period of confinement; and (2) that this liability is not avoided when another asylum is by legal authority substituted for the district asylum.

Poor—Settlement—Husband and Wife.—A married woman living apart from her husband cannot acquire a settlement in a parish by industrial residence, unless the separation has been caused by her husband's desertion.

Expenses.—When one of several parties to an action acquiesces in a judgment of the Lord Ordinary, he is not entitled to the expense of attending by counsel the discussion on a reclaiming note presented by another party, unless he has made inquiry whether the other parties will not consent to allow the judgment to stand as regards him.

The inspector of poor of the parish of Stirling brought this action for the purpose of recovering the expense incurred by the parish in maintaining Margaret M'Intosh or Tweedie as a pauper lunatic from 23d August 1861 to 2d February 1871, when she died. The action was brought in the following circumstances:—

The lunatic was born in Lochbroom parish in 1819, and was married in 1838 to Robert Tweedie. On the very day of the marriage she deserted her husband for another man, and afterwards maintained herself by her own industry. From 1854 to 1860 she lived in the parish of Dunoon as a domestic servant. On 23d August 1861 she became chargeable as a pauper lunatic to the parish of Stirling, and was placed, under a warrant by the Sheriff, in Hallcross Asylum, Musselburgh, which was then used for the reception of pauper lunatics from Stirlingshire district. In February 1869 she was removed to the Stirlingshire district asylum at Larbert when that asylum was opened, and she remained there until her death.

Robert Tweedie was born in the parish of Manor. For twelve years prior to 1859 he lived in the parish of Portree, and had acquired an industrial settlement there. From 1859 till his death in 1871 he lived in the parish of Bracadale, without applying for or obtaining parochial relief.

Statutory notices were sent to the parishes of Dunoon, Lochbroom, Bracadale, and Portree, at the dates mentioned in the Lord President's opinion.

The action was directed against (1) the parish of Dunoon, as the parish of the lunatic's residential settlement; (2) Lochbroom, as the parish of her birth settlement; (3) Portree, as the parish of her husband's settlement at the date of her becoming chargeable; or (4) Bracadale, in which her husband had a settlement since Whitsunday 1864.

[186] The Lord Ordinary pronounced the following interlocutor:—"Finds that the parish of Bracadale, as the parish of the settlement of Robert Tweedie, the husband

of the lunatic Margaret M'Intosh or Tweedie, from and after 15th May 1864 to the date of her death on 2d February 1871, is liable to the pursuer, the inspector of poor for the parish of Stirling, for the expense incurred by him during that period, for or in relation to the examination, removal, and maintenance of the lunatic, the said Margaret M'Intosh or Tweedie; assoilzies the defenders, the inspectors of poor for the parishes of Dunoon, Lochbroom, and Portree from the conclusions of the libel, and decerns, and appoints the cause to be put to the roll, with a view to the ascertainment of the amount for which the pursuer is entitled to obtain decree against the defender, the inspector of poor for the parish of Bracadale, and for the disposal of the question of expenses." *

---

* "NOTE.—The pursuer avers that Margaret M'Intosh or Tweedie was maintained as a lunatic by the parish of Stirling from 23d August 1861 to 2d February 1871, when she died; and he has raised the present action for the purpose of recovering the expense incurred by him for or in relation to the examination, removal, and maintenance of the lunatic. The parties called as defenders are the inspectors of the four parishes of Dunoon, Lochbroom, Portree, and Bracadale.

"It is admitted by all the parties that the lunatic, Margaret M'Intosh or Tweedie, was born in the parish of Lochbroom in or about the year 1819, and that she was regularly married to Robert Tweedie on 27th January 1838. And it is admitted by the parishes of Portree and Bracadale that Robert Tweedie resided in the parish of Portree for upwards of twelve years prior to 1859, and acquired a residential settlement in that parish, and that he resided in the parish of Bracadale from Whitsunday 1859 until his wife's death in February 1871, without applying for or obtaining parochial relief, and without having recourse to begging.

"The grounds on which the parishes of Lochbroom and Dunoon have been called as defenders are, that the former is the birth settlement of the lunatic Margaret M'Intosh or Tweedie, and that the latter is the parish in which she had acquired a settlement for herself by industrial residence while living separate from her husband.

"The Lord Ordinary is of opinion that neither the parish of Lochbroom nor the parish of Dunoon is liable in the sums sued for, because Margaret M'Intosh or Tweedie, on being married, lost her birth settlement, and because she could not, while her marriage with Robert Tweedie subsisted (which it did until February 1871, when it was dissolved by death), acquire any settlement in her own right, and apart from that of her husband. From the day of the marriage his settlement became her settlement. But it is said that Margaret M'Intosh or Tweedie deserted her husband on the very day of her marriage, and never returned to him, and that, after cohabiting with a cousin for about a month, she went into service, and maintained herself by her own industry down to the time of her becoming chargeable as a lunatic. This does not, in the opinion of the Lord Ordinary, affect the question, because Margaret M'Intosh or Tweedie, being a married woman, could not, during her husband's life, and notwithstanding her desertion, acquire any settlement separate and apart from him—(M'Crorie *v.* Cowan, 24 D. 723).

"The defender, the inspector of Portree, has by minute lodged in process consented to the inspectors of Lochbroom and Dunoon being assoilzied, but the inspector of Bracadale refused to give any such consent.

"Statutory notices of chargeability were sent to the inspector of Bracadale on 5th April 1865, and to the inspector of Portree on 24th August 1869. By the Lunacy Act, 20 & 21 Vict. cap. 71, sec. 78, the parish of the lunatic's settlement is liable in repayment of the expenses of the lunatic's examination, removal, and maintenance 'incurred subsequent to such notice, and for the year preceding.' The account libelled on in the conclusion of the summons against Bracadale commences at Whitsunday 1864,—that is, on the expiry of the period of Robert [187] Tweedie's five years' residence in that parish by which he acquired a residential settlement therein, and within the year preceding the date of the notice.

"The inspector of Bracadale maintains that Robert Tweedie could not acquire a settlement in his parish, because he was, by reason of his wife's treatment as a pauper lunatic in Hallcross Asylum, Musselburgh, from and after 23d August 1861, when his and her settlement was in the parish of Portree, constructively a pauper, and in receipt of parochial relief. The question whether the wife or the husband is in such

[187] Bracadale reclaimed, and argued;—After a lunatic became chargeable there could be no shifting of settlement,* and the separation between [188] the husband and wife should receive the same effect in regard to the settlement of the latter as the husband's desertion was held to have.

The pursuer was desired by the Court to confine his argument to the effect of the Lunacy Act, and to the question whether Tweedie, the husband, who had an industrial settlement in 1864, was pauperised by the fact that his wife was maintained by the parish of Stirling as a pauper lunatic. He argued, that the 75th section of the Lunacy Act applied only to proper district asylums, and not therefore to Hallcross Asylum, in which the pauper was confined down to 1869, and that it was quite possible for a

---

circumstances the pauper is attended with much difficulty. It has not, so far as the Lord Ordinary is aware, been decided. It is admitted in the record by the inspector for Bracadale that the husband during the five years preceding 15th May 1864 did not apply for or receive parochial relief in Bracadale, and it was admitted at the debate by him that the husband did not have recourse to common begging. He therefore supported himself. His wife was confined and treated in a lunatic asylum under the provisions of the Poor-Law and Lunacy Acts, as her condition required such treatment, and it was the duty, under the Poor-Law Act, of the inspector of the parish of Stirling, in which she was found, to make the necessary provision for that purpose. If her husband had been able, he would have been bound to pay for his wife's maintenance and treatment in the asylum. But if not able, from his position in life, to make such payment, or to provide such maintenance and treatment, he could not be compelled to do so; and her treatment in an asylum, rendered necessary by the nature of her disease, and enjoined by statute, fell to be defrayed by the parish of the settlement of the lunatic, which, seeing that she was a married woman, was that of her husband. As her position as a lunatic was exceptional, and as her confinement and treatment in an asylum were statutory, it seems to the Lord Ordinary that no obligation can be held to have attached to her husband, Robert Tweedie, in regard to her maintenance in the asylum, and that her maintenance became a parochial burden. Accordingly the Lunacy Act makes express provision for such a case, by enacting (sec. 77) that if the lunatic has no estate, and if the expense of examination, removal, and maintenance of the lunatic shall not be borne by the relations, 'then the lunatic shall be treated as a pauper lunatic, and such expense shall be defrayed by the parish of the settlement of such lunatic.' The defrayment of such expense cannot, therefore, it is thought, be considered, in such circumstance, as parochial relief furnished to the husband for behoof of his insane wife, or be pleaded as a bar to the acquisition of a residential settlement in Bracadale by Robert Tweedie.

"The inspector of Bracadale also contended that, as Portree was the settlement of Robert Tweedie and of his wife on 23d August 1861, the date when she first became chargeable as a lunatic, the parish of Portree continued to be the parish of her settlement, and to be chargeable with her maintenance as a lunatic for the rest of her life. The Lord Ordinary is of opinion that this plea is untenable. It is expressly provided by the Poor-Law Act (sec. 76) that a residential settlement shall not be retained if there has not been residence in the parish continuously for at least one year during any subsequent period of five years. The Lord Ordinary is not aware of any rule of law or principle suspending the operation of this statutory provision in the case of a derivative settlement, and he is of opinion that the settlement in Portree of Robert Tweedie, and of his lunatic wife, was lost in consequence of his not having resided in that parish during any part of the five years ending on 15th May 1864. During all that time he resided in the parish of Bracadale, and he resided there until February 1871, during which month both he and his wife died.

"The inspector of Bracadale also contended that the settlement of the lunatic must be held to be in the parish of Portree, in respect of the provisions of sec. 75 of the Lunacy Act. The Lord Ordinary is of opinion that as Margaret [188] M'Intosh or Tweedie was not 'detained in any district asylum under this Act' while her husband's settlement was in Portree, the section does not apply. He also considers that the interpretation put upon the section by the inspector of Bracadale is erroneous. But it is unnecessary to refer further to its construction, as it does not apply."

*Melville *v.* Flockhart, Dec. 19, 1857, 20 D. 341; 20 & 21 Vict. c. 71, sec. 75 (quoted in Lord President's opinion), 76, 77, 78, 68.

husband to be in a position to acquire an industrial settlement while his wife was receiving statutory support as a lunatic.*

Portree referred to the cases undernoted with reference to the effect of the Act 20 & 21 Vict. c. 71, sec. 75.†

At advising,—

LORD PRESIDENT.—The parish of Stirling maintained Margaret M'Intosh or Tweedie as a lunatic from 1861 till 2d February 1871, when she died, and has now brought this action for the purpose of obtaining relief of the expenses so incurred from the parish truly liable. Four different parishes have been called as defenders. Notice in terms of the statute was given to the inspector of poor of Dunoon on 26th August 1861, that being the parish in which the lunatic had resided and supported herself for a period of five years. Another notice was given about the same time (31st August 1861) to Lochbroom, the parish of her birth. Some years later, probably in consequence of the fact of her marriage having been discovered, notice was given to Bracadale parish on 5th April 1865, on the ground that her husband's settlement was in that parish, in respect of his residence there for five years down to Whitsunday 1864. Later still, on 24th August 1869, notice was given to the inspector of Portree, as the parish of the husband's settlement at the date of the lunatic's being sent to an asylum. Thus all parties who could be interested were called, and the Lord Ordinary has selected Bracadale as the parish liable, holding the notice given on 5th April 1865 to draw back and create a liability for all expenditure subsequent to Whitsunday 1864. And the Lord Ordinary assoilzied all the other defenders, including Portree, the parish of the husband's settlement at the date of the lunatic's confinement. The case raises questions of difficulty, but one or two principles involved in it are clear enough.

1. The woman could have no settlement except in right of her husband. It is said indeed that after their marriage Tweedie and his wife never cohabited, having parted at the church door. But that can make no difference, for *consensus non concubitus facit matrimonium*. The woman not having been deserted, which is a peculiar and exceptional case, it follows that she can have no settlement but the settlement of her husband for the time.

2. It is clear that the husband, Tweedie, was never a proper object of parochial relief within the meaning of the Act. Having throughout his life been an able-bodied man, supporting himself by his own industry, he could not possibly be a proper object of relief, notwithstanding any amount of domestic incumbrances. This has been settled since the case of Lindsay *v.* M'Tear was affirmed in the House of Lords (1 Macq. 155). It follows as a natural consequence of the deci-[189]-sion in that case that the affliction of mental disease falling either on his wife or his children cannot pauperise an able-bodied man. He must bear his own burdens. Such is the law of Scotland; and though some have thought it a hard law, and some eminent Judges before the date of Lindsay *v.* M'Tear had doubts upon the subject, yet it is now undoubted law, and those who have most intelligently studied the question think it a politic and expedient law.

In the administration of this law, however, by the parochial boards and Board of Supervision, lunacy has always been regarded as an exceptional case. There are very good reasons for this, inasmuch as important public interests are there concerned. The Legislature has interposed to secure the proper treatment of lunatics, and under 8 & 9 Vict. c. 83, sec. 59, except in exceptional circumstances, they must be sent to an asylum.

It is the general rule that every pauper lunatic shall be sent to an asylum. That being so, when a married woman comes to be a lunatic, being the wife of a labouring man, this difficulty occurs: he himself is not a proper object of parochial relief, but the law takes away his wife from his family, and sends her to be maintained in a lunatic asylum at an expense far greater than he can bear. It is reasonable that the law, which deprives him of his marital rights, should provide for the maintenance of the wife in the asylum, the confinement in which is prescribed on grounds of public

---

* Hay *v.* Paterson, Jan. 29, 1857, 19 D. 332; Beattie *v.* Adamson, 1866, *ante*, vol. v. 47.

† Fraser *v.* Robertson, June 5, 1867, *ante*, vol. v. 819; Lindsay *v.* Mackenzie, July 11, 1866, *ante*, vol. iv. 1037; Kirkwood *v.* Lennox, July 10, 1869, *ante*, vol. vii. 1097.

policy. Hence, in an Act of Parliament subsequently passed, it is provided that the lunatic shall be treated as a pauper lunatic, and the parish of the settlement of the lunatic shall defray the expense of examination, removal, and maintenance, if he has no estate, and if that expense is not borne by his relations. The question therefore is, in this case, what is that parish? The answer must be, in the first place, the parish of the husband's settlement, because at the time of her confinement, and ever since, the lunatic was a married woman. Here a great practical inconvenience occurs, because the parish of the husband is chargeable, and it may be that, during the detention of the wife in the asylum, that parish may change more than once. Thus it might happen that, by four years' residence in another parish, a man loses his settlement in the parish where he had a settlement at the date when his wife was taken to the asylum. But the second parish has not become his settlement, so that his birth parish becomes his settlement, and so continues for 364 days, at the end of which he acquires a new settlement in the parish of his residence. So, in the course of a long confinement, it follows that each acquisition of a new settlement by the husband would involve two different changes of settlement, and two shiftings of liability for the maintenance of the wife. The Lunacy Act intended to provide against this and other similar difficulties, and accordingly section 95 provides that "every pauper lunatic to be detained under the powers of this Act shall be sent to the asylum for the district in which the parish of the settlement of such pauper lunatic is situated"; and then it provides that in special circumstances it may be lawful to provide otherwise. We must take in connection with this the 75th section, which enacts that "every pauper lunatic detained in any district asylum under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted, and the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly; and the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic." Now, it is very difficult to see why this should not apply to a derivative as well as to a personal settlement. Indeed, the difficulty to be obviated is greater, as I have shown, in the former than in the latter case, and I think that the clause was intended to apply to a derivative as well as an industrial settlement. In the present case it happens that this lunatic pauper was not sent in the first instance to a district asylum, and it is said that therefore the 75th section does not apply. This raises a question of delicacy; but I am of opinion that where, from the necessity of the case or from special circumstances, the general rule is relaxed under a warrant of the Board of Supervision or Lunacy Board, that does not affect the principle of section 75, because the other asylum [190] so appointed comes in place of the district asylum. It is not inconsistent with the ordinary canons for the construction of statutes to hold that where one place of confinement is substituted for another by legal authority, in special circumstances, the same effects will follow. In the present case no district asylum was in existence at the time when the lunatic was first put in confinement; and whenever the district asylum was ready, the lunatic was transferred to it. Here, therefore, the 75th section of the statute does apply, and the parish of her legal settlement at the time of her first confinement must remain always her settlement during that confinement. That parish was Portree. The effect is to subject Portree to liability for the expenses of the lunatic's maintenance, but that liability will be very limited, because the statutory notice was not given till 1869, so that only three years' charges are due.

LORD DEAS.—Some points are involved in this case about which I have no doubt. I agree with your Lordship that this woman must, in certain respects at least, be regarded as a pauper lunatic, apart from any pauperism of her husband. She must therefore be provided for as such, even though her husband be able-bodied. That is a case which forms an exception, produced by necessity, to the general rule that the father or husband must be the pauper. On that point I need not add anything to what your Lordship has said.

In the second place, I have no hesitation in agreeing with your Lordship that though that is so the settlement of this woman at the time when she was placed in the asylum must be held to be her derivative settlement as a married woman—that is to say, the parish of the settlement of her husband at the time. I have no doubt that a derivative settlement is to be dealt with in such a case as precisely on the same

footing with a personal settlement. The real difficulty in this case is, whether the derivative settlement which this woman had when first placed in the asylum is to remain permanently the same as it then was. If she had been sent to a district asylum there could have been no doubt about it, because the 75th section of the Act 20 & 21 Vict. c. 71, would then have applied in its terms, and under that enactment the pauper would necessarily have been held, in all future time, to be resident in the parish in which she was settled when placed in the asylum. The difficulty here is, that the asylum in which the pauper was placed and detained, although a lawful asylum, was not a district asylum. Now, that question requires careful attention to a good many sections of the Act, and when these are attended to the only reasonable conclusion will be found to be that the pauper must be held to have retained the settlement she had at the time she was placed in the asylum, although it was not, strictly speaking, what is called a district asylum.

All asylums are defined by the interpretation clause of the statute, as comprehended under the term "public asylum." The third head of the interpretation clause bears,—"The words 'public asylum' shall mean and include all such hospitals, madhouses, or asylums as are or shall be established for the custody of lunatics by Act of Parliament or royal charter, or under any deed, &c. . . . and also all hospitals, madhouses, or asylums, other than district asylums, into which lunatics committed by order and certificate, as hereinafter provided, cannot be refused access or reception, without special cause shown." All licensed asylums, commonly called private asylums, are therefore truly in the sense of this Act public asylums. Then section 10 enacts, that all public asylums—that is, all lawful asylums of every kind—shall be under and subject to all the provisions of the Act. Section 25 enacts, that the Sheriff may visit and inspect all asylums, public or private, within his jurisdiction; and by section 34 he may grant orders for the reception of lunatics into any public, private, or district asylum. Then the question, whether a district asylum is to be established depends, by sections 51 and 52, on whether there is or is not already sufficient accommodation for pauper lunatics in the district. Then by section 59, district boards may agree with the proprietors of any existing asylum for the reception and accommodation of pauper lunatics. Then comes section 95, which is in these terms:—"Every pauper lunatic to be detained under the powers of this Act shall be sent to the asylum for the district in which [191] the parish of the settlement of such pauper lunatic is situated," &c. Taking these words by themselves, it would follow that the pauper lunatic could not be sent to any but a district asylum. But such a reading of the clause would contradict all the provisions that go before. Then the clause goes on,—"Provided always that under special circumstances it shall be lawful for the parochial board, with consent of the board, to dispense with the removal of any pauper lunatic to such asylum, and to provide for him in such other manner, and under such regulations as to inspection and otherwise, as shall be sanctioned by the board," &c. Thus there is a power, in the very same section which provides for the sending of a pauper lunatic to the district asylum, to send him or her to any asylum the parochial board, with consent of the Lunacy Board, may think proper. The statute 21 & 22 Victoria, and subsequent statutes of that class, may be referred to in confirmation of the same view.

Taking all these enactments together, it is impossible, I think, to construe the statute as making any distinction, in respect of chargeability, between a pauper lunatic in a district asylum and a pauper lunatic in any other lawful asylum to which the Sheriff may have sent the lunatic. If that be so, there is an end of the only nice question in the case. On the whole matter, therefore, I entirely concur in the result arrived at by your Lordship.

LORD ARDMILLAN.—One point which was argued at some length does not appear to me to be attended with any difficulty. I think this woman, being undoubtedly married, had, and could have, no settlement but that of her husband. But it is a fact in the case that when she became a lunatic she was not living with her husband, but was in service, and believed to be a single woman, without any means of livelihood but her own industry. As a lunatic pauper she was taken up by the inspector of Stirling, and sent to an asylum. Now, dealing with the case as under the Poor-Law Act only, and not considering it as under the Lunacy Act, there can be no other conclusion than that her husband's settlement at that time was hers. But when struck down by lunacy and rendered a pauper, she was sent, as a pauper lunatic, to the asylum. I think when the law, for benevolent public purposes, interposes to send insane persons

to an asylum, then the Lunacy Act comes to rule the incidence of liability, and that under that Act it is clear that if she had been sent to a district asylum she would have been chargeable on the parish in which she had her legal settlement at the date of the order for her reception. That parish is Portree, the parish of her husband's settlement at that date, and if she had been sent to a district asylum there could be no doubt on the point. But the asylum to which she was then sent, and in which she was received, was not a district asylum. There was, at that time, no district asylum available. She was afterwards sent to one, and that raises the only difficulty in the case. I think Lord Deas's explanation of the clause in the statute is very instructive, and I arrive at the same conclusion. I think also that if the private asylum was, under the circumstances, a legal substitute for the district asylum where there was no district asylum established, then the legal effect of confinement in the substituted asylum may well be held to be the same as confinement in the district asylum. But further, I think it would never do to permit the inspector of poor of a parish, by his conduct in selecting the place of confinement for a pauper lunatic, to affect the incidence of chargeability, and if the choice of a private asylum instead of a district asylum by an inspector were to make any difference in that respect, I would not think it right that effect should be given to that circumstance so as to alter the liability of parties. But that question does not arise, and it is sufficient to decide this case on the general ground that confinement in a substituted asylum takes the place, to all legal effects, of confinement in a district asylum.

LORD KINLOCH.—The case with which we have now to deal is that of a lunatic, and is mainly to be decided by the enactments of the Lunacy Acts. Even under the Poor-Law Act the case of a lunatic is special and exceptional. In the general case relief cannot be sought for a wife or child where the husband or father is able-bodied. But, on considerations of public policy, a lunatic is main-[192]-tained at the public expense, even where the party on whose settlement he hangs would be excluded from claiming relief for himself or the other members of his family.

It is not disputed, on any side, in the present case, that Margaret M'Intosh was in 1861, when relief was given to her by the parish of Stirling, a proper object of parochial relief, and so continued till her death in 1871. It is said that on this account she was a pauper in her own right. I do not much object to the term, though I would rather avoid using it, as it is liable to misconstruction. I sufficiently express her position in saying she was a proper object of parochial relief.

By the Lunacy Act, 20 & 21 Vict. c. 71, sec. 76, it is provided, generally, that any one whatever incurring expense in the maintenance of a lunatic shall, in default of other means of reimbursement, have recourse against "the parish of the settlement of such lunatic." By section 75 it is provided that every lunatic detained in a district asylum "shall be deemed and held to belong, and be chargeable, to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted"; and further, that "the residence of any pauper lunatic in any such district asylum shall be deemed to be the residence of such lunatic in the parish legally chargeable with the maintenance of such lunatic." By section 95 it is provided that every pauper lunatic "shall be sent to the asylum for the district in which the parish of the settlement of such pauper lunatic is situated"; but under the qualification that in special circumstances this may be dispensed with. Combining these enactments, I think that section 75 must be held to rule, universally, the case of all pauper lunatics, whether actually confined in a district asylum or not. I conceive that, for the purposes of that section, all are constructively so confined. I can see no reasonable ground for making any distinction, so far as the enactment of section 75 is concerned. The chargeability of the parish of settlement at the time relief is first afforded, and downwards, is in reason equally applicable, whether the lunatic reside in a district asylum or a private house. And the same chargeability, I think, follows in either case from the direct implication of the statute.

Applying this principle, the question comes to be, what was the legal settlement of Margaret M'Intosh when, in August 1861, she received relief as a lunatic from the parish of Stirling. As to this there can be no doubt. The legal settlement of her husband was then in the parish of Portree; and this was equally the settlement of the wife. The peculiar circumstances of the marriage do not, as I think, affect this question; for they do not get rid of the fact that Margaret M'Intosh was then a wife lawfully married, nor of the law that the settlement of a wife is in every case that of

her husband. In August 1861 the parish of Portree was the parish of her settlement, and liable in relief to the parish of Stirling.

But, this being so, I am of opinion that Portree continued, down to Margaret M'Intosh's death in 1871, to be liable for her maintenance. I consider this to follow from the terms of the Lunacy Act already referred to, which throw on the parish of settlement, at the time of the lunatic being taken under maintenance, the burden thereafter of his support, and constructively protract that settlement during the continuance of the lunacy. This is nothing more than to apply the general principle of the poor-law, that after parish relief is received the settlement remains fixed during the continuance of the pauperism.

The only difficulty connected with this conclusion arises from the fact that the husband of the lunatic, who had his settlement in Portree in 1861, had his settlement changed to the parish of Bracadale from 1864 downwards. Of this, I think, there can be no doubt. He removed from Portree to Bracadale in 1859. By the lapse of more than four years he lost his settlement in Portree; by the lapse of five years he acquired a settlement in Bracadale, which he retained till the time of his death. I am clear that the receipt of parish aid by his lunatic wife did not place this able-bodied man himself in the position of a pauper, nor prevent his acquiring a new settlement. I am equally clear that this settlement was in Bracadale subsequently to 1864.

To hold Margaret M'Intosh to be, notwithstanding this, still chargeable to [193] Portree, conflicts with the principle that a wife's settlement varies with that of her husband, and leads to the anomalous conclusion that the settlement of the wife came ultimately to be in one parish, and that of the husband in another. But this result simply arises out of the statutory provision of the Lunacy Act, by which the general principles applicable to the case must be held overruled. Perhaps there is nothing in the result more anomalous than it would be to hold that, after becoming an object of parochial relief, the settlement of the still continuing pauper lunatic shifted from one parish to another. Whether the result arising in a case like the present was contemplated by the framers of the statute, or whether they had their view confined to the case of a personal, as distinguished from a derivative, settlement, may be fairly questioned. But so I think the words of the statute import; and I am not at liberty to deny them effect on any merely speculative view.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be altered, and the charge laid upon the parish of Portree. The charge cannot, of course, be carried further back than a year prior to the date of the statutory notice. This notice can have no effect whatever in regard to legal rights and obligations. But, when once these are settled, it limits the pecuniary amount.

The following interlocutor was pronounced:—"Recall the interlocutor: Find that the parish of Portree was the parish of settlement of the husband of Margaret M'Intosh or Tweedie at the time that she was first sent to a lunatic asylum in 1861: Find, therefore, that in virtue of the 75th section of the Act 20 & 21 Vict. c. 71, the said parish of Portree was legally liable for the expense of maintaining the lunatic during the whole period of her confinement: But find that no statutory notice was given by the pursuer to the parish of Portree till the 24th August 1869, and consequently that the right of the pursuer to recover from the parish of Portree the expense of maintaining the said lunatic is limited to the expense of maintenance from 24th August 1868 till the death of the pauper on 2d February 1871, amounting in all to £65, 8s. 1d.: Decern against the defender, the inspector of the parish of Portree, for payment of the said sum of £65, 8s. 1d. to the pursuer, with interest on the said sum of £65, 8s. 1d. at the rate of 5 per cent. per annum from 2d February 1871 until payment: Assoilzie the other defenders, and decern: Find the pursuer liable in expenses to the inspector of Bracadale: Find the inspector of Portree liable in expenses to the pursuer, and also to relieve the pursuer of the expenses of the inspector of Bracadale: Find the pursuer liable to the inspectors of Lochbroom and Dunoon in the expenses incurred by them in the Outer-House, but no further: Allow an account," &c.

TRAQUAIR & DICKSON, W.S.—W. & J. BURNESS, W.S.—ADAM & SANG, S.S.C.—T. & R. B. RANKEN, W.S.—Agents.

[*Commented upon*, Milne *v.* Henderson & Smith, 1879, 7 R. 317. *Followed*, Inspector of Coupar Angus *v.* Inspector of Murroes, , 21 R. 583.]

No. 39. X. MACPHERSON, 193. 1 Dec. 1871. 2d Div.—Steward of Kirkcudbrightshire, I.

WILLIAM M'DOWALL, Pursuer.—*J. P. B. Robertson.*
HUGH STEWART, Defender.—*M'Kechnie.*

Expenses—Damages.—In an action by a seller against a purchaser for the price of the subject sold, the pursuer obtained decree for the price and expenses, but certain charges for extrajudicial expenses incurred in that action were not allowed. The seller having brought a second action to recover these extrajudicial expenses in name of damages sustained by him through the purchaser's wilful breach of contract, *held* that the action was incompetent.

William M'Dowall, innkeeper at Dalbeattie, brought an action in the Court of Session against Mr. Stewart of Tonderghie, for £45, the price of a horse. After some litigation, Mr. Stewart paid the sum sued for, and offered to pay expenses. Two accounts of expenses incurred by M'Dowall were remitted to the Auditor of the Court of Session, one by the country [194] agent, and the other by the town agent. The Auditor struck off £11, 2s. 6d. of the country agent's account, and £3, 2s. of the town agent's account. The pursuer brought this action in the Steward Court of Kirkcudbright against the defender for £25 of damages sustained by the pursuer, and law expenses incurred by him to his law-agent, in consequence of the defender having illegally and "wilfully" failed to implement the bargain on which the original action was founded, and arguing, that where a breach of contract was wilful, collateral damage was due.

The Steward-substitute (Rhind) decerned for the amount of the account of expenses, and *quoad ultra* found no damages due. The Steward (Hector) recalled, and assoilzied the defender. The pursuer appealed to the Second Division. The Court held that the action was a mere attempt to turn extrajudicial expenses into a claim of damages, and adhered to the interlocutor of the Steward, with additional expenses.

W. ROSS GARSON, S.S.C.—WILLIAM MILNE, S.S.C.—Agents.

[*Referred to*, Mushet's Ltd. *v.* Mackenzie Bros., 1899, 1 F. 756.]

No. 40. X. MACPHERSON, 194. 5 Dec. 1871. 2d Div.—I.

GEORGE DINGWALL FORDYCE, Applicant.—*Reid.*
E. B. LOCKYER, Respondent.—*J. C. Smith.*
GEORGE LOCH, M.P., Respondent.—*Mackintosh.*
JAMES MILLER, Respondent.—*Asher.*

Member of Parliament—Corrupt Practices Act, 1868 (31 & 32 *Vict. c.* 124), *sec.* 41—*Expenses.*—Section 41 of the Corrupt Practices Act, 1868, enacts that "all costs, charges, and expenses of and incidental to the presentation of a petition under this Act, and to the proceedings consequent thereon," with certain exceptions, "shall be defrayed by the parties to the petition in such manner and in such proportions as the Court or Judge may determine."

Held (*dub.* Lord Benholme), that a person who had been returned as Member of Parliament was not, as respondent in a petition, presented under the above Act, which had been withdrawn, liable for the expenses incurred by the Returning Officer in connection therewith.

Mr. E. B. Lockyer, a candidate at the election of a Member of Parliament for the Wick Burghs, presented and subsequently withdrew a petition under the Corrupt

Practices Act of 1868, against Mr. Loch, the candidate who had been returned, to have him unseated. James Miller was cautioner in the petition. In this petition Sheriff Fordyce, the Returning Officer, who had incurred an account in connection with the petition to the amount of £23, 1s. 11d. presented this note, praying the Court "to grant an order on the said Edmund Beatty Lockyer and George Loch, conjunctly and severally, to pay the said expenses to the Returning officer, together with the expenses of this application, under such pains and penalties as to your Lordships shall seem proper."

The applicant argued;—The expenses can be obtained from any "of the parties to the petition," the successful party being entitled to relief against the unsuccessful, and he explained that the delay in presenting the note was caused by his having made an application for payment of the expenses to the Treasury, which had been ultimately refused.

Mr. Lockyer argued that the returning officer's expenses fell to be paid by the Treasury.

Mr. Loch argued that by "parties to the petition" the Act meant the unsuccessful parties.

The Court ordered intimation to the cautioner, who compeared, and argued that the only mode in which he could be rendered liable was by diligence under his bond of caution.

LORD JUSTICE-CLERK.—There is no question that there has been great delay. I do do not say that the Sheriff has on that account lost his recourse, but it is important to observe that he has allowed two years to elapse.

[195] It is clear that Mr. Loch is not responsible. It is equally clear that the petitioner, Mr. Lockyer, is responsible. As to the cautioner, I am rather inclined to think the meaning of the statute is, that decree must be first given against the petitioner. When the Sheriff has obtained that decree he may register the bond and have recourse against the cautioner if he is liable.

LORD COWAN.—The 41st section of the statute declares that the expenses shall be defrayed by the parties to the petition. Mr. Loch is not a party in the sense of the statute. There might be expenses for which he might be liable, but the present are not of that nature.

In reference to the returning officer coming forward and asking relief, the only difficulty I have arises from the fact that he has delayed so long. But the occasion of that delay has been explained. I think we ought to pronounce judgment against the party, and not against the cautioner.

LORD BENHOLME.—I shall not anticipate what my opinion will be if the cautioner is charged to pay and resists. I am content at present to concur in what is proposed, and confine the decree to the petitioner.

My only doubt is as to the returning officer's expenses. I doubt if liability for these (the liability of the "parties") is confined to the petitioner; for while he is a party to the petition the candidate against whom the petition is presented is to be held also a party, especially if he be unsuccessful.

LORD NEAVES.—I see great difficulty in subjecting Mr. Loch to the expenses incurred in abortive proceedings not taken at his instance, but in opposition to him. I think that Mr. Loch is not so liable.

As to the cautioner, I give no opinion whether he is liable or not. In the meantime I concur in thinking that we should find Mr. Loch not liable, and give the Sheriff decree against the petitioner, Mr. Lockyer.

This interlocutor was pronounced:—"The Lords (Second Division) having considered the note for Mr. George Dingwall Fordyce, the returning officer, with the taxed account of expenses incurred by him, of which intimation was made to the agents of the parties to the petition, and to Mr. James Miller, ironmonger, Princes Street, Edinburgh, the cautioner under the petition, and having heard counsel for the parties and the cautioner, Find the petitioner, Mr. Edmund Beatty Lockyer, liable to the returning officer for the said expenses, amounting to £23, 1s. 11d., and decern against him for payment thereof to the said George Dingwall Fordyce: Find the petitioner also liable for the expenses incurred by the returning officer in connection with the taxation of his account and relative discussion in Court, and remit to the Auditor to tax the same, and to report."

PHILIP & LAING, S.S.C.—W. SPINK, S.S.C.—MACKENZIE & BLACK, W.S.—**Agents.**

No. 41. X. MACPHERSON, 195. 6 Dec. 1871. 2d Div.—Sheriff of Lanarkshire, I.

THE SHOTTS IRON COMPANY, Petitioners and Appellants.—*Millar—Scott.*
GEORGE KERR, Respondent.—*J. Guthrie Smith—R. V. Campbell.*

Jurisdiction—Appeal—Value.—A summary petition in the Sheriff-court prayed the Sheriff to ordain the respondent to deliver to the petitioners four one-year-old lambs, and failing doing so, to ordain him to pay to the petitioners £10 sterling, "or such other sum as shall be ascertained to be the price or value" of the lambs. *Held* that as it did not appear from the petition that the value of the lambs was under £25, the appeal was competent.

This petition was presented in the Sheriff-court of Lanarkshire by William Crichton, 17 India Street, Glasgow, and Archibald Melville, W.S., trustees and attornies for the Shotts Iron Company, against George Kerr, farmer, Brownhill, on the narrative that on 2d January 1871 four one-year-old lambs or hogs, belonging to the company, strayed or were taken away from their farm by some person or persons unknown, and [196] that Andrew Robb, their grieve, had discovered that they were in the possession of the respondent, and praying the Sheriff "to decern and ordain the respondent instantly to deliver up to the petitioners, or to the said Andrew Robb, for their behoof, the said four one-year-old lambs or hogs, the property of the said Shotts Iron Company; and failing the respondent doing so within such period as your Lordship shall appoint, to decern and ordain the respondent to pay to the petitioners the sum of £10 sterling, as the price or value of the said four one-year-old lambs or hogs, or such other sum as shall be ascertained to be the price or value thereof."

On a proof, the Sheriff-substitute (Logie) assoilzied the respondent, and, on appeal, the Sheriff (Glassford Bell), adhered.

The petitioners appealed to the Second Division.

The respondent objected to the competency of the appeal, on the ground that the sum at issue was under £25.

At advising,—

LORD COWAN.—This question comes before us in a somewhat novel way. It is not stated as an objection to the competency of the appeal, but the respondent's counsel puts himself in the position of an *amicus curiæ*, and suggests to us to consider, as being *pars judicis*, whether the Court has jurisdiction.

My opinion, after looking into the authorities, is, that we should allow the case to go on. I cannot say that the authorities are all at one, but it seems to be held that where the conclusion is *ad factum præstandum*, or for interdict, this Court has jurisdiction, unless it appears from the pleading, and particularly from the conclusion of the summons or the prayer of the petition, that the value of the subject-matter of the suit is truly under £25. Now, here the petition is, *ad factum præstandum*, "to decern and ordain the respondent instantly to deliver up to the petitioners . . . the said four one-year-old lambs or hogs, the property of the" petitioners; and if this had been the sole conclusion the jurisdiction of this Court would be undoubted. Cases used to occur in regard to appeals to the Circuit Court, the jurisdiction of that Court being excluded if the sum in dispute was above £25, and the difficulties in such cases arose from the alternative conclusions. Here we have an alternative conclusion, "and failing the respondent doing so (*i.e.* delivering up the lambs) within such period as your Lordship shall appoint, to decern and ordain the respondent to pay to the petitioners the sum of £10 sterling, as the price or value of the said" lambs. If the prayer had stopped there, it would have fixed the value at £10 and no more, but it goes on to say, "or such other sum as shall be ascertained to be the price or value thereof, in the event of appearance being entered," and thus a larger sum than £10, and it might be exceeding £25, could be decerned for. In the case of Lamb *v.* Henderson, 4th October 1844, 2 Broun, 311, the conclusion of a summons was for £25, "or such other sum, more or less," as should, on an accounting, appear to be the proper balance due to the pursuer. Objection having been taken to the jurisdiction of the Circuit Court, the Lord Justice-Clerk (Hope), considering the question of great importance, made avizandum, and after

consulting Lord Wood, the Court found the appeal incompetent. A similar decision was given by the same Judges in the case of Wilson *v.* Addison, 11th October 1845, 2 Broun, 519, in which there was a petition for interdict against certain encroachments on the petitioner's property; and it prayed further, that the Sheriff should find the respondent "liable in the sum of £10 sterling, or such other sum, less or more, as may be modified in name of damages," on account of the encroachments. As the pecuniary conclusions did not appear to be limited within £25 the jurisdiction of the Circuit Court was held to be excluded. The subsequent case of Whyer *v.* Hendry, 17th September 1849 (J. Shaw's Reports, 265), decided by Lord Mackenzie, is reconcilable with the decisions referred to, because of the words "more or less" not occurring in the conclusions. These decisions are, I think, authoritative, and have been followed to the effect that, when there is a specific sum less than £25 claimed, the subsequent words "more or less" enables the Court to decern for a larger sum. [197] The nature of the cause is thus indefinite, and on this principle in the present case our jurisdiction is not excluded.

LORD BENHOLME.—I concur with Lord Cowan. There must be something distinct and definite to oust our jurisdiction, or rather, as here, to induce us to decline the jurisdiction. A conclusion *ad factum præstandum* cannot be measured by money. Besides, the alternative conclusion is not confined to the special sum of £10, but asks such other sum as may be ascertained to be the value of the lambs. What that amount may be we do not know.

LORD NEAVES.—I concur. Our jurisdiction exists, unless it is excluded by the Act of Parliament. It is said that this is an action *ad factum præstandum*. I think it falls under another category. It is a *rei vindicatio* brought by a party for recovery of his own property. Now, a man is entitled to get back his own property, and is not bound to take it as commuted into money. If the pursuer can recover *in forma specfica*, he is entitled to do so; for another is not entitled to keep what belongs to him. If the litigation continues for some time the value of the animals in question might be greatly increased. The amount alternatively concluded for accordingly is indefinite, and thus we have no means of knowing that the value may not exceed £25.

The LORD JUSTICE-CLERK concurred.

The following interlocutor was pronounced:—"Having heard counsel in the appeal, sustain the competency thereof: Find," &c.

ARCHIBALD MELVILLE, W.S.—W. B. GLEN, S.S.C.—Agents.

[*Followed*, Aberdeen *v.* Wilson, 1872, 10 M. 971.]

No. 42. X. MACPHERSON, 197. 7 Dec. 1871. 1st Div.—Sheriff of Aberdeenshire, M.

MRS. MARY ECKFORD OR ROSS, Pursuer and Appellant.—*Fraser*—*Strachan.*
THOMAS MELLIS, Defender and Respondent.—*Watson*—*Keir.*

Donatio mortis causa—Presumption—Proof—Onus.—Evidence in support of an alleged *mortis causa* donation, which *held* (*diss.* Lord Kinloch) insufficient to overcome the legal presumption against donation.

Observed, That the decision of such cases does not depend on a balancing of evidence, but that to establish donation the proof must be unambiguous and conclusive.

This action was instituted in the Sheriff-Court of Aberdeenshire in November 1869, by the niece and executrix-dative of the late Janet Eckford, who died on the 27th of July 1868, against Thomas Mellis, spirit-merchant in Aberdeen, to recover payment of £40, 11s. 7d., the contents, with interest thereon, of a deposit-receipt for £40 granted to the deceased by the Aberdeen Town and County Bank, and uplifted by the defender on 18th June 1868, with interest at 5 per cent. from that date. The summons also contained conclusions for an accounting in regard to the defender's alleged intromissions with certain furniture and other moveable property belonging to the deceased.

The defence was that Janet Eckford during her last illness endorsed the deposit-receipt and handed it to the defender, who was married to one of her nieces, "telling him to draw the money and give her what she might require during her lifetime, and after payment of her funeral expenses, if anything was over, to keep it to himself, as in that case the balance was to be his own."

The defender averred further, that during the life of Janet Eckford he had paid to her, or on her account, various small sums which, with her debts and deathbed and funeral expenses, amounted to £21, 1s. 2d., including an amount of £2, 13s. 7d. for wine and spirits supplied to the deceased between the 2d June 1868 and her death on 26th July following. He denied having intromitted with any funds or property belonging to the deceased, other than the contents of the deposit-receipt.

[198] A proof before answer was allowed to both parties, in the course of which it appeared that Janet Eckford died at the age of eighty-two, and that she had executed two probative settlements, by the first of which, dated 5th May 1866, after directing payment of her debts and certain specific legacies to the pursuer's children, she appointed the pursuer to be her sole executrix and residuary legatee; by the second deed, which was dated 2d March 1867, and was prepared by a different agent, the testatrix nominated a different executor, and after payment of debts and specific legacies to the pursuer's children she left the residue of her property to Alexander Walker, merchant in Aberdeen, who was not related to her. The specific legacies, however, almost exhausted the estate, including therein the contents of the deposit-receipt sued for in this action. The defender deponed that for five or six years before the death of Janet Eckford he used to do small commissions for her, such as drawing money from the Savings Bank. "I was not in her house for three or four months before her illness. She sent for me. After inquiring for her health, she said she thought she would never rise again. She wished me to take charge of herself and what affairs she had while she was living. Margaret Eckford or Wyness came for me. This was on or about 2d June, about breakfast hour. Mrs. Wyness and her husband were with Mrs. Eckford. She wanted me to take charge of her as long as she lived, and see her decently buried. She then told Mrs. Wyness to go to her chest and get her purse. Mrs. Wyness got it. Miss Eckford said, 'Now, Thomas, this is all the money I have got in the world. You will take it and give me what I require so long as I am in life. See me decently buried, and if there is a balance it is your own, and do with it what you please.' She got some wine that same night at her own request. It was a half bottle of port. She also got a gill of brandy. I was not in the way of sending her drink before, but she occasionally came for it before—perhaps once a month. All the drink mentioned in the account lodged was ordered by her, or by Mrs. Wyness, or by a message girl. In fact Miss Eckford lived on drink latterly. Miss Eckford took a deposit-receipt out of the purse at the time she said that was all her money, &c. It was for £40 in the Town and County Bank. I presented it at the bank. The teller refused it, because it was not endorsed. I was told by Mr. Keith at the bank that if she could not endorse it from illness, I could call in some respectable person to see her put her mark on it, and hand it to me. I told this to Miss Eckford, and that the bank would not cash it unless she would endorse it, or hand it over in presence of some one, and I suggested Mr. Brown, the landlord. She said she thought she could sign, and Mrs. Wyness raised her up, gave her her glasses and pen and ink, and she then signed the receipt without assistance. She then said, 'you'll surely get the money now,' and she came over the same things as she said when she first gave me the receipt—about seeing her kept as long as she lived, seeing her decently buried, and doing with balance as I pleased. She was not much given to stimulants till her deathbed illness, when she subsisted on them. No doctor attended her—she would not hear of that. The whisky supplied was not for herself. That and the rum was for the people about her. She drank wine and brandy principally. I remonstrated with her for taking so much. I produce the book I kept."

Margaret Eckford or Wyness, a niece of the deceased, deponed that her aunt sent for her during her last illness, and told her to bring the defender, who came. "Janet then asked defender if he would take charge of her. She took her keys from under her head, and asked me to take her purse out of her trunk. I did so, and gave it to her. She took out a paper and handed it to defender. She said that was all she had in the [199] world, and that she hoped he would take charge of her while she lived, and see her respectably buried, and if there was anything over it would be his own.

Defender took the paper. He came back some time after with this paper, and told Miss Eckford the bank had refused payment. She was much surprised. I understood this was because he or his son had been in the way of lifting money for her before. Defender proposed calling in the landlord to see her sign the bill, but she would not hear of that, saying she was quite able to sign it herself. She asked her spectacles, and got the bill and a book, and signed the bill. She then repeated the same as before, asking him to keep her while she lived, see her buried, and to do with the balance as he liked. She then handed the document to him. During her deathbed illness Miss Eckford principally lived on stimulants. I got them from defender, and I also got from him the money required for keeping the house."

James Wyness deponed,—"Miss Eckford gave my wife the keys to get a purse out of a trunk. When she got it, she (Miss Eckford) took out a document and gave it to defender. She said there was a document for £40, and that he was to keep her as long as she lived, bury her decently, and do with the lave as he had a mind to. I was present on another occasion. Defender told her he could not get the money, because the paper was not signed. He brought it back. Miss Eckford ordered my wife to raise her on the pillow, got a book, and signed her name, saying that would surely do now. She again handed it to defender, and said that was pretty good for an old woman. She told him what it was for, again, in the same terms as she had previously done."

The Sheriff-substitute (Wilson) pronounced this interlocutor:—"Finds in point of fact (1), that the deceased Janet Eckford died on 27th July 1868; (2), that the pursuer is her executrix; (3), that on 18th June 1868 the deceased was possessed of the sum of £40, and certain interest thereon, lying on deposit-receipt in the Town and County Bank, Aberdeen; (4), that on or about said date the said receipt was endorsed by the deceased, and that on said date the contents thereof were uplifted by the defender; (5), that at said date the deceased required the proceeds of the receipt, or part thereof, for her maintenance; (6) that at said date she was incapacitated by illness from personally uplifting the money; (7), that the defender has failed to prove that the deceased made to him a donation of any part of the contents of the deposit-receipt; (8), that the deceased died of the illness under which she was suffering at the date of uplifting the money, and that between that date and her death she was not able to resume management of her own affairs; (9) that during that period the defender applied part of the proceeds of the receipt to the deceased's maintenance; (10) that after her death he applied part in payment of funeral and other expenses; (11), that he retains the balance; (12), that he also intromitted (after deceased's death) with other effects belonging to her: Finds, in point of law, that the presumption is that the defender, in uplifting the contents of the receipt in the circumstances herein set forth, acted as agent for the deceased, and that, having failed to prove donation, he is bound to account for his intromissions with the contents of the receipt; and farther, that he is also bound to account for his intromissions with deceased's other effects: Therefore repels the pleas in law for the defender; decerns *ad interim* against him for the sum of £20 sterling: Further, ordains the defender, within ten days from this date, to lodge an account of all his intromissions with the contents of said deposit-receipt, and with all other monies or effects belonging to the deceased: Allows the pursuer to lodge objections to said account within six days thereafter, and the defender answers to said objections within [200] four days after the lodging of the same: Finds the defender liable in the expenses hitherto incurred," &c.

Against this judgment the defender appealed to the Sheriff (Smith), who, on 5th July 1871, recalled the interlocutor of his Substitute:—"Finds it proved that on the 17th June 1868, the deceased Janet Eckford, being on deathbed, endorsed and delivered to the defender a bank deposit-receipt for the sum of £40, with a request that he would, out of the proceeds, supply her with what she might require as long as she was in life, and see her decently buried; at the same time adding, that if there was any balance over it was to be his own, and he might do with it what he pleased: Finds that this was a valid *mortis causa* donation of the sum contained in the said deposit-receipt, so far as the same was not required for the purposes foresaid, and that the defender is not bound to account therefor to the pursuer as executrix of deceased: Therefore assoilzies the defender from the first conclusion of the summons, and remits the case to the Sheriff-substitute that he may dispose of the remaining questions in the cause."

The pursuer appealed. The argument turned entirely on the special circumstances of the case, referred to in the opinions of the Judges.

At advising,—

LORD PRESIDENT.—This is an action at the instance of the executrix-dative of an old woman named Janet Eckford, and the first conclusion of the summons is for payment of a sum of £40, 11s. 7d., being the contents, with interest to 18th June 1868, of a deposit-receipt granted by the manager of the Aberdeen Town and County Bank to the deceased upon the 26th September 1867, which was cashed on the 18th June 1868 by the defender, who has failed to pay or account for the amount to the pursuer, although bound to do so.

The defence is that the deposit-receipt was handed to the defender as a donation *mortis causa*, and it is almost needless to say that, in maintaining that plea, a heavy *onus probandi* was laid upon the defender, because the presumption of law against donation is strong. This was plainly in view of the Sheriff, for in the note to his interlocutor he says—"The one requirement of the law is that in cases of this description the proof must be clear and unambiguous, and also sufficiently strong to redargue the presumption that in delivering possession the donor, in the words of Lord Stair, meant rather 'to give in custody or in trust, than to gift.'"

The question, therefore, is, whether the defender has proved enough to overcome the legal presumption against donation,—a presumption which is sometimes strongly fortified by the circumstances of the case.

Now, this woman did not die intestate, for she left two formal settlements prepared by law-agents, in each of which she seems to have made a careful scheme for the division of the little money she had, and under both of these settlements the pursuer's family were the persons chiefly interested.

I think, therefore, that it is *prima facie* somewhat improbable that the deceased, in handing to another the deposit-receipt for her money, intended to revoke her subsisting settlement, and that the presumption against donation is thereby considerably strengthened. Well, then, the proof of donation is, that in June 1868, about six weeks before her death, the deceased, in the presence of two witnesses, took the deposit-receipt from her purse and handed it to the defender, telling him to draw the money and give her what she might require during her lifetime, and after payment of her funeral expenses, if anything remained over, to keep it to himself, as in that case the balance was to be his own.

Of course, it is impossible to regard possession of the deposit-receipt as a piece of real evidence in favour of the alleged donee, because everything depends on the purpose for which it was placed in his hands. It appears from the proof that the defender was a good deal with the deceased during her last illness, and his son had been employed by her before that time on several occasions to draw money from the Savings Bank, so that the defender was not an unlikely person [201] to be asked to uplift the contents of the deposit-receipt, although there might be no intention on the part of the owner to make a donation in his favour. It is therefore in the proof of the words used by the deceased that the evidence of donation consists. According to the defender's own statement, the words uttered were these—"Now, Thomas, this is all the money I have got in the world. You will take it and give me what I require so long as I am in life; see me decently buried, and if there is a balance it is your own, and do with it what you please." This statement, with the exception of the concluding words, would be insufficient to prove donation, and it is therefore upon the proof of these words having been used that the whole case for the defender depends. Two witnesses, Mr. and Mrs. Wyness, substantially concur in the defender's evidence. Mrs. Wyness says—"She (the deceased) took out a paper" (*i.e.* from her purse), "and handed it to the defender. She said that was all she had in the world, and that she hoped he would take charge of her while she lived, and see her respectably buried, and if there was anything over, it would be his own." Her husband says—"Miss Eckford gave my wife the keys to get the purse out of a trunk. When she got it, she (Miss Eckford) took out a document and gave it to the defender. She said, there was a document for £40, and that he was to keep her as long as she lived, bury her decently, and do with the lave as he had a mind to." According to the evidence of these witnesses, the statement to which they refer was twice repeated, the second occasion being when the defender brought back the receipt, which he was unable to get cashed at the bank owing to the want of the deceased's endorsation.

Now, undoubtedly, if the words to which these witnesses and the defender depone were actually uttered by Janet Eckford, she knowing and intending them to have the effect of giving the balance of her money to him, that will in law be sufficient to establish donation. But we must in every case of this kind carefully scrutinise the whole circumstances in which the alleged gift was made, and to my mind there are here circumstances which render the proof very far from being satisfactory. The deceased was a very old woman, upwards of eighty-two years of age, and up to the time of her last illness she appears to have been of very temperate habits, but from the time of the alleged donation it is proved by the defender and his own witnesses that she drank a great quantity of intoxicating liquor, quite sufficient, I think, in a person of her age, to produce some disturbance of mind. The defender says that she lived upon drink, and it is proved that it was all supplied to her by himself without any medical authority, although he says that he remonstrated with her for taking so much. But the contents of the deposit-receipt would have amply sufficed for procuring the best medical advice, and no explanation is offered why a doctor was not consulted, except the defender's statement that she would not hear of it. Now, I cannot but think that there was a serious dereliction of duty on the part of the defender and Mr. and Mrs. Wyness in not calling in a doctor, and it is such as to give rise in my mind to some degree of suspicion as to their testimony in a case like this, where everything depends upon our knowing the very words spoken by the deceased person, for a very slight variation would convert the alleged gift into a mere trust. The question therefore being, whether the evidence in favour of donation is so clear and unambiguous as to redargue the legal presumption against it, I must say that, after careful consideration of the whole circumstances, I do not think the defender's proof sufficient, and I am of opinion, therefore, that the judgment of the Sheriff should be recalled.

LORD DEAS.—The privilege, which the law allows to persons who believe themselves to be dying, of making donations *mortis causa*, is a valuable privilege, but it is one the exercise of which requires to be carefully guarded to prevent its being unduly taken advantage of by alleged donees. Nothing, I think, could make that clearer than a case like this, where one of the parties took the entire charge of this old woman before her death, and obviously had great facilities for taking advantage of her situation, if so disposed.

Now, I can say that in none of the cases in which we have given effect to the proof of donation was there any room for doubting the evidence. Wherever [202] the evidence was at all doubtful, we have invariably refused to give effect to the alleged donation. In a case of this kind we must look to the whole circumstances. It is not a question as to the mere balance of evidence, where there is no presumption either way. The party alleging donation is bound to overcome the presumption against donation. Now, here we have a formal written will, which had been prepared by a man of business for the deceased, and executed by her a year before her death, containing very detailed instructions for the distribution of her means and effects, and I agree with your Lordship that that materially strengthens the presumption against the subsequent donation alleged to have been made. Among other circumstances to which I attach importance is the position in which this old woman, upwards of eighty-two years of age, was placed. She had been seized with severe illness in the beginning of June 1868. She then sent for the defender, and in the account said to have been incurred to him we find items which show that the first thing he did was to supply her with a pint of port wine, and a gill of brandy. That was immediately followed by the alleged donation. Now, there is no suggestion that the deceased had been previously in the habit of taking strong drink. On the contrary, we have the defender's own statement to the effect that she was not previously in the habit of taking stimulants. The amount of drink thereafter supplied to her from time to time was very large, looking to the woman's age and her state of health. The defender says that the deceased refused to allow a doctor to be sent for; but assuming that to be a sufficient excuse for not obtaining medical advice, and that the defender *bona fide* believed the drink to be beneficial, the question remains whether it clearly appears that the deceased was in a proper state intelligently to revoke the formal settlement which she had previously executed. It would certainly require more distinct evidence than we have in this case to induce me to adopt that conclusion. Moreover, we are asked to hold that this was a deliberate and well-considered donation *mortis causa*, merely because the deceased on two occasions made use of the words deponed to by the defender and by Mr. and Mrs. Wyness. I must say that I think this evidence, which is the whole evidence in support of the defender's

case, is extremely unsatisfactory, and is not sufficient to overcome the legal presumption against donation, fortified as that presumption is by the surrounding circumstances. It would be very unsafe, and might altogether outweigh the benefit arising from the privilege of making *mortis causa* donations, if anything but very clear and satisfactory evidence were held to be sufficient to support them, and it is in the recognition of this rule or principle that the importance of the present case lies. On the whole, I entirely concur with your Lordship that the Sheriff's judgment should be recalled.

LORD ARDMILLAN.—I concur so entirely with your Lordship that I think it unnecessary to add anything, except on one point. There is no question of law here raising any difficulty. It is now established that there may be a *mortis causa* donation, and that it is competent to prove a *mortis causa* donation by parole testimony, taken in connection with the whole facts and circumstances of the case. It was not without deliberate consideration that that result was reached by the Court. But it was reached on the ground that it is safer to let in cautious inquiry, than to shut out all evidence of the acts of the testator, or donor, with the result, it may be, of shutting out all proof of the truth. But it does not follow from that, that a narrow or defective proof can be sufficient, *talis qualis*, to establish *mortis causa* donation. The proof must be clear, satisfactory, and unambiguous. In this particular case, four presumptions arise against the defender, which it was necessary for him to overcome. 1. There is the general presumption of law against donation, which must be met by sufficient evidence. 2. There is a further presumption against donation in this case of nearly all the testator possessed, from the fact that the deceased had made a previous general and comprehensive will, calling in the aid of a man of business, and had again employed an agent to make some alteration in her settlement. She did not, on any view of the evidence, give the contents of the deposit-receipt to the defender. The Sheriff-substitute says she made the defender her agent, and the Sheriff thinks she [203] made the defender her trustee. On either view, there is a presumption against the trustee or agent being released from the obligation to account. 4. I do not suggest that drink was supplied to the deceased for the purpose of stupifying her. But it is in evidence that she was previously of temperate habits, that she was of advanced age, and feeble, and that she got a great quantity of stimulating drinks between the two dates when, the defender says, she made this donation, viz., when she first gave him the receipt, and when she afterwards signed it. Now, between these two dates, 2d and 18th June, there was supplied for her use a great deal of liquor,—six pints of wine, three half-pints of rum, and three gills of brandy, and that altogether or nearly without food, so far as we see, and without any medical advice, or the intervention of any person, besides the Wynesses, except the defender, in whose favour the donation is alleged to have been made. After that date more drink is got, altogether, in thirty-eight days, twelve pints of wine, two of rum, twelve gills of brandy, and three of whisky; and all that time this old woman, getting this large supply of drink, is lying in bed, dying, and without a medical attendant. In these circumstances, more explanation was required than we have got, and there is an additional presumption against donation.

I do not attribute any fraud to the defender in getting possession of this receipt; but there is certainly something unsatisfactory in his standing on that possession, and claiming a gift made in such circumstances. On the whole matter, viewing these circumstances of real evidence, which are beyond doubt, in combination with the testimony of the witnesses, I do not find that measure of proof which law, reason, and common sense require, to overcome the presumption against donation.

I agree entirely with Lord Deas, that no case has yet been decided in favour of donation where the evidence to support the averment of donation against the presumption was not beyond doubt, and that is not the case here.

LORD KINLOCH.—In this case the two Sheriffs differ, and each has argued his case very ably. I confess I lean to the side of the Sheriff-depute; and I am of opinion that donation has been proved. It is settled that donation *mortis causa* may be proved by parole. It was so settled, contrary to my views as expressed in my judgment, in the case of Muir *v.* Ross;* and it has since then been laid down in several cases, and must now be held as fixed law. The question then is one on evidence, whether donation has been proved or not. There is no other question in the case. I agree with the Sheriff in holding that donation has been proved, and on this ground, that there is

* June 15, 1866, *ante*, vol. iv. p. 820.

here the express testimony of three witnesses to the use of words which admittedly imply donation; and on the credibility of these witnesses sufficient suspicion has not been thrown to warrant me in disbelieving them. There is nothing to lead me to the conclusion that there was any fraud practised, or that this old woman did not know what she was about. I think she uttered these words, knowing what she did, and meaning what the words expressed. On the 2d of June she gave the deposit-receipt to the defender. He did not present it to the bank till the 16th. He was therefore in no hurry to get the money. He was told at the bank that they could not cash the receipt without an endorsement, and he brings it back to the old woman. He proposes to bring the landlord in to witness her signature, but she objects to this. She is raised in bed, endorses the deposit-receipt, and hands it back to the defender, repeating the words she had used before as to her intention regarding its contents. This is on 18th June, and she survives till 27th July. She never recalls the money, nor asks for it, and she dies without indicating any change of purpose.

It is said that there are unsatisfactory circumstances connected with this transaction. So there are. But I am afraid that this happens in many such cases. It is very seldom that any case is entirely satisfactory, "one entire and perfect chrysolite." But what are the unsatisfactory circumstances? It is said that a doctor was not called, and that this is suspicious. But it appears that it was proposed to call a doctor, and that the old woman would not hear of it. **[204]** This is a very prevalent feeling in her class, and not very unnatural in the circumstances. She was simply dying of old age, without a trace of any particular malady, and that unfortunately is a disease which no doctor can cure.

Then it is said that stimulants were supplied to her in unusual quantities. But for an old feeble woman, with no particular disease but weakness, that is the very thing which a doctor is likely to have ordered. There is no evidence of such excessive administration of stimulants as would affect the mind. I see no proof whatever of that, nor that these stimulants were administered for any wrong or fraudulent purpose.

In the absence, therefore, of any such elements of suspicion as would justify doubt as to the truth of the statement, I recur to the ground of decision already indicated, that here are words proved by witnesses of credit, importing a deliberate purpose of donation. I believe these words were uttered; there is no evidence of any practising upon the person who spoke them; and, therefore, though there is some measure of unsatisfactoriness about the case, there is not enough, in my opinion, to warrant me in denying effect to a donation deliberately made.

I give little weight to the fact that this old woman had made a previous settlement. It is in the very nature of a *mortis causa* donation that it should come after a previous settlement, if there was one, and perhaps it is in the nature of old women to make frequent changes in their settlements. It is true that in the first of her settlements she appointed the pursuer her residuary legatee, but then afterwards superseded her by another appointment. If the evidence be true, she altered these settlements on the 18th of June previous to her death so far as to make a donation to the defender, and the proof of that fact is not affected in any way to my mind by the circumstance that there was a previous settlement which that donation *pro tanto* superseded.

The following interlocutor was pronounced:—"Recall the interlocutor of the Sheriff of Aberdeenshire of 5th July 1871, appealed against: Find that the defender, Thomas Mellis, has failed to establish by sufficient evidence that the deceased Janet Eckford did, while on deathbed, make a gift to the defender *mortis causa* of the sum contained in the deposit-receipt for £40, dated 26th September 1867, or of the balance of said sum after providing for the maintenance of the deceased while in life, and for her funeral expenses: Therefore find that the defender is bound to account to the pursuer as executrix-dative for the said sum of £40, with interest; and remit to the Sheriff to proceed as shall be just, and in accordance with the above findings, reserving to the Sheriff to dispose of the expenses hitherto incurred in the inferior Court: Find the appellant (pursuer) entitled to expenses in this Court, and remit," &c.

T. F. WEIR, S.S.C.—MORTON, WHITEHEAD, & GREIG, W.S.—Agents.

[*Commented upon*, Crosbie's Trs. *v.* Wright, 1880, 7 R. 823.]

No. 43. X. MACPHERSON, 204. 7 Dec. 1871. 2d Div.—Sheriff of Stirlingshire, I.

JOHN INGLIS, Pursuer and Appellant.—*D.-F. Gordon.*
MRS. ANN ELIZABETH HAY OR MOIR AND OTHERS (Moir's Tutors), Defenders and Respondents.—*Shand—Mackay.*
GEORGE PONTON GUNNIS, Defender and Respondent.—*Sol.-Gen. Clark—M'Laren.*

Landlord and Tenant—Reparation—Game—Rabbits.—A farm was let to an agricultural tenant, and the whole shootings upon it were let to another person. The agricultural lease contained a reservation of game (no mention being made of rabbits), and also a reservation of power to resume possession of any part of the farm which the landlord might require for planting. The landlord availed himself of his right of planting, and the consequence was that the rabbits bred in the plantations and did considerable injury to the crops. In an action of damages brought by the agricultural tenant against the landlord and the game [205] tenant, *held* that the landlord was answerable to the agricultural tenant for the damage done to his crops by the rabbits bred in the plantations, but that the game tenant, being under no obligation to keep down the number of rabbits, was not answerable.

Observed, An agricultural tenant is entitled to destroy rabbits which are injuring his crops.

There were conjoined actions in this case by John Inglis, farmer, Spittalton, against his landlords, the tutors of Robert Graham Moir of Leckie, and against Mr. Gunnis, the tenant of the mansion-house and shootings of Leckie. The following narrative is taken from the opinion of the Lord Justice-Clerk :—

"Inglis became tenant of a farm under a lease from the late Mr. Moir in 1850. The parts of that lease which are material to the present question are two reservations —the first, a reservation to the landlord of power to resume possession of such parts of the lands let as he might require for planting or enclosing, and also of the existing plantations; and the second was a reservation of the game and fish on the farm, and the liberty of hunting, shooting, and fishing. There is no reservation of rabbits, and no mention of them. The pursuer entered on possession of the farm, and during the course of the lease thirty acres were resumed by the landlord, under the former reservation. It is alleged that prior to 1865 considerable damage was done by rabbits, and that an extrajudicial arrangement was made between the landlord and tenant on that head. In 1864 Mr. Moir died, and the shootings were let to Mr. Bruce, who was killed in the same year, and in 1865 the tutors of the present owner let the shootings on a game lease to the defender Mr. Gunnis. It is admitted, that in 1865–66, 1866–67, and 1867–68, considerable damage was done to the crops of the agricultural tenant by rabbits. The game lease contained a clause in these terms,—'The whole cost of keeping and preserving the game, including gamekeeper, under-keeper's wages, to be paid for by the second party (*i.e.* the game tenant). The stock of game to be fairly used and kept up and so as not to injure the tenants or give ground for action at law.'

"In these circumstances Inglis, the agricultural tenant, brings an action against the landlord stating the injury he has suffered by rabbits, and claiming damages for these three years. Defences were lodged, and a similar action was brought by Turnbull, a tenant of an adjoining farm under the same landlord. In the Sheriff-substitute's note to an interlocutor in the latter case, which is referred to in the note to his interlocutor in this case, of October 15, 1869, he says—'The Sheriff-substitute would hazard this other remark, that before incurring further expense in this cause the pursuer should deliberately consider whether he is suing the proper party, or is right in bringing the defenders only into the field.' On that hint the pursuer acted, and brought a supplementary summons against Mr. Gunnis, the game tenant. The actions were then conjoined, and, after proof, the Sheriff-substitute decerned against both defenders, and, on appeal, the Sheriff assoilzied both."

The pursuer appealed, and argued;—The proof showed that there had been an

increase of rabbits. There is implied in every lease an obligation on the landlord not to allow the rabbits or game to increase to such an extent as will injure the crops. This obligation is stronger when planting is undertaken, as it facilitates the increase of rabbits. The agricultural tenant could not enter the plantations in order to destroy the rabbits, and so was in the same position as if the rabbits had been reserved by the landlord. The game tenant is not entitled to use his right of preserving game and rabbits so as to injure the agricultural tenant. No one is entitled to maintain noxious animals to the injury of his neighbour. [206] He had used his right in violation of the maxim *sic utere tuo ut alienum non lædas.* Besides, he had prevented the game tenant from taking steps to keep down the stock of rabbits to a reasonable amount.

The defenders, Moir's Tutors, argued;—The tenant had his common law right of destroying rabbits, and had himself to blame if he allowed them to increase. The landlord can only be answerable for his own fault, and he did nothing to increase the number of rabbits. He was not bound at common law to keep down the rabbits, and there was no contract that he should do so.*

Argued for Mr. Gunnis, the game tenant;—The tenant of the shootings was entitled to preserve the rabbits. If the crops suffered it was the fault of the agricultural tenant in not availing himself of his right to kill the rabbits when they became so numerous as to injure his crops.

At advising,—

LORD JUSTICE-CLERK.—Some very important questions have been argued in this case—important to the parties, and to the law on the relations of landlord and tenant; and the Judges in the Court below differed. (After the narrative quoted *supra*, his Lordship said),—

In regard to the claim against Mr. Gunnis, to whom the shootings were let, I am of opinion that the Sheriff's judgment is right, and that the case against him has failed. There are two grounds of action alleged by the pursuer against him, the first, which is stated in the 7th article of the condescendence, to the effect "that by exterminating the vermin and preserving the rabbits he increased the stock during these three seasons to an enormous extent from the amount on the farm when it was taken by the pursuer." That is the first ground. The second, as stated in article 8th of the condescendence is that Mr. Gunnis prevented the pursuer from destroying the rabbits by shooting them, and in that way has made himself responsible for the damage which they have done.

The first of these grounds must be founded on contract or *quasi* contract. It assumes an obligation on the part of Mr. Gunnis, undertaken to the agricultural tenant, to destroy the rabbits on the farm. But Mr. Gunnis never undertook any such obligation. The lease of the shootings which Mr. Gunnis held merely communicated to him the proprietor's personal privilege of destroying wild animals on the farm, and traversing the lands for that purpose. The lessee obtained by this lease no right either in the lands or in the fruits of the lands. Although the soil might be let to a tenant for the purposes of cultivation, no contract relation was constituted between the lessee of the lands and the assignee of the shooting privilege. If not prohibited by the lease, the agricultural tenant was entitled to kill the rabbits on his farm whether the shootings were let or unlet. If the tenant of the shootings did any personal act to the injury of the agricultural tenant, such as treading down his corn, or breaking down his fences, he would be responsible. And so, if the agricultural tenant were to encourage his dogs or his hinds to scour the covers to the injury of the game, he might be responsible to the assignee of the shooting privilege. But the latter is under no obligation to kill rabbits for the benefit of the crops of the former, nor is the former bound, although, of course, he is entitled to kill the owls, or weasels, or polecats which may damage the game. There is no mutual obligation between them. Neither the omission to kill rabbits, nor the destruction of vermin, which are matters entirely within the power of the game tenant to do or to omit, can give the agricultural tenant any just cause of action. His claim lies against his own landlord, under the contract with him, which is neither enlarged nor restricted by the rights given to the tenant of the shootings.

There may no doubt be an ulterior question underlying all this, springing out of the general principle that no man can so use his property as to injure his [207] neighbour.

---

* Moncrieff *v.* Arnot, Feb. 13, 1828, 6 S. 530; Morton *v.* Graham, Nov. 30, 1867, *ante*, vol. vi. 71; Weston *v.* Incorporation of Tailors of Potterrow, July 10, 1839, 1 D. 1218.

It may be maintained that no one is entitled to keep on his property an unreasonable amount of destructive animals if the lands in the vicinity are thereby injured. I desire to give no opinion as to whether cases may exist between adjacent proprietors which may fall under this principle. But before the question could arise it would be necessary to allege and prove a deliberate and excessive harbouring of wild animals with a view to their multiplication. But no such case can arise here. The proof shows that, whatever stock Mr. Gunnis found on the farm, he did nothing to increase, and in the latter years much to diminish it.

But it is said, in the second place, that Mr. Gunnis prevented the pursuer from shooting the rabbits on the farm, and that he has, consequently, made himself liable for the damage done by them. Now, it is not necessary to say that if there had been, on the part of the tenant, a persistent attempt to shoot the rabbits and a persistent obstruction on the part of Mr. Gunnis, there might not have arisen a claim of damage. But the facts do not disclose any such state of matters. There never was a persistent attempt by the pursuer to shoot, and there never was any persistent refusal by Mr. Gunnis to permit shooting. If the pursuer had intended to make this a separate ground of action, he should have taken care to insist on his right, and to have done so with the intention of bringing it to a distinct solution. He never did so, and I do not believe that he ever meant to do so; and Mr. Gunnis says that, if he had been applied to, the leave would have been granted.

Lastly, as regards the case against the game tenant, I am of opinion that the clause in his lease relative to not giving rise to claims by tenants is one with which the pursuer has no concern; and, on the whole I am of opinion that Mr. Gunnis must be assoilzied.

This leaves the question as it was originally raised in the summons against the landlord; and I have now to consider how far any case is established against him and his tutors.

In regard to this claim, it is necessary to keep in mind the legal principles which apply to it. In the first place, rabbits are not game. That was quite clearly decided in the case of Moncrieff *v.* Arnot in 1828,* and has been held as law ever since. It was suggested at the bar that the case of North in 1864,† threw some doubt on this doctrine; but in reality that decision in no degree affects the question. The question raised in that case was one solely between the proprietor and the tenant of the shootings. The proprietor had reserved in his own hands the rabbits in his agricultural leases, and had let to Mr. North the whole shootings of every description. He subsequently gave to his agricultural tenants privileges in regard to the rabbits, and the lessee of the shootings maintained that this was inconsistent with the grant to him. And so the Court found. But there was nothing in that decision inconsistent with the general proposition that rabbits are not game. That they are not so is rendered certain both by the Revenue Statutes and the Night Poaching Act. In the second place, it necessarily follows that, if the tenant is put under no restriction by the terms of his lease, he is entitled to destroy rabbits as an ordinary agricultural operation, necessary to the cultivation of the farm; and if so, that he is not entitled either to require the landlord to destroy the rabbits or to claim damages for the injury done by them. But, thirdly, I am very clearly of opinion that a landlord cannot both reserve covers for game preservation within or around the land which he has let for agricultural purposes, and, at the same time, answer such demands as this, in regard to depredations by rabbits, by the plea that the tenant had the remedy in his own hand. If there be one fact which is clearly proved in the course of the evidence in this case it is that the covers sheltered the rabbits, and that the rabbits multiplied in the covers. It may perhaps be said to be more assumed than proved in the evidence; but every witness who is examined speaks to what it really required little testimony to establish. I am of opinion, therefore, that in the present case the reservation of the covers on the farm rendered the landlord as much responsible for an unreasonable stock of rabbits as if he [208] had reserved them along with the game in the lease; and the only question which remains is, whether, during the years libelled, that stock was unreasonable.

I am very clearly of opinion that, during the years 1865–66 it was entirely unreasonable, and that the landlord, consequently, is liable for damages for that year and for part of the next. It is said, indeed, that if the tenant had been allowed to shoot,

* Moncrieff *v.* Arnot, Feb. 13, 1828, 6 S. 530.

† North *v.* Cumming, Dec. 2, 1864, *ante*, vol. iii. 173.

the rabbits might have been kept down without trapping in the plantations. But although Mr. Turnbull, one of the tenants, in his anxiety to make Mr. Gunnis liable, says he would have kept down the rabbits if he had been allowed to shoot, the inadequacy of this remedy is quite clearly proved by all the witnesses of skill. If there had been more substance in the plea of the proprietor, it is greatly weakened by the fact that he had tied his own hands by letting the game to a tenant. I attach little importance to the statement that the landlord's agents told the pursuer, when he complained, to shoot the rabbits. They were bound to have prevented their game tenant from interfering in this matter; but they always avoided taking any responsibility, or aiding the tenant in such a remedy, even if it would have been available.

I am therefore of opinion that, to the extent to which the stock of rabbits was excessive, the landlord is liable in this case, on the principle which has ruled the decisions from the case of Moncrieff downwards; and that practically it is impossible, as regards rabbits, for a landlord both to reserve for purposes of sport, and still more of profit, the covers where rabbits are bred, and yet to exact, without compensation, full rents from the tenant on whose crops they are maintained in life. The case is, of course, all the stronger when the rabbits, which eat the corn and destroy the turnips, yield a second rent to the proprietor from the hands of a third party.

But, on the other hand, the tenant has some things in his power in regard to this matter. I have no idea that he is entitled to act upon the advice which I see the pursuer received in this case, when he was told that if he killed the rabbits he would have no claim for damages, but that he would if he refrained. Wherever a tenant is entitled to go on his farm there he is entitled to kill rabbits as he is entitled to kill rats, unless he be prohibited by the lease; and he is not entitled to omit reasonable exertion on the one hand, and claim compensation for the injury done to his crops on the other. On reading this proof I am satisfied that, for the season 1865–66, and for the next half-year, there was an unreasonable accumulation of rabbits on this farm, for which I think the landlord is responsible. For the remainder of the time I think the stock was considerably reduced; and, not being satisfied that the tenant has proved the existence of an unreasonable amount during this period, I am not prepared to alter the Sheriff's judgment in regard to it. I think we should allow the pursuer £30 in all, in name of damages.

Lord Cowan.—As to the position of the game tenant called as defender in the supplementary action, I concur in the views of your Lordship so entirely as to make it unnecessary for me to say anything.

The real question relates to the alleged liability of the landlord to the pursuer for the damages claimed in the summons; and I do not think the principles on which this question falls to be decided doubtful.

It must be held to be quite fixed that, where there is no stipulation to the contrary, and no obligation, express or implied, to the effect that the landlord has reserved to himself the rabbits on a farm, the agricultural tenant is entitled at common law to kill them, and so to protect himself against damage to the crops. This was authoritatively decided in the case of Moncrieff *v.* Arnot, and has been recognised in subsequent cases. But the consequence of this right in the tenant is to exclude him from claiming damages from his landlord on account of damage suffered from the ravages of rabbits—it being his own fault that he has not kept down the stock of rabbits on the farm. So much on the one hand.

But, on the other hand, when under his lease the tenant is debarred from destroying rabbits, the landlord will be responsible to him for the damage caused to his tenant, when they have been allowed to increase to an unusual and excessive amount.

[209] Taking these principles as fixed, I would have been inclined to affirm the judgment of the Sheriff under review, were it not for the specialties which exist in this case. By the lease between the landlord and his agricultural tenant there is reserved to the pursuer "the whole woods and plantations on the foresaid farm and land," and there is also reserved power and liberty to him, during the currency of the tack, "to resume possession of such part or parts of the farm and lands hereby let as he or they may require for planting and enclosing." Under this reserved power about six acres of ground were resumed in 1853 or 1854, and planted by the landlord. And subsequently an additional quantity of land was resumed to the extent of upwards of 20 acres. There was thus a considerable extent of land in possession of the landlord as plantation, from which the right of the tenant under his lease was excluded. The landlord alone,

or those authorised by him, could enter into these enclosures. But these were the very best cover for rabbits on the lands, and the tenant having no power to enter them was virtually debarred from killing them on that part of his farm. The landlord alone could keep down the stock so as to be within reasonable bounds, having regard to the size of the farm. And it is for inquiry whether, on the proof, it is established that during the three years set forth in the summons there was damage truly suffered by the tenant through a superabundant stock of rabbits, and whether the increase may not be traced to the existence of these protected enclosures. In that case it seems to me consistent with the principles stated that damages therefrom suffered should be made good to the tenant by the landlord.

On the proof I think it is sufficiently established that, during the years 1866 and 1867, but more especially in 1866, being the first year for which damage is claimed, there was an excessive number of rabbits on the farm. The game tenant employed a man Connell to keep down the stock of rabbits. He says that it was in October 1866 that he began operations, remaining till the beginning of April following; and his statement is—"The stock was too heavy for the estate when I first went to it, and required to be reduced, but they were pretty well down when I left the first year." And he proceeds to explain the state of matters in the two following years, till, as he says, at the close of his engagement the stock of rabbits was reasonably reduced. These statements appear to me to be substantially consistent with the rest of the evidence. For the damage done in 1865 payment had been made to the tenant by the landlord; and as, for the years 1866 and 1867, there were no effective measures resorted to by the landlord to reduce the excess of stock on the farm, I think there is room so far for the claim advanced in this action. For the other year, 1868, it appears to me that the game tenant had effectually kept the stock of rabbits within reasonable bounds. As stated by the same witness, the decrease had gone on steadily from the time he went, so that "at last there was a very small stock indeed; the stock was taken down rapidly."

There is, no doubt, difficulty in ascertaining how far the excessive stock in the years 1866 and 1867 arose from the cover afforded by the plantations; and there is room for doubting whether the whole amount of damage claimed by the tenant should be allowed him, seeing that the tenant abstained from killing rabbits on his farm, as he was entitled to do. This must be equitably and reasonably judged of from the whole proof, as in a jury question; and, on the whole, I concur in the judgment which your Lordship proposes.

LORD NEAVES.—I concur. In the argument an important question was raised which we ought to notice, although it may not be necessary for the decision of the case. It was contended that, apart from contract, a proprietor of land is responsible for any injury arising to a neighbour in connection with that land. But this can only be true in special circumstances, and it requires a strong case to make a man responsible for the use of his property. He may be so answerable if he puts it to an unnatural or artificial use so as to produce injury. Thus he will be held answerable if he erects a dam over a stream, and constructs it so defectively that the water overflows and injures his neighbour's land. If again he were to keep noxious animals such as wolves upon his ground, and they were [210] to escape and injure a neighbour's flock, he would be bound to make good the damage. In the case even of tame animals the proprietor is responsible, if he knows their predatory or ferocious tendencies, and does not keep them so as to prevent their doing mischief. But I cannot say that the mere proprietorship or possession of ground, which in its natural uses may be occupied by rabbits or wood-pigeons, will make the owner responsible for damage caused by these animals. Looking now, in this case, to the possession of the game tenant, I do not see how he can be made answerable for what here occurred. He was under no contract to the agricultural tenant to keep down the stock of rabbits. It is not said that he did anything positive to occasion any injury. His fault is rather said to consist *in non faciendo*, and to make him liable on that head it would seem to be necessary that there should be a contract. But further, I think that from the proof he appears to have done what he could to keep down the rabbits. It is said that he prevented the tenant shooting them; but I do not think that there was any such persistent course followed by him as to amount to prevention, and so give a claim of damage. The tenant was told by the keepers that he had no right to shoot, but this amounted to no more than an advice or opinion as to what his rights were, which the tenant was in no respect bound to follow. He may have followed this advice, which appears to have been contrary to his own view of his

rights, but such a state of things will not found an action of damages. Therefore I concur in thinking that Mr. Gunnis is not answerable.

As to the landlord I also concur in the qualified view taken of his position. This is not a case between strangers, but between persons who have entered into a contract of location of land, in which the *bona fide* fulfilment of its obligations is implied on both sides. If the landlord fail in doing what is reasonably necessary for the tenant's proper enjoyment of his right, he commits a fault which entitles the tenant to reparation, and still more if he does anything which directly leads to injury. I should be sorry to say anything which would discourage planting, but if the consequence of the landlord exercising his right of planting be that the rabbits so increase as to become an injury to the tenant, I think that the landlord ought to shew that he has exercised his right under reasonable precautions, so as to keep faith with his tenant on whose crops the rabbits live. This seems especially to be the case where the landlord gets a rent from the game tenant partly for the rabbits. There is enough with proof here to shew a remissness on the part of the landlord in carrying on the planting so as to counteract its operations in that way. It is an equitable limitation on his right that he should take care that the rabbits were not thereby increased, whereas he seems actually to have encouraged their increase.

As far as the tenant has right and facility to destroy rabbits, so far I think he cannot claim damage for their increase. If his right is not taken away or impeded he has the remedy in his own hands, and if he does not use it he seems to have no claim for damages. Care must always be taken that he does not make this grievance a pretence. He may be glad to have the damage from rabbits to complain of as an excuse for not paying his rent, and in so far as he neglects on this footing the natural and obvious means of self-protection he ought not to have a claim against his landlord.

The result is that the game tenant should be assoilzied, and the agricultural tenant held entitled to limited damages from the landlord.

The Lord Justice-Clerk intimated that LORD BENHOLME, who was absent, concurred in this judgment.

THE COURT pronounced the following interlocutor:—"Find that the pursuer entered to the farm of Spittalton under a lease granted by the late Mr. Moir of Leckie, dated in 1850: Find that by the terms of that lease the landlord was entitled to resume part of the lands for the purpose of planting, and also reserved the whole woods on the land and the game and rights of shooting: Find that the land to the extent of thirty acres or thereby was resumed and planted by the landlord prior to 1865: Find that at and prior to Whitsunday [211] 1865 the rabbits had greatly increased on the farm, and chiefly in the plantations, and that their amount was unreasonable and excessive, and continued to be so during the year 1866: Find that during the years 1867 and 1868 the number of rabbits was not excessive: Find that the said increase in the number of rabbits arose from the failure of the landlord to perform the obligation under which he lay to the pursuer to prevent the number of rabbits from becoming unreasonable and excessive: Find the defenders, the tutors of A. E. G. Moir of Leckie, liable to the pursuer in the sum of £30 in name of damages for the injury done to the crops on his farm by the rabbits within the period embraced in the summons, and to that extent sustain the appeal, and recall the judgment appealed from, and discern against the said defenders for the said sum of £30, with interest from the date of citation: Find that in the year 1865 the defenders, as representing the owner, let to the defender, Mr. Gunnis, the whole game on the said lands for ten years: Find that the said defender Gunnis, during the period embraced in the summons, did not do any act by which the stock of rabbits was increased, but that he took steps by which they were considerably reduced: Find it not proved that the defender Gunnis obstructed the pursuer in destroying the rabbits on his farm, or that the pursuer made any persistent attempt to destroy them: Find that the pursuer has not proved nor stated any relevant case against the said defender Gunnis: Therefore dismiss the appeal as regards the said defender, Mr. Gunnis, and decern: Find the pursuer entitled to expenses both in the inferior Court and in this Court against the defenders, Moir's tutors: Find him liable to modified expenses to the defender Gunnis both in this Court and in the inferior Court, and modify the same to two-thirds of the taxed amount, and remit," &c.

A. J. DICKSON, S.S.C.—DUNDAS & WILSON, C.S.—MILLAR, ALLARDICE, & ROBSON, W.S.—Agents.

[*Commented upon and distinguished*, Kidd *v.* Byrne, 1875, 3 R. 255.]

No. 44. X. MACPHERSON, 211. 8 Dec. 1871. 1st Div.—Sheriff of Fifeshire, M.

MRS. MARGARET KEDDIE OR SMITH AND HER HUSBAND, Petitioners.—*Hall.*
THOMAS JACKSON, Respondent.—*Brand.*

Apparent Heir—Custody of Title-deeds. — Circumstances in which *held* (*diss.* Lord Kinloch) that a depositary of title-deeds was not bound to deliver them up to the heir-at-law of the proprietor last infeft until the heir had expede a general service.

Margaret Keddie, as only child and heir-at-law of the late James Keddie, formerly residing in Kinglassie, presented a petition to the Sheriff of Fifeshire, setting forth that Thomas Jackson, writer in Kirkcaldy, "wrongously and unwarrantably withholds and refuses to deliver up to the petitioner the title-deeds and other writs in his possession of and connected with a property in the village of Kinglassie, which belonged to the said James Keddie, the petitioner's father, and that notwithstanding he has no hypothec or right of retention of any sort over the same. The petitioner is unable to enumerate said deeds and writs. That the petitioner has immediate occasion for the use of the said title-deeds and other writs, and she has already suffered, and will continue to suffer, till they have been delivered up. That the petitioner, through her agents, has repeatedly applied to the respondent for the said title-deeds and writs, and also for any claim that he might pretend to have, without receiving any reply; and, while disputing all liability to the respondent for any account whatever, has offered to find security for the payment of any account which the respondent alleges to be due to him by the late James Keddie, [212] or the petitioner as his heir-at-law, or, under reservation of all pleas, to consign in bank the amount of any account claimed by him, and interest, if any, thereon, to abide the issue of any action for payment of such account he might bring against her, and such offers are hereby judicially repeated. To the said offers the respondent made no answer."

The prayer of the petition was to decern the respondent to deliver up the title-deeds in question to the petitioner, on her finding caution for, or consigning, any sum which the respondent might instruct to be due to him by the deceased James Keddie, or by the petitioner as his heir-at-law.

The respondent denied that he was in possession of the title-deeds, and he alleged that the petitioner was not heir-at-law to any property in Kinglassie belonging to Keddie.

During the dependence of the proceedings the petitioner married Archibald Smith, who was sisted as a party.

A proof was taken, in the course of which it was ascertained that the petitioner was the only child of James Keddie, who had died many years previously, infeft in a small property in Kinglassie, the titles to which he had deposited with the respondent in security of a loan of £5. No evidence was adduced by the respondent.

The Sheriff-substitute (Beatson Bell) pronounced the following interlocutor:—"Finds in point of fact (1) that the female petitioner is the only child of the late James Keddie, formerly residing in Kinglassie; (2) that shortly before his death, which occurred about twenty-one years ago, the said James Keddie placed in the hands of the respondent the title-deeds of a property in Kinglassie belonging to him; (3) that the respondent still retains said title-deeds, and has not placed on record any plea claiming to retain the same in virtue of any hypothec or right of retention: Finds in point of law that the respondent is bound forthwith to restore the said title-deeds: Therefore decerns and ordains him instantly to do so in terms of the prayer of the petition: Finds the respondent liable in expenses," &c.

To this interlocutor the Sheriff (J. A. Crichton) adhered *simpliciter.*

Jackson appealed, and argued;—The petitioner, as apparent heir of James Keddie, might no doubt insist in an action of exhibition *ad deliberandum*; but until her actual entry as heir, she cannot compel delivery of the title-deeds, which is the object of this petition.*

The petitioner (respondent in the appeal) argued;—The title-deeds were proved to

* Ersk. iii. 8, 57; Nisbet *v.* Whitelaw, 1696, Dict. 3995.

have been deposited with the appellant in security of a small loan; but as it is not pretended that the debt is still unpaid, it cannot be maintained that he has any right to retain the deeds, which he is therefore bound to give up to the petitioner, who is the only person claiming the property, in order that she may complete her title.*

LORD PRESIDENT.—My Lords, I am not aware of any authority for holding that an apparent heir has an absolute right to demand possession of his ancestor's titles. That is the right of an entered heir. It may be that in particular circumstances an heir, although unentered, may be allowed the same privilege, or may be permitted, temporarily at least, to have the custody of the titles, and I do not think that we are called upon to lay down any absolute rule upon that matter, because this is a case of the barest kind, and I shall only say that, as at present advised, I am not prepared to affirm the proposition upon which the Sheriff's interlocutor is based. At the same time I should be sorry to put the petitioner out of Court. She may be willing to enter, and I am therefore prepared to affirm the judgment appealed from, at the same time superseding extract until a service is produced.

[213] LORD DEAS.—I am of the same opinion. It is not, perhaps, necessary to decide the general question as to the right of an apparent heir to get possession of the titles to the estate; but I think if it were held that his right is absolute, much difficulty and confusion would arise. An apparent heir is always anxious to avoid the responsibility which he incurs by representing his ancestor, and if he were to be allowed to get the title-deeds into his own custody without a service he might continue in possession of the estates, and die without ever completing a title, and it would be difficult to prevent subsequent heirs from doing the same thing. I have a pretty distinct recollection that in the Breadalbane case, although we found the pursuer entitled to draw the rents, we refused to allow him to get possession of the papers, although the deceased Earl's trustees had no competing claim, but only desired to be relieved of responsibility before giving up the custody of the documents.

LORD ARDMILLAN.—There are three cases in which an apparent heir may seek to obtain delivery of his ancestor's titles. In the first place, he may make the demand against a person alleging a preferable right, and in that case I think the apparent heir would clearly not be entitled to get possession of the deeds. In the next place, where, as in the Breadalbane case, the documents are in possession of trustees, or other persons acting in a fiduciary capacity, I think these parties are entitled to say that they must be relieved of any risk or responsibility before giving them up. A third class of cases is, where, as in the present instance, the demand is made against a person who alleges no right whatsoever to retain the deeds in his own hands. Now, I must say that I think he cannot resist the proposition that he is not entitled to keep them; but he may be entitled to be protected against any ulterior responsibility to which he might be exposed, by requiring the heir to expede a service. If there was a competition he would clearly be entitled to do this; and although there is here no competition, I am disposed to concur in the course suggested by your Lordship.

LORD KINLOCH.—My Lords, I think it is impossible to say that the qualification proposed to be adjected to the interlocutor does not necessarily import that the petitioner is not entitled to get possession of these title-deeds until she has been served heir. Now, I entertain no doubt that she is not entitled to the deeds as her own property; but I take this to be merely a question as to their custody, in a case where the party in whose hands they now are has neither right nor interest to keep them. The question is, whether he is not bound to cede possession forthwith. That the petitioner is the only child and apparent heir of the last proprietor of the subjects is not disputed; and it is not alleged that the respondent incurs any risk whatsoever by parting with the documents. But an apparent heir has many rights in relation to the property, for the exercise of which the use of the titles is required. He is entitled to possession of the estate, and if so, why is he to be debarred from that which is merely an incident to that right? If the respondent could have qualified any risk, we might have had to consider whether it was sufficient to justify his retention of the deeds; but, as I already said, nothing of that sort is alleged. Now, I confess that in these circumstances, and in the absence of any one pretending to have a better right, I am unable to see any ground for holding that the petitioner is not entitled *de plano* to get the deeds into her own custody.

* Craig v. Howden, 1856, 18 D. 863.

This interlocutor was pronounced:—"Find that the petitioner is the only child and apparent heir of her deceased father, James Keddie: Find that the title-deeds of a property in Kinglassie, which belonged to the petitioner's father at the time of his death, are in the possession of the defender (appellant): Find that the defender has no title or interest to retain the said title-deeds: Therefore refuse the appeal, and adhere to the interlocutors complained of, but under the condition that the decree of delivery of the title-deeds shall not be extracted till the petitioner (respondent in the appeal) shall be served heir in general to her father, the late James Keddie, and decern: Find no expenses due."

CRAWFORD & GUTHRIE, S.S.C.—JAMES BARTON, S.S.C.—Agents.

No. 45. X. MACPHERSON, 214. 8 Dec. 1871. 1st Div.—Sheriff of Ayrshire, M.

GOODWIN AND HOGARTH, Pursuers and Appellants.—*Scott*—*J. C. Smith.*
JOHN PURFIELD, Defender and Respondent.—*Fraser.*

Foreign—Jurisdiction—Arrestment—Reconvention.—A ship was arrested to found jurisdiction in a small-debt action against the owner, a foreigner, and the vessel was also arrested on the dependence. The defender presented a petition for recall of these arrestments as groundless and oppressive, but before any deliverance thereon he paid the debt sued for, with expenses. The pursuer then raised an ordinary action against him in the Sheriff-court for the expenses incurred in executing the arrestments. *Held* that the Sheriff had no jurisdiction, in respect (1) that the arrestment to found jurisdiction had been used with reference to the small-debt action, and had fallen with it; and (2) that the petition for recall of arrestments, although not disposed of, was purely incidental to the small-debt case, and was in no sense an *actio conventionis* so as to found a plea of reconvention.

On 5th December 1870 Goodwin and Hogarth, ship-chandlers, Ardrossan, raised a small-debt action in the Sheriff-court of Ayrshire against John Purfield, master of the schooner *Speed* of Balbriggan, in Ireland, for himself, and as representing the owners of the schooner *Speed*, to recover £2, 5s. 6d., the balance of an account for furnishings supplied to the defender, and on the same day the pursuers obtained warrant from the Sheriff to arrest the vessel, which was then lying in Troon harbour, *jurisdictionis fundandæ causa*. This warrant was executed on the 6th of December. The pursuers also obtained and executed a warrant for arrestment of the vessel on the dependence of the action. On 7th December the defender presented a petition to the Sheriff for recall of these arrestments as groundless and oppressive, but no deliverance was pronounced on this petition, and on the 16th of December he paid the debt sued for, with expenses.

On the 22d December the petition at Purfield's instance for recall of the arrestments being still in dependence, Goodwin and Hogarth raised an ordinary action in the Sheriff-court against him as master, and as representing the owners of the schooner *Speed*, concluding that the defender, "against whom arrestments *jurisdictionis fundandæ causa* have been executed at the pursuers' instance, and who is pursuer in an action against the present pursuers loosing the arrestments herein referred to," should make payment (1) of £6, 1s. 8d., being the expenses incurred by the pursuers in obtaining and executing the warrants of arrestment foresaid, and for dismantling the ship and placing her apparelling in safe custody; and (2) 5s. per week for storage of the apparelling, until relieved thereof by the defender.

The defender denied his liability for these expenses, and maintained that the action should have been raised in the Small-debt Court. He did not, however, plead want of jurisdiction, but the Sheriff-substitute (Robison) pronounced this interlocutor:—"Finds that this Court has no jurisdiction to entertain this action, it being neither a maritime cause (M'Glashan, 4th edit., secs. 303–305) nor founded upon arrestment *jurisdictionis fundandæ causa* (*ibid.* sec. 390); while the defender is a foreigner, and was furth of Scotland when the action was raised, and has been cited edictally under letters of

supplement, and not by personal service: Therefore dismisses the action: Finds no expenses due."

To this judgment the Sheriff (Campbell) adhered *simpliciter*.

The pursuers appealed, and argued;—(1) The action being merely incidental to the original suit in the Small-debt Court, the Sheriff's jurisdiction was competently established by the arrestment *jurisdictionis fundandæ causa*, which had never been loosed. Being a maritime cause, the Sheriff-[215]-court was the appropriate *forum*, although the defender is a foreigner.* (2) Jurisdiction was established by reconvention, the petition at the defender's instance for recall of the arrestments being in dependence when this action was raised.† (3 and 4) It was also contended that the Sheriff had jurisdiction, in respect of an alleged contract between the parties, out of which the proceedings had arisen for recovery of the debt sued for in the original action; and a correspondence between the agents for the parties prior to the raising of this action was founded on, to shew that the defender had agreed to prorogate the Sheriff's jurisdiction. As the question was one regarding jurisdiction the appeal was competent, although the value of the cause was under £25.‡

Argued for the respondent;—(1) This action was not incidental to the small-debt case, which was at an end before this was brought into Court.§ It was not a maritime cause,‖ but merely an action for the expenses of proceedings for recovery of debt; and in a cause which was not maritime arrestment *jurisdictionis fundandæ causa* did not found jurisdiction in the Sheriff-court.¶ (2) The petition for recall of arrestments was merely an incident of the original case, and in no sense an *actio conventionis*. (3) The appeal was incompetent, the balance of the cause being under £25.** (4) The action should have been raised in the Small-debt Court, from which no appeal would have been competent.††

LORD PRESIDENT.—The action in which this appeal has been taken was brought by the appellants against John Purfield, master of an Irish vessel lately lying in the harbour of Troon, but not alleged to be there now, concluding for payment of £6, 1s. 8d., "being the expenses and outlays," etc. (*supra*). The action is maintained on the ground of arrestments *jurisdictionis fundandæ causa*, and on the fact that the defender is pursuer in an action presently depending in the Sheriff-court of Ayr against the appellants. Jurisdiction is thus founded on two grounds, arrestment and reconvention.

A third ground of jurisdiction was intimated in the course of the discussion, founded on the circumstance that the matter in question grew up within the territory of the Judge, and constituted a contract between the parties. But that is plainly untenable, there being no contract, and no personal citation of the defender.

A fourth ground was also suggested, to the effect that the defender prorogated the jurisdiction, but the correspondence between the agents on which that plea was supported does not bear out any such conclusion.

The only pleas, therefore, requiring consideration are the two first mentioned. Now, the arrestments founded on were used, not with reference to this action, but to found jurisdiction in a previous action, out of which this one is said to have grown. That was a small-debt action for £2, 5s. 6d., against Purfield as an individual, in which decree was given against him, and the amount, with expenses, was paid by him on the same day. That action, therefore, was at an end before this action was raised; and I cannot see how the arrestments used in that action can have any effect in founding jurisdiction in this action. This action is not a proceeding incidental to the other, though the claim may have arisen out of it. It is plainly not a maritime cause, and therefore that ground of jurisdiction entirely fails.

[216] The plea of reconvention is founded on a different proceeding, a proceeding by the master and owner of the vessel on 7th December 1870. The small-debt action

---

* 1 Gul. IV. cap. 69, sec. 22; 1 & 2 Vict. cap. 119, sec. 21.

† Morison *v.* Massa, Dec. 8, 1866, *ante*, vol. v. 130; Thomson *v.* Whitehead, 1862, 24 D. 331.

‡ Dick *v.* North of Scotland Railway Company, 3 Irv. 616; Buie *v.* Stiven, Dec. 5, 1863, *ante*, vol. ii. 208.

§ Taylor *v.* Taylors, 25th January 1820, F. C.; Smith *v.* Ninian, 1826, 5 S. 8 (N. E. 7).

‖ Smith's Maritime Practice, 16.

¶ Burness *v.* Purves, 1828, 7 S. 194.

** 16 & 17 Vict. cap. 80, sec. 22.

†† 1 & 2 Vict. cap. 41, sec. 2.

above mentioned was raised on 5th December, and the arrestments were executed on that day. But on the 7th the master and owner presented a petition to the Sheriff for recall of these arrestments. That was during the dependence of the small-debt action. It was the existence of the small-debt action that made the application competent, and they could not well have gone to any other Court for redress. They complained that the arrestments were unlawful and malicious, and they asked, not for loosing of them on caution, but for their absolute recall. If they were to get them recalled, which *prima facie* they were well entitled to, then they had no recourse but in this form by an application to the Sheriff. They were obliged to take this course for their own protection; and that makes the petition for recall of arrestments a proceeding necessarily incidental to the small-debt suit. The question is, whether that can be founded on as an *actio conventionis*, to support the plea of reconvention in this new action. It is quite true that this action was raised while that petition was still in dependence. But the petition was of very little use after the small-debt action was at an end, and seems to have been left in Court rather through negligence than anything else. Still it was in dependence, and therefore the question arises, purely enough, whether it can support the plea of reconvention. I do not think it can. I do not think the petition is an action at all, in any proper sense. It is not an independent proceeding in which the petitioners voluntarily submit themselves to the jurisdiction of the Sheriff-court of Ayr. On the contrary, they were obliged to apply to the Sheriff, because they were in his Court already, and only there could they obtain the protection they sought. In no sense is it an *actio conventionis*, and therefore it appears to me that the Sheriff-substitute and the Sheriff were right in declining to exercise jurisdiction in this action.

LORD DEAS.—Some points have been raised in this case by Mr. Smith's ingenuity, which at first impressed me a good deal. One was that the arrestment to found jurisdiction in the original action was the substratum of the whole proceedings, and that the second action, in which it was agreed to accept the Sheriff's decision, was merely incidental to the first. The second point was the plea of reconvention.

But the conclusive answer to the first plea is that the action here before us is not incidental to the first action, in which the arrestments were used, but separate and distinct, and on the face of this second action it is not a maritime cause at all. The very foundation of it is that the sum sued for is a separate debt, which may competently be made the subject of a separate action; and in that separate action no arrestment has been used to found jurisdiction.

As to reconvention the application by the defender to the Sheriff for recall of the arrestments was not a separate action. It was an incidental proceeding in a depending action, and the Sheriff could not have dealt with it if it had not been so. I am not prepared to say that such an incidental step taken by a defender in a cause can be regarded as a proceeding on which to found a plea of reconvention, and therefore I think that this plea also must be repelled.

LORD ARDMILLAN.—I am of the same opinion. The only plea maintainable by the appellants against the judgment of the Sheriff is that of reconvention; and I think there is no reconvention here. The plea rests on the petition of the respondent for recall of the arrestments, and I agree with your Lordships that that application was simply incidental to the action raised against him in the Sheriff-court. It was not an original and separate action, and therefore not in the eye of law an *actio conventionis*, to which there might afterwards be brought an *actio reconventionis*, which would found a plea of reconvention.

LORD KINLOCH.—I am of the same opinion. The action before us on appeal is clearly a new and independent action. Whether a maritime cause or not, it is separate and distinct from any previous action in Court between the parties, and it required a foundation for jurisdiction, and none such was laid. It is [217] clear that there was no prorogation of jurisdiction; there is no arrestment *jurisdictionis fundandæ causa* applicable to this action, and the circumstance of this being a new and independent action is on that point conclusive. As to the plea of reconvention, it can only be maintained when the party against whom it is pleaded has previously himself voluntarily appealed to the jurisdiction of the Courts of this country. It is not so here. The respondent never came into the Scottish Courts as a pursuer. The respondent was a defender only; he was compelled to come here; every step he took was that of a defender, and not of a pursuer; and in applying for recall of the arrestments he was

only doing, as defender, what he could not help doing. Therefore there is no case at his instance, in any sound sense, before the Courts of this country, and so no foundation for the plea of reconvention.

The appeal was dismissed, with expenses.

FYFE, MILLER, & FYFE, S.S.C.—MILLAR, ALLARDICE, & ROBSON, W.S.—Agents.

No. 46. X. MACPHERSON, 217. 12 Dec. 1871. 1st Div.—Lord Gifford, M.

SOREN ANDERSEN, Pursuer.—*Trayner.*
HANS PETER HARBOE, Defender.—*Asher—Thorburn.*

Process—Amendment—Summons—Arrestment ad fundandam jurisdictionem.—Held that the 29th section of the Court of Session Act of 1868 (31 & 32 Vict. c. 100), authorising amendment of "any error or defect in the record or issues in any action or proceeding," &c., did not authorise an amendment of a summons, raised in name of A. B. as owner of a vessel, to the effect of introducing new pursuers to the action as joint owners of the vessel.

Observed, that arrestment *ad fundandam jurisdictionem* founds jurisdiction against the arrestee only in the particular action for the purpose of which it is used, so that if in such an action new pursuers are introduced, by amendment or otherwise, the plea of no jurisdiction would fall to be sustained.

This action was brought at the instance of "Soren Andersen, shipowner of Laurvig, in Norway, owner of the ship *Oscar*, of Laurvig," against Hans Peter Harboe of Skjelskor, owner of the schooner *Peter*, of Marstal, in Denmark, for the purpose of recovering damages for injury to the *Oscar* by a collision alleged to have been caused by those in charge of the *Peter*. Arrestments *ad fundandam jurisdictionem* were used against the defender. It was averred in the first article of the condescendence that the pursuer Andersen was owner of the *Oscar*. After proof had been led before the Lord Ordinary, the pursuer, by minute, craved leave to amend the summons "by adding after the words 'Soren Andersen, shipowner, of Laurvig, in Norway, in the instance of the summons, the following words, viz.—E. Eriksen, shipowner there; A. A. Solum, shipowner there; and A. L. Amundsen, shipowner there, the registered owners,'" and making corresponding changes in the first article of the condescendence, and elsewhere.

The Lord Ordinary pronounced the following interlocutor:—"Having heard parties' procurators on the minute for the pursuer, No. 41 of process, refuses to allow the amendment of the libel and relative condescendence therein proposed; and, on the pursuer's motion, grants leave to reclaim against this interlocutor, and discharges the adjourned diet of proof fixed for the 18th inst. till the reclaiming note be disposed of." *

[218] The pursuer reclaimed, and argued that he was entitled to make the amendment under the Act of 1868. The real question between the parties to the action as raised was the question of fault, which the original pursuer could raise without the concurrence of his co-owners. †

---

* "NOTE.—The proposed amendment was resisted by the defender as incompetent; and although it might be admitted, of consent, the Lord Ordinary has found himself compelled to reject it as not falling within the provisions of the 29th section of the Act of 1868. The real purpose of the amendment is to add three new pursuers, that is, three new parties to the suit, so as to make the action one at the instance of different parties from the party at whose instance [218] it was instituted. The Lord Ordinary thinks that an alteration like this is not contemplated by the statute, and as the defender stands upon his strict legal right, the Lord Ordinary has rejected the amendment.

"The amendment was not tendered till the close of the pursuer's proof, it having been adjourned only for a special purpose."

† Mackenzie *v.* Smith, June 26, 1861, 23 D. 1201; Young *v.* Cunningham, June 22, 1830, 8 S. 959; Lawson *v.* Leith and Newcastle Packet Co., Nov. 26, 1850, 13 D. 175.

The defender argued that before the Act of 1868 a party was not entitled to sist himself as pursuer without the defender's consent, and that rule was not affected by the statute.* Further, the 29th section of the Act allowed amendments to be made on the record only, *i.e.* on the pleadings, not on the formal part of the summons stating the instance. The arrestments *ad fundandam jurisdictionem* could not be amended so as to make them arrestments at the instance of those whom it was now proposed to make pursuers.

LORD PRESIDENT.—The pursuer sues as owner of the ship *Oscar*, by which, of course, he means sole owner, and he concludes accordingly for payment of £500, in respect of damage sustained by a collision with the defender's vessel, *The Peter*. It turns out that he is not the owner, *i.e.*, sole owner, and he now proposes to substitute "owners" for "owner," for it is nothing else but the substitution of one set of pursuers for another, the fact of Andersen being one of the four owners making no difference. In short, he finds he cannot sue without the title and interest which are necessary to raising the action. That is simply a change of ground, and independently of the late statute, it is well established in practice, on good and reasonable grounds, that that is incompetent. But it is said that the change is justified by sec. 29 of the statute of 1868. The Lord Ordinary has rejected that view as inconsistent with the fair reading of the enactment, and I entirely agree with him. What the clause authorises is "to amend any error or defect in the record or issues in any action or proceeding in the Court of Session," &c. These words are broad enough, but it is pretty plain from what follows what the purpose is for which that power is given, for it goes on to say—"and all such amendments as may be necessary for determining in the existing action or proceedings the real question in controversy between the parties shall be so made." Now, carrying out the object and spirit of that enactment, we allow considerable latitude in making such amendments, on condition of a payment of expenses. But we have never gone beyond the true object of the statute, which is to make such a record as will enable us to determine the true question in controversy between the parties, that is, the parties to the record. It would be a very singular amendment, in order to settle that question, if we were to enable one of the parties to raise a question with other new parties, without the consent of his adversary. As the pursuer could not try this question with the defender to the effect of recovering the whole damage sustained, we are not asked to amend the record in order to determine that question, but in order to try and determine the question between another party and the defender. That seems to me to be going beyond the true scope of the section. But the difficulty is confirmed by one of the specialties of the case. There is no jurisdiction *ratione domicilii*, or *rei sitæ*, and, therefore, the only foundation of jurisdiction in the case is arrestment. The ship *Peter* has been arrested. But that has not the effect of subjecting the arrestee to jurisdic-[219]-tion in all actions, even at the instance of the same party, or in reference to the same matter. The effect is only to subject him to jurisdiction in the particular action for the purpose of which the arrestment is used. Now, the action brought under the authority of the arrestment used by the pursuer is the action at his own instance. But the other parties whom it is sought to substitute as pursuers have founded no jurisdiction, and, therefore, the very first thing that would happen, if we sustained this amendment, would be that the defender would object to the jurisdiction of the Court; and I confess I do not see how that plea could be answered. We cannot, therefore, allow an amendment, the effect of which would be to destroy our jurisdiction; and that alone affords a sufficient illustration of the absurdity and incompetency of perverting the enactment to a purpose which it was never intended to serve.

LORD DEAS.—This is an action at the instance of Andersen, as the owner of the ship *Oscar*, and there is no doubt that that means as sole owner. It is directed against a foreigner, jurisdiction being founded by arrestment, and it is also explained to us that arrestments have been used on the dependence. It is now proposed to amend the summons by adding the names of three other pursuers—persons who turn out, in the course of the proof, to be co-owners with Andersen. Under our former law it is quite clear that this amendment could not have been made. It appears to me that even now it is a conclusive answer to the proposal, that, on the showing of the pursuer himself,

* Mags. of Edinburgh *v.* Budge & Co., Dec. 15, 1824, 3 S. 403; Taylor *v.* Crawford, June 2, 1829, 7 S. 192; Smith *v.* Stoddart, July 5, 1850, 12 D. 1185; Taylor *v.* Crawford, Nov. 14, 1833, 12 S. 39.

the new pursuers have done nothing to found jurisdiction against the defender so as to entitle them to convene him in this Court. They have not used arrestments against him, and those of the pursuer Andersen cannot avail them. This ground of judgment seems to me to be sufficient, but I am not prepared to differ from the more general views stated by your Lordship.

LORD ARDMILLAN.—In this case, in which both the parties are foreigners, the pursuer sues an owner, *i.e.*, as sole owner, of the ship *Oscar*. It now appears that that is a mistake, the pursuer being only the managing owner and one of several owners. That being so, he is either not entitled to sue at all, or only to the effect of recovering his proportion of the damages. If he cannot sue at all, the effect of the proposed amendment would be to create his title to sue, and, indeed, to create a new substantive action. If he can sue (as I think he can, to the effect of getting his own share), the effect of introducing new pursuers who can, along with him, sue for the whole, would be to make this a much more important suit in regard to the value at stake, and the scope of the conclusions, than it was before, as against the foreign defender. That is a serious objection. But there is a more serious objection. There is no jurisdiction against the defender in this Court apart from the arrestment which has been used; and on the most favourable view of the pursuer's case I think that we must regard that arrestment as limited in its effect to creating a jurisdiction *quoad* Andersen's share of the vessel. I therefore rather agree with Lord Deas in holding that this view is sufficient to dispose of the case; but I also concur with the Lord Ordinary that the clause of the statute of 1868 does not, when fairly read, extend to the amendment suggested.

LORD KINLOCH.—I think the Lord Ordinary is right. I should not like to decide absolutely beforehand that under no circumstances whatever should a new pursuer be allowed to appear and insist without the consent of the defender. Here, however, it is unnecessary to decide that point. The proposed pursuers cannot appear in this action, against a foreigner, for want of an arrestment to found jurisdiction at their instance. This specialty of the arrestment is quite enough to dispose of the case. This is not a question of title to sue, but a point preliminary to the parties appearing at all. We might or might not have power to amend an instance; but we cannot amend the arrestments *ad fundandam jurisdictionem* so as to render them arrestments at the instance of these parties.

THE COURT adhered.

SCARTH & SCOTT, W.S.—MURDOCH, BOYD, & Co., S.S.C.—Agents.

No. 47. X. MACPHERSON, 220. 13 Dec. 1871. 2d Div.—Sheriff of Inverness-shire, I.

JOHN CRAWFORD ORCHARD, Pursuer and Respondent.—*Rhind.*
JAMES CUMMING, Defender and Appellant.—*Strachan.*

Process—Sheriff—Enrolment—Dismissal—Procedure—Statute 16 *&* 17 *Vict. c.* 80, *sec.* 15.—*Held* that the enrolment of a case in the cause-book of the Sheriff-court, and the allowance by the Sheriff of the enrolment to drop, constituted procedure in the cause in the sense of the 15th section of the Sheriff-court Act of 1853, so as to prevent the action standing dismissed under that section.

This was an action of forthcoming in the Sheriff-court of Inverness by John Crawford Orchard against certain parties as arrestees, and against James Cumming (the present appellant), common debtor.

On 28th June 1871 the Sheriff-substitute pronounced an interlocutor appointing the 11th July for taking a proof. It appeared from the cause-book that the case had been afterwards enrolled by the agent for the pursuer, and again on 5th October by the agent for the defender (the appellant). It further appeared from markings of the Sheriff-clerk that at both diets for which the case had been enrolled the enrolment had been allowed to drop.

The Sheriff-substitute (Blair) pronounced this interlocutor:—"Having heard the

defender's agent on his motion for revival of the action, finds that no sufficient reason has been stated for reviving it, and that no offer is made to pay expenses."

The defender appealed, and argued, that under the 15th section of the Sheriff-court Act of 1853 enrolment of a case was sufficient procedure to prevent the action standing dismissed.

The respondent argued that enrolment was not procedure. The provision in the statute was intended to bring the case before the mind of the Judge. The Judge did not see the roll of causes. An enrolment which was not followed up by a motion did not advance the case, and so did not constitute procedure. If enrolment were held to be enough the parties might defeat the provision of the statute by agreeing to enrol the case, and allowing it to drop.*

At advising,—

LORD JUSTICE-CLERK.—I am of opinion that the appeal is competent, and that we ought to refer the case back to the Sheriff-substitute. I think that it is a mistake to suppose that the action expired under the 15th section of the Act. The question is, whether enrolment is such procedure in the cause as will satisfy the requirement of the statute. The enrolment must be presumed to have been made *in bona fide*. I do not say what effect it would have if it were a mere pretence. The words of the Act are these—"Where in any cause neither of the parties thereto shall, during the period of three consecutive months, have taken any proceeding therein." An ordinary enrolment is unquestionably procedure, for thereby the cause is brought under the consideration and cognisance of the Judge. The party who enrols is bound to follow out his motion, and if the case be dropped he is liable in expenses. The case never did get into the purgatorial or dormant state to which the section of the Act refers, and therefore the interlocutor of the Sheriff-substitute is wrong.

LORD COWAN.—I concur. The case depends upon the power and competency of the Sheriff to exercise the statutory power conferred on him by the 15th section of the Sheriff-court Act of 1853, in the then existing state of the process. He holds that three months had elapsed since any procedure in the cause had taken place, and that the cause could only be revived by an interlocutor to be [221] pronounced by him on cause shown. But if it appear that there had been sufficient procedure to keep the cause alive, the interlocutor brought under review was pronounced under essential error. The cause in that state of matters was not in the position contemplated by the statute, and there was no room for the exercise of the statutory discretion conferred on the Sheriff. Assuming this, the appeal to this Court must be quite competent, the interlocutor being *ultra vires*.

The question then is, whether there was *bona fide* procedure within the three months. The case appeared in the roll of causes in the Sheriff-court before the expiry of that period. The enrolment was duly intimated to the opposite party, and we must presume that the parties appeared, as there is no evidence that they were absent. On the contrary, the enrolment of the cause was allowed to drop, and is so marked by the Sheriff-clerk in his book of causes for that diet of Court. The Sheriff must have been present, and given his tacit consent to that mode of disposing of this enrolment, as he did to the disposal of the other cases called on the same day in Court. Although, therefore, no interlocutor was pronounced, I think there was such procedure in the cause taken in good faith as to have kept it from being sopited within the statutory period. The case of Stewart *v.* Grant (*ante*, vol. v. 735) is a strong authority in support of this conclusion; for though there was no marking here by the Sheriff, there is one by the Sheriff-clerk, and the Sheriff must have been present in Court when it was made.

LORD BENHOLME.—I concur. It is not necessary that there should be an interlocutor of the Sheriff in order to procedure. Nor is it necessary that the cause should be advanced. If there had been an adjournment of the cause it would have been enough.

LORD NEAVES.—I am of the same opinion. This section of the statute is not to be construed judaically. Going through the form of enrolment might not be enough

* *Respondent's Authorities.*—Forbes *v.* Milne, Feb. 22, 1870, *ante*, vol. viii. 598; Mackintosh *v.* Mackintosh, Nov. 10, 1863, *ante*, vol. ii. 48; M'Dowall *v.* Brown, July 13, 1865, *ante*, vol. iii. 1079; Stewart *v.* Grant, March 29, 1867, *ante*, vol. v. 736.

to save the action if the parties did not appear. But here the party who enrolled the cause, and was entitled to ask for circumduction and his expenses, waived his right. When the parties again appear the Sheriff refuses to do anything. The appellant in such circumstances is entitled, I think, to come here and maintain that the action is still alive. The interlocutor of the Sheriff-substitute is a plain denial of justice, and should be taken out of the way.

THE COURT pronounced this interlocutor:—"Sustain the appeal: Recall the judgment appealed against: Find that the enrolment of the cause in the cause-book of the Sheriff-court on the 5th of October, and the allowing by the Sheriff of that enrolment to drop, constituted procedure in the cause, in the sense of the 15th section of the statute, and remit to the Sheriff to proceed in the cause: Find no expenses due to either party."

DAVID COOK, S.S.C.—D. CRAWFORD & J. Y. GUTHRIE, S.S.C.—Agents.

No. 48. X. MACPHERSON, 221. 14 Dec. 1871. 2d Div.—Lord Mackenzie, R.

THE HERITORS OF ABERDOUR, Pursuers.—*Sol.-Gen. Clark—Fraser—Scott.*
THE REV. GEORGE RODDICK, Defender.—*Watson—Asher.*

Manse—Heritors—Minister.—A minister for several years let his manse furnished for two months in summer while he took his family to another part of the country for change of air. The duties of the parish were discharged by a substitute who did not reside in the manse, and the minister came occasionally to preach on Sundays. The heritors having raised an action against the minister concluding for declarator that he had no right to let the manse, and for interdict against his doing so, *held* that, as the letting of the manse did not injure it, the heritors had no interest or title to interfere.

Question, whether a minister is entitled to let his manse for a longer period.

The following narrative is taken from the Lord Ordinary's note:—

"The present action has been raised by the heritors of the parish of Aberdour, and by the Earl of Morton, the Earl of Moray, and Mr. Wother- [222] -spoon, of Hillside, three of the heritors, against the Reverend George Roddick, the minister of that parish, to have it found and declared that the defender 'has no right to let or hire out the manse of the said parish of Aberdour, or any part thereof, to tenants, strangers, sea-bathers, or others, or to occupy, or to allow or permit the same to be occupied, by such tenants, strangers, sea-bathers, or others, not being his own family, servants, or other members of his household,' and to obtain interdict against the defender prohibiting him from so letting or hiring out the manse. The pursuers aver that the defender has for some years been in the practice of letting his manse during the months of August and September, and, in particular, that he did so in 1868, to Mr. Dryburgh, brewer, Edinburgh, at £25, and in 1870 and 1871 to Mr. James Shand, a fire-engine manufacturer in London, at £30, for each of these two months. The defender admits these statements of the pursuers, and he explains that he so let his manse, while absent, with the knowledge of the presbytery, from his parish for the benefit of his health, and that, besides visiting his parishioners, he has, during these two months, discharged his Sunday duties personally for at least half the time, and that, during the remainder of the time, his duty is performed either by other clergymen, with whom he exchanges pulpits, or by means of a paid assistant, for whom he takes lodgings in the village of Aberdour."

The pursuers pleaded;—1. The minister of a parish, having right to his manse as a residence for himself and his family, and for this purpose only, is not entitled to let or hire it out to tenants, strangers, sea-bathers, or others. 2. The defender having no right to let or hire out the manse of Aberdour, the pursuers are entitled to decree of declarator and interdict against him, as concluded for in the summons.

The defender pleaded;—2. The defender should be assoilzied—(1) In respect the defender's actings in regard to his manse have in no way exceeded his legal powers

and rights; (2) In respect the defender's manse, by being let during the period of his annual absence from the parish, has been in no way injured, but, on the contrary, improved, and the pursuers have therefore no interest to insist in the present action; (3) In respect the defender's manse has, during his incumbency, been in no way subjected to undue wear and tear, but has, on the contrary, been kept and maintained by him in such a way as to prevent, as far as possible, deterioration in the premises.

The Lord Ordinary pronounced this interlocutor:—"Assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses, of which allows an account to be given in," &c.*

---

* "NOTE.— . . . It is not easy accurately to define the nature of a minister's right to his manse. Lord Stair, in treating of infeftments of property, states, that 'the gleibs of ministers seem to come nearest to allodials, having no infeftment, holding, rent, or acknowledgment, though they be more properly mortified fees, whereof the liferent escheat befals to the King only' (2, 3, 4). In the same book, after defining infeftments of mortified lands, he says (2, 3, 40), 'Of all these mortifications there remains nothing now except the manses and gleibs of ministers, which manses and gleibs are rather allodial than feudal, having no express holding, reddendo, or renovation, yet are esteemed as holding of the King in mortification, and therefore the liferent of the incumbent, by being year and day at the horn, falls to the King.' In the Heritors of Cargill *v.* Tasker, 29th February 1816, F. C., where the question was, whether a minister is liable to be assessed for poor-rates, the Court, in deciding that he was not, observed, as the report bears, that 'he is, *qua* minister, neither an heritor, a tenant, nor a possessor.' But this was explained by Lord Fullerton, in the case [223] of Forbes *v.* Gibson, 18th December 1850, 13 D. 341, 'as importing that, though *de facto* possessing, still the possession of ministers was, from their peculiar character, not such as to bring them within the assessing clauses' of the Poor-Law Acts. The question, in that case, was, whether a parish minister was, by reason of the provisions of the Poor-Law Amendment Act, liable to assessment for support of the poor in respect of his manse and glebe. In the same case, in the House of Lords, the Lord Chancellor (Lord St. Leonards) stated that 'ministers are in a sense owners.'

"The right of a parish minister to his manse is statutory. By the Act 1563, c. 72, it is provided, that the 'minister have the principal manse of the parson or vicar, or sa meikle thereof as shall be fundin sufficient for staiking of them, to the effect that they may the better await upon the charge appointed and to be appointed unto them, quhidder the saidis gleibes be set in few or tack of before or not: Or that ane reasonable and sufficient house be bigged to them beside the kirk be the parson or vicar, or others, havand the said manses in few or lang tackes.' By the Act 1572, c. 48, it is declared, 'that the manses outher perteining to the parson or vicar maist ewest to the kirk, and maist commodious for dwelling, perteins and sall pertein to the minister or reader serving at the samin kirk: Together with four acres of land of the glebe at least lyand contigue, or maist ewest to the said manse, gif there be sa meikle,' and these are appointed to be designed 'to the use of the minister or reader that sall serve and minister at the said kirk in time cumming.' And by the Act 1663, c. 21, the heritors of the parish are ordained, where competent manses are not already built, to 'build competent manses to their ministers,' and, where competent manses are already built, to repair them, the ministers being bound to uphold them during their possession after being repaired and declared free. According to these statutes, manses pertain to ministers during their incumbency, and they are designed for their use, 'to the effect that they may the better await upon the charge appointed.'

"Such being the statutory right of ministers, the Lord Ordinary has been unable to see any sufficient grounds on which the pursuers, as heritors of the parish of Aberdour, can, in the circumstances, and on the grounds averred by them, obtain the decree of declarator and interdict for which they conclude in their summons. It is not said that the defender, by letting the manse for two months annually at a high rent to a family of respectability, has dilapidated the manse, or that he is applying it otherwise than for the purposes of a dwelling-house. The pursuers aver that the manse has not been declared free, but the defender states in the record that it has been virtually so ever since his entry—that he has improved the premises by means of the rent which he has received—and that he will put no difficulty in the way of the heritors having it declared free. The Lord Ordinary does not feel called on to

[223] The pursuers reclaimed, and argued;—The minister has no power of letting his manse. Manses are a part of the property of the Church. [224] Before the Reformation both manses and glebes were taken from the property of the Church. Now, the heritors are bound to furnish manses. They have, therefore, a right to see that the manse is not applied to a purpose for which it was not intended. The minister is not entitled to make profit out of the manse, which is given for the residence of the minister in order that he may properly discharge the duties of his office. The minister's right is no more than a right of use. The result of letting the manse would be that the minister will reside elsewhere, and this he is not entitled to do.*

The minister answered;—The heritors are not entitled to object to a reasonable act of administration. It is not said that the burden of the heritors is increased. The manse is simply one of the temporalities of the benefice, which the minister is entitled to use. The presbytery is the proper Court to exercise discipline over the minister if he absents himself improperly from his duties.†

At advising,—

LORD JUSTICE-CLERK.—I think that by adhering to this interlocutor we do not necessarily resolve several of the wider questions which have been raised under this reclaiming note. We only find that the declaratory conclusions in this summons are not well founded; and these conclusions are as comprehensive as they could be made, and apply to every lease of the manse for any purpose or for any period. I am of opinion that these conclusions are not well founded in law, and cannot be maintained.

Whatever the minister's right in the manse may be, it is necessarily subject to two important limitations,—one ecclesiastical, and the other civil. He owes due residence to his ecclesiastical superiors. He owes due administration and reasonable care of the subject to the heritors, as he is bound to them to keep the manse in repair. But neither of these elements affect the present question. I assume that his ecclesiastical

---

give any opinion whether the heritors would be entitled to prevent the defender from completely inverting the possession of the manse, and from using it in a way which would be injurious. All that he has decided is, that, on the facts averred by them, the heritors are not entitled to the decree concluded for. He considers that the letting of the manse complained of is not beyond the powers of the defender as minister of the parish, and that the heritors are not entitled to prevent him from doing so. The Acts above referred to, under which the minister has right to his manse are not averse to such letting. The Act 1563, c. 72, only ordains 'that na parson, vicar, nor uther ecclesiastical person, set in few or lang tackes onie of their manses or gleibes perteining to the saidis kirkes, without special license and consent of the Queen's Grace in writ.' The Act 1572, c. 48, also provides—'Quhilkes manses and acres of land, sa marked and designed as said is, it sall not be leasum to the ministers or readers, present or to cum, to sell, annalie, set in few or tackes, or to put ony in possession of the samin in prejudice of their successors: bot the samin to remain alwayes free to the use and easement of sik as sall be admitted to serve and minister at the said kirk.'

[224] "There are some averments in the record which seem to imply that the defender does not duly discharge the duties of his parish during the two months that he lets his manse, and that the pursuers seek to remedy this by preventing him from letting the manse during these months. The Lord Ordinary considers that such averments are not relevant in the present case, and that he can take no cognisance of them. If the heritors conceive that the defender neglects the duties of his cure, the Church Courts, which can alone take cognisance of that matter, are open to them."

* Ersk. 2, 10, 55; 1572, c. 48; Dunlop's Parochial Law, pp. 92, 97; Hay *v.* Low and Williamson, 5 Brown's Supp. 415; Duke of Richmond *v.* Earl of Fife's Trustees, Feb. 16, 1844, 6 D. 701; Easson *v.* Lawson, July 20, 1843, 5 D. 1430; Duncan's Parochial Law, 39; Connell, pp. 154, 161, 166; Stewart *v.* Lord Glenlyon, May 20, 1835, 13 Sh. 787; Little Dunkeld, M. 5153; Pittenweem *v.* Durie, M. 8497; Balfour *v.* Bishop of St. Andrews, M. 8495; 1584, c. 132; Minister of Falkland *v.* Johnston, M. 5155; Stair, 2, 3, 37; M'Allum *v.* Grant, March 4, 1826, 4 Sh. 527 (535).

† Cowan *v.* Gordon, July 9, 1868, *ante*, vol. vi. 1018; 29 & 30 Vict. c. 71, sec. 3; Ersk. 2, 10, 61.

superiors are satisfied, for they make no complaint. I assume also that the building has suffered no injury, and is not in danger of doing so, for nothing is alleged to the contrary. The question is whether, on these assumptions, the pursuers can prevail in their declarator.

I do not think the heritors have any title to insist in this declarator apart from their interest as liable to maintain the building. They are not proprietors of the manse. Neither are they, in any sense, the trustees of the property. In virtue of their resulting obligation they have a title to see that the property is duly administered with a view to its being kept in repair. But they have nothing more. They have no right beyond this to interfere in any way with the minister's possession or administration. Their right in the church and the churchyard stands [225] on an entirely different footing; for, as regards them, the minister has no patrimonial interest in either, and the heritors have the property as administrators in trust. But a minister's right to his manse and glebe is entirely otherwise. He is more than occupant. He represents and administers for the series of incumbents who are collectively the proprietors. He cannot affect the interest of his successors; but subject to this condition he has all the rights of a proprietor, at least so far as necessary for the complete enjoyment of the subject for the period of his incumbency. He can exclude every one from his manse and glebe, nor is a heritor in that respect distinguished from the rest of the public. There is no act of ordinary administration which he cannot perform, although the effect of anything he does is limited by his incumbency. He can certainly let his glebe, not only, as I imagine, for agricultural purposes, but for any purposes not inconsistent with the interest of his successors, and not inconsistent, as I assume here, either with his ecclesiastical duty or the interest of the heritors. As against his tenant in the glebe he has all the remedies of a proprietor. On the other hand, his right to the manse is certainly something much beyond a right of occupancy. His right is precisely of the same kind as his right to the glebe. I give no opinion as to how far the minister can virtually alienate the manse during his incumbency, or let it for a prolonged term, to his own exclusion. Many considerations would arise in such a case which do not occur here. I can conceive cases in which this might not be an unreasonable exercise of his power. I can also conceive cases in which it would be entirely inadmissible. But in this case the minister has only let his manse for two summer months, during his absence for a period to which the presbytery did not object; and I think the heritors have no title to interfere with his proceedings.

LORD COWAN.—This is a question of some general interest. The conclusions of the summons amount to a negation of all right on the part of the minister to let the manse, even for the shortest period, or in any circumstances. Suppose the defender had not attempted to let the manse at all, we could not have entertained such an action against him individually, for the Court is not in the habit of allowing declaratory actions unless the pursuer has suffered or been threatened with some real injury. And this leads me to consider what has been done by the minister to call for this action on the part of the heritors. The only thing alleged against him is that, during the short period of his holiday absence from his pulpit and parish, he let the manse for the occupation of another family; and the only question is his right to let the manse during that time. That being the matter at issue, are the pursuers entitled to the universal declarator against letting the manse which they demand?

It was argued that a manse is an official residence, the letting of which is a contraversion of duty, and that the minister should be interdicted from diverting its occupancy away from the purpose for which alone he has right to possess the manse. I need not go into the general argument as to the minister's position, your Lordship having fully explained the distinction between his ecclesiastical and civil duties. The ecclesiastical courts must judge whether the minister improperly absents himself from his parish, and if they are satisfied we have no right to judge whether, in this respect, he has committed a breach of duty. But, as regards his right to the manse, it is quite a mistake to represent it as similar in character to his right to occupy the pulpit of the parish church. The one is part of the ecclesiastical establishment of the parish, provided by the heritors. The other is part of the benefice attached, with the glebe, to the parochial charge, the enjoyment of which by the minister cannot be interfered with by the heritors. They have no title to do so, unless, indeed, there was such misuse of the premises as might injure either the structure of the building or the

surface or soil of the glebe. The letting the one or the other for a greater or less period is not intended with any such effect. If it had been alleged that the interest of the heritors, as bound to uphold the manse, was affected by the way in which the manse was occupied, or that the succession in the benefice would suffer from the acts of the present incumbent, I can understand the right and title of the heritors to come forward and object. Suppose the manse [226] had been let, not for family occupancy, but, *e.g.*, for use as a granary, so that the structure of the building might be injuriously affected by rats or other vermin being attracted to it,—such a perversion of the use of the parochial manse might well give the heritors an interest and title to object. But here the manse was, for the short period alleged, occupied by another family, and no injury whatever is alleged to have been done to the building, or to be likely to ensue from this act of the incumbent. And as to his absence from his parish when his manse was thus put by him into the possession of another, that is a departure from duty, if it can in any sense be so denominated, into which the presbytery of the bounds have the sole jurisdiction to inquire.

LORD BENHOLME.—I concur. It was argued that the church and churchyard on the one hand, and the manse and glebe on the other, were in the same position. That is a great mistake. The church and churchyard have been given for the benefit of the congregation—the one for the benefit of their souls when alive, the other for the repose of their bodies when dead. No one but the clergyman of the parish has any beneficial interest in the manse and glebe. No doubt the heritors are entitled to look after them, so far as their own interest is concerned, and on behalf of any successor in the benefice. If it could be said that their interests were prejudiced their title would have emerged. But they come forward seeking to prevent the minister doing what may be of important advantage to him and cannot prejudice them. It is of importance not to the minister alone that he should have change of residence; his health is of interest and advantage to all the parish.

LORD NEAVES.—I am satisfied with the way in which this case has been disposed of. I say nothing on the general question. There may be some cases in which the heritors can interfere. The Lord Ordinary has negatived the general proposition that a minister is not entitled to let his manse.

This action is raised on a false analogy between a manse and glebe on the one hand, and a church and churchyard on the other. These things belong to distinct and different classes. The minister is not proprietor or owner in any sense of the church and churchyard. The parishioners have a right to burial in the churchyard, and they have a joint right of a very important kind in the church. But the manse and glebe are different. That the duty of providing them is imposed on the heritors as a tax does not give them the right of refusing their use. They cannot use them themselves if the living happened to be vacant. The minister is the only person who has a character at all approaching to that of an owner.

If it could be shown that the minister was increasing the heritors' burdens it might be different. We must also assume that he has done nothing wrong, nothing which could bring him before the church courts in respect of non-residence.

I suppose the minister may bring a household of grandchildren or friends to reside with him. It is common for ministers to take boarders in their families. Nobody ever objected to that. So, may he not let his manse to a select friend? The worst of lodgers do not so much destroy the fabric; they destroy the furniture.

On the whole, I think this an unreasonable application on the part of the heritors and I am of opinion that the Lord Ordinary's interlocutor should be affirmed.

THE COURT adhered, with additional expenses.

WOTHERSPOON & MACK, S.S.C.—ADAMSON & GULLAND, W.S.—Agents.

No. 49. X. MACPHERSON, 227. 15 Dec. 1871. 1st Div.—Lord Gifford, M.

THE TRUSTEES OF THE LATE WILLIAM GUNNING CAMPBELL, Pursuers and Claimants.—*Sol.-Gen. Clark—Fraser.*

MRS. M. A. MENZIES OR CAMPBELL OR CLARKE, Defender and Claimant.—*Lord-Adv. Young—C. Smith.*

CAPTAIN L. G. A. CAMPBELL, Defender and Claimant.—*Millar—Blair.*

MRS. CATHERINE CAMPBELL OR HUNTER, Defender and Claimant.—*Adam.*

Succession—Trust—Implied Direction to Accumulate—Intestacy.—A truster left heritable and moveable estate, with directions that his moveable estate should forthwith be converted into heritage, which, with the heritable estate belonging to him at the time of his death, was to be held by his trustees until the death of the last survivor of his nephews and nieces (his heir-at-law and next of kin) and widow, and then entailed upon a certain series of heirs. He directed his trustees to pay the free rents and income of his heritable estate to his widow during her life, and that after her death, and until the death of the last survivor of his nephews and nieces, such income, together with the income derived from the heritage to be purchased with the proceeds of his moveable estate, should be accumulated, and from time to time employed in the purchase of lands to be entailed as aforesaid; but the settlement did not contain any directions with regard to the disposal of the income derived from the heritage to be purchased with the proceeds of his moveable estate during the period between his own death and the death of his widow. *Held* (repelling claims by the widow and the heirs *ab intestato*) that although the testator had not expressly disposed of the free income arising from the proceeds of the said portion of the estate during the life of the widow, his intention that it should be accumulated and invested along with the capital in purchasing lands to be entailed was implied by the terms of the settlement.

William Gunning Campbell of Fairfield, in the county of Ayr, died in 1857, leaving a trust-disposition and settlement, with relative codicils, whereby he conveyed to his trustees his whole estates, heritable and moveable, with directions (1) for payment of debts, legacies, &c., out of the personal estate; (2) to hold the free annual income of Fairfield and his other landed property, after deduction of public and parochial burdens, and an annuity of £250 per annum provided to his wife Mrs. Maria Anna Menzies or Campbell by their contract of marriage, for her liferent use after his decease, with instructions to allow her the free liferent use and enjoyment of the house at Fairfield, with the furniture, &c., therein; (3) "my said trustees, so soon as convenient after the decease of the said Mrs. Maria Anna Menzies or Campbell, and after the decease of the longest liver of my nephews and nieces, sons and daughters of my late brothers Charles Hay Campbell and Napier Campbell, shall execute a deed of entail of the lands and others before disponed, so far as undisposed of by me, and of such other lands as shall belong to me in fee-simple," in terms of certain deeds of entail specially mentioned; (4) "upon my death, or as soon thereafter as conveniently may be, my whole moveable or personal estate (but excepting the household furniture, plate, paintings, prints, and whole other moveables in my house of Fairfield, and which my said trustees may, if they shall deem it proper and expedient so to do, hand over to the institute or heir of entail for the time, to be held and retained for the use and behoof of himself and the succeeding heirs of entail in the said lands and estate of Fairfield and others), shall be sold and disposed of by my surviving and accepting trustees, and converted into money, and by them the free proceeds thereof shall be laid out and invested (at once or from time to time) either in the purchase in their own names as trustees foresaid, of such lands and other heritages as my said trustees may in the exercise of a sound discretion deem suitable and [228] proper for being entailed as after-mentioned, or upon heritable security or securities, also always in their own names as trustees foresaid,—all to be held and retained by them during the lifetimes of my said nephews and nieces, sons and daughters of my late brothers Charles Hay Campbell and Napier Campbell, and during the lifetime of the longest liver of my said nephews

and nieces"; (5) "my said trustees are hereby appointed and enjoined, and they shall, from and after the decease of my said wife, and during the lifetimes of my said nephews and nieces, sons and daughters of my said two brothers Charles Hay Campbell and Napier Campbell, and during the lifetime of the longest liver of my said nephews and nieces, retain and accumulate, according to their discretion, the free rents, interest, and annual produce that may arise during the period between the death of my said wife (or my own death, if she shall predecease me), and the death of the longest liver of my said nephews and nieces, from my said lands of Fairfield and others foresaid, herein specially described, and hereby disponed, and also from the said lands and others hereby appointed to be purchased, and also from the said investments on securities of the monies arising from my personal or moveable estate, means, and effects appointed to be realised; and for the purpose of accumulation, my said trustees shall, if they see fit, and from time to time, according to their own discretion, lay out and invest the said free rents, interest, and annual produce arising during the said period between the death of my said wife (or my own death, if she shall predecease me), and the death of the longest liver of my said nephews and nieces, upon heritable securities, in their own names as trustees foresaid"; (6) "upon the death of my said wife, and of the longest liver of my said nephews and nieces, or as soon thereafter as conveniently may be, my said trustees shall call up and realise the monies invested on securities as aforesaid, in so far as not previously called up and realised (and they are hereby, in all the investments whatsoever on loan, to be made in virtue of my settlements, fully authorised to call them up and realise them, and reinvest the monies, and grant discharges and renunciations at pleasure), and with the proceeds thereof, and with any accumulations of the rents and produce arising from my said lands of Fairfield and others, or from previous rents, interest, and annual produce as said is, my said trustees shall, as soon as they may deem it expedient and beneficial so to do, purchase in their own names, as trustees foresaid, such farther lands and heritages as they, in the exercise of a sound discretion, may deem suitable for being entailed, either along with my lands of Fairfield and others foresaid, or separately, and of which lands and other heritages so to be purchased by my said trustees with the monies arising from the produce of my said moveable estate, and from the various accumulations aforesaid, I hereby direct, appoint, and ordain my said surviving and accepting trustees, with all convenient speed to execute a deed or deeds of entail," in terms of the entails previously referred to.

Mr. Campbell was survived by his widow, but left no lawful issue, and after his death his trustees having entered on the management of his estates, partially implemented the purposes of the trust, and, *inter alia*, realised the personal property directed to be sold, but a difficulty occurred as to the disposal of the free income arising from the proceeds of the personal estate during the lifetime of the widow, and they raised an action of multiplepoinding for the determination of this question. The action was raised in 1870, and the fund *in medio* consisted of £2734, the surplus income of the proceeds of the personal property after deducting all charges and burdens affecting the same from the testator's death in 1857 to 31st December 1869.

[229] Claims were lodged (1) for the trustees, who claimed the fund, with a view to its being ultimately applied in the purchase of lands to be entailed in terms of the settlement.

(2) For the testator's widow, who, at the date of the action, was married to the Rev. Charles W. Clarke, and claimed the fund *in medio* as falling, either expressly or by implication, under the liferent created in her favour by the deceased.

(3) For Captain Leveson G. A. Campbell, the testator's nephew and heir-at-law, who claimed the fund *in medio* as being undisposed of by the settlement, and as falling to him *ab intestato*, being heritable *destinatione*.

(4) For Captain Campbell and Mrs. Catherine Campbell or Hunter, as the surviving next of kin of the testator, who, in the event of the fund *in medio* being held to be moveable, claimed the whole as the truster's heirs *in mobilibus ab intestato*.

The Lord Ordinary pronounced this interlocutor: — "Ranks and prefers the claimants, the accepting and acting trustees of the deceased William Gunning Campbell, to the whole fund *in medio*, in terms of their claim No. 12 of process: Repels the whole other claims to the said fund *in medio*, and decerns: Finds no expenses due in the competition to or by either party as against the competing parties, but finds and declares that the trustees of the said William Gunning Campbell shall be entitled to payment out of the fund *in medio* of their whole expenses of raising and

bringing the action into Court, of adjusting the fund *in medio*, and of the expenses incurred by them in the competition, as the same shall be taxed by the Auditor of Court," &c.*

---

* NOTE.—. . . (After narrating the facts)—"The grounds of the Lord Ordinary's judgment are shortly the following:—

"(1) He is of opinion that the question is entirely dependent on the terms of Mr. William Gunning Campbell's settlements. It is a *questio voluntatis testatoris*. What did the testator intend should be done with the surplus income of his moveable estate? and this intention must be gathered from the terms of his trust-disposition and settlement and codicils, read as a whole.

"It may be true that the testator may not have directly provided for the case which has arisen. He may not have contemplated that there would be any surplus income, such as that now in question, and here, as in many cases, it may be difficult to gather from the testator's words his will in reference to a matter which was not presented to his mind. Still there is no alternative. The duty of the Court is to get at the testator's will through his testamentary writings, read in the light of surrounding circumstances, which are fairly and fully disclosed in the present case. Extrinsic and parole proof of the testator's intention is inadmissible, and was not asked by any of the claimants in the present case.

"(2) Mr. Campbell's testamentary writings form a universal settlement of his whole estate, heritable and moveable. There is a universal and unlimited conveyance to his trustees of his whole estate, heritable and moveable, of every description, and his whole estate is conveyed for the purposes specified in the deeds. There is no exception. Mr. Campbell certainly did not intend to die intestate in reference to any portion of his estate, or in reference to any part of the income arising therefrom. It is true, intestacy may arise even under a universal settlement, by reason of special provisions therein. But intestacy in such cases is never to be presumed, and can only be reached when it is the necessary and unavoidable result of the directions or provisions of the deed.

"(3) Where residuary legatees are appointed, or where there are, either in form or in substance, provisions which amount to a disposal or appointment of residue, the residuary legatees, or the parties interested in the residue, will always *in dubio* be preferred to the heir-at-law, or to the next of kin of the testator *ab intestato*. On this principle, lapsed legacies fall, not to the next of kin, but to residuary legatees, even where the residuary bequest is only of [230] residue, after deducting all legacies. In short, the testator is presumed, unless a contrary construction be absolutely unavoidable, to prefer the parties and the objects mentioned in his settlement to his heirs or next of kin *ab intestato*, whom it is the very object of his settlement to exclude. It is unnecessary to refer to cases or authorities in support of this general principle, for it was not disputed. The whole argument turned upon the special terms of Mr. Campbell's settlements.

"(4) The Lord Ordinary is of opinion that the terms of these settlements exclude the claims both of the truster's heir-at-law, and of the truster's next of kin.

"The object of the truster may be generally stated thus:—He wished to make certain liferent and other provisions for his widow, and for certain other persons, to whom he bequeathed legacies or annuities; and after his widow's death, and after the death of all his nephews and nieces, he wished to create an entail, and found an entailed estate, consisting of his lands of Fairfield and others, and of other lands to be acquired with the whole accumulated residue of his means and property, all to be entailed and settled upon the series of heirs specified in the deed. This seems to the Lord Ordinary to be the short result of the whole settlements. The detailed provisions and directions are somewhat complicated, but, reading them together, their effect seems to be as now stated. Whatever was not required for the special and preferential purposes of the trust was to go to enhance the entailed estate, the creation of which was the testator's ultimate purpose.

"In this view the Lord Ordinary thinks that the claims both of the heir-at-law and of the next of kin are inadmissible. There is no undisposed of residue, either for the heir-at-law or for the next of kin. The testator did not die intestate as to any part of his estate, either capital or income, and there is no difficulty in disposing of the whole income forming the fund *in medio* under one or other of the purposes of the trust.

[230] Mrs. Clarke and the other parties whose claims had been repelled reclaimed.
[231] Argued for Mrs. Clarke;—A liferent of the testator's whole estates must be

---

"The Lord Ordinary will immediately advert to the special terms of the settlement, as, in his opinion, excluding both the widow's claim and that of the heirs-at-law; but apart from all specialties, he thinks the heirs-at-law, both in heritage and in moveables, are completely cut off by the general conception and obvious meaning of the whole settlement.

"(5) If the Lord Ordinary is right in holding that the truster's heirs *ab intestato* are excluded, both by the general purpose and by the special terms of the settlements, it becomes unnecessary to consider whether, supposing the fund *in medio* intestate succession, it would go to the heir-at-law or the next of kin. The Lord Ordinary thinks it can be claimed by neither.

"He may add, however, that in case he should be wrong in the view now taken, and in the event of the fund *in medio* being held undisposed of residue, he could not hold it to be heritable *destinatione*. This would be to make it both testate and intestate at once under the same deed. If the direction to purchase heritage applies to it, then it must be heritage the rents of which go to make up, like other investments, the ultimate entailed estate. If intestate succession at all, its character must be fixed at the testator's death, and being the proceeds of his moveable estate, the Lord Ordinary thinks it must be held to be moveable succession. This point, however, need not be further considered.

"(6) The Lord Ordinary thinks that the widow, the only other claimant, is excluded by the special terms of the settlement, and by the limited and precise character of the provisions made to her by the truster.

"The widow's provisions are, first, her jointure under the marriage-contract of 17th March 1845, and second, in addition thereto, the liferent of the free annual residue of the truster's heritable estate, the liferent of the house of Fairfield, and of the furniture and moveables therein. It is quite inconsistent with these provisions to give the widow, in addition, the liferent of the testator's free moveable estate. This is not given to her by the deed, either expressly or by implication, and yet that is virtually what she claims in the present process. It is impossible [231] to construe a bequest of the liferent of heritable estate as including a liferent of the moveable estate also, especially when the heritable and moveable estates are dealt with in the deeds throughout separately and distinctly, with separate precise directions regarding each.

"(7) The great argument urged, and with great force, both by the widow and by the next of kin, is that there is no direction to accumulate the free proceeds of the moveable estate during the widow's life,—that such accumulation is not to begin until after the widow's death; and that, consequently, free income accruing during the widow's life is not to form part of the ultimate entailed estates, but must be otherwise disposed of.

"Now, without denying the force of the argument, the Lord Ordinary is of opinion that, even if the deed had stood absolutely without any direction to accumulate the free income of the moveable estate, such direction must be presumed from the purposes of the trust. The truster wanted everything to be entailed which was not needed for his preferential or primary bequests. A direction to apply moveable estate at a particular time in the purchase of lands to be entailed necessarily means moveable estate, with accrued interest or income. The interest or income is just an accessory of the principal.

"But the trust-deed does not leave this matter to a mere inference. The Lord Ordinary reads the settlement as expressly directing the income of the moveable estate to go with the principal.

"By the fourth purpose, the whole moveable or personal estate is directed, 'upon my death, or as soon thereafter as convenient, to be sold and disposed of (excepting the furniture, &c.), and the proceeds laid out or invested, either in the purchase of lands suitable for entailing or on heritable securities,' all to be held and 'retained by them during the lifetimes of my said nephews and nieces, sons and daughters of my late brothers Charles Hay Campbell and Napier Campbell, and during the lifetime of the longest liver of my said nephews and nieces.' This is a precise direction, and the Lord Ordinary thinks that the moveable estate sold, or the securities representing it, so to be held and retained, includes not only the securities themselves, but the interest accruing

held to have been conferred upon his widow by implication. The lands [232] to be purchased with the moveable estate were not to be entailed until after her death, and as intestacy is not to be presumed, the testator's intention must have been that his widow should enjoy not only the liferent of the landed property, which was expressly given her by the deed, but also the income arising from the capital of the personal estate.*

Argued for Captain Campbell;—Sums destined to be invested in heritage must be held to be heritable, and the proceeds thence arising, not being disposed of by the settlement, fall to the heir-at-law *ab intestato.*†

Argued for the next of kin;—The income of the personal estate must be deemed moveable in the person of the testator, and therefore moveable *quoad* succession, and falling to his heirs *in mobilibus.*‡

Argued for the trustees;—Accumulations of income not expressly disposed of form part of the residue of the estate, and must be applied in the same way as the capital.§

At advising,—

LORD PRESIDENT.—My Lords, the questions in this case which have been disposed of by the Lord Ordinary arise upon the construction of the settlements of the late Mr. Campbell of Fairfield.

The fund *in medio* consists of the surplus income of the testator's personal estate, from his death in 1857 to 31st December 1869, and the questions are, whether the

---

thereon. It would be a very forced construction to read the provision as a direction to hold the principal sums secured only, but not the interest, or to hold the lands purchased, but not the rents. Principal and interest, lands and rents together, are to be held and retained till the time appointed. Here it is worthy of notice that the widow is not mentioned at all. The time fixed is the death of the longest liver of the testator's nephews and nieces, and this is the time when accumulations are to be invested and the entail ultimately settled.

"In entire accordance with this view, the sixth purpose of the trust provides that on the death of the widow, and of all the truster's nephews and nieces, the trustees are to call up all sums lent on security, and with the proceeds thereof, and with the 'accumulations of rents and produce arising from my said lands of Fairfield and others, or from previous rents, interest, and annual produce,' to buy more land to be entailed as aforesaid. Now, the expression 'previous rents, interest, and produce,' must mean previous to the accumulation of Fairfield rents, &c., and as Fairfield is liferented by the widow, the word 'previous' must refer to accumulations during the widow's life. But such accumulations can only be accumulations from the moveable estate, and thus the Lord Ordinary finds here almost an express direction to accumulate the free moveable income. The same result is reached on comparing the other clauses of the deed, although the inference is probably less direct.

"On the whole, the Lord Ordinary has come to be pretty clearly of opinion that the free moveable income must be applied in exactly the same way as the free moveable estate, and this necessarily leads to the judgment he has pronounced.

"(8) A farther question will almost certainly ultimately arise under the provisions of the Thellusson Act, which prohibits accumulation for more than twenty-one years, or for a longer term than the life of the settlor, or the minority of any [232] person living at the settlor's death. This question, however, does not arise in the present process. The accumulations from 1857 to 1869 are undoubtedly lawful; the illegality will not commence at soonest before November 1878; and it is unnecessary to decide now what class of heirs or next of kin will then take the accumulation struck at by the statute."

* Cockshott *v.* Cockshott, 2 Collyer, 432; Roe *v.* Summerset, 5 Burr. 2608; S. C., 2 Blackstone Rep. 692; Blackwell *v.* Bull, 1 Keen, 176; Humphreys *v.* Humphreys, L. R. 4 Eq. 475; 1 Jarman (3d edit.), 497.

† Dick *v.* Gillies, July 1828, 6 S. 1065; Cowan *v.* Turnbull's Trustees, June 1845, 7 D. 872—6 Bell's App. 222.

‡ Weir *v.* Lord-Advocate, 21st June 1865, *ante*, vol. iii. 1006; Somerville's Trustees *v.* Gillespies, July 1859, 21 D. 1148; Lord *v.* Colvin, 1860, 23 D. 111, *per* Lord Curriehill.

§ Douglas *v.* Douglas, December 1843, 6 D. 318; Sturgis *v.* Campbell, June 1861, 23 D. 1128—aff. *ante*, vol. iii. H. L. 70; Pursell *v.* Newbigging, Nov. 1856, 19 D. 71.

free income of the personal estate during that period is or is not disposed of by the settlements; and if not disposed of, whether it belongs to the heir-at-law, or to the heirs *in mobilibus* of the deceased. The first and leading question depends entirely upon the intention of the testator as evinced by the terms of the settlements, and does not appear to me to involve any general question of law.

Now, in endeavouring to ascertain the testator's intention, it is material to keep in view that he unquestionably had a general purpose of creating as large an entailed estate as he could.

He left also a handsome provision to his widow, but had some objection to his immediate relatives, and effectually precluded them from succeeding to any part of his estate. Keeping these facts in view, we are to consider the purposes of the trust. The first purpose is not merely the ordinary direction to pay debts, funeral expenses, &c., but also to pay certain legacies and annuities. The second purpose relates to a provision for the truster's widow, to whom he specifically conveys the estate of Fairfield. Now, it seems to me desirable to consider the third and sixth purposes together, because they are to come into operation at the same time, viz., after the death of the widow, and of the last survivor of the truster's nephews and nieces. The third purpose is, that after that date a deed of entail of the estate of Fairfield is to be executed. The sixth directs that at the same time, *i.e.*, after these two events, the trustees shall lay out, if not already done, the [233] whole residue of the trust-estate in the purchase of land, and entail it along with Fairfield on the same series of heirs, and with the same fetters. The testator contemplates that more than one deed will be required to carry these purposes into effect, but taking the two purposes together, they have these two things in common. The two intervening purposes depend on different events. The fourth purpose comes into operation on the truster's own death, and the fifth on the decease of his wife, but it may be during the lifetime of his nephews and nieces; so that the time for these purposes to come into effect is different from that of the third and sixth purposes. By the fourth the truster provides that "upon my death, or as soon thereafter as conveniently may be, my whole moveable or personal estate (but excepting the household furniture, plate, paintings, prints, and whole other moveables in my house of Fairfield, and which my said trustees may, if they shall deem it proper and expedient so to do, hand over to the institute or heir of entail for the time, to be held and retained for the use and behoof of himself and the succeeding heirs of entail in the said lands and estate of Fairfield and others), shall be sold and disposed of by my surviving and accepting trustees, and converted into money, and by them the free proceeds thereof shall be laid out and invested (at once or from time to time) either in the purchase, in their own names as trustees foresaid, of such lands and other heritages as my said trustees may, in the exercise of a sound discretion, deem suitable and proper for being entailed as after mentioned, or upon heritable security or securities, also always in their own names as trustees foresaid,—all to be held and retained by them during the lifetime of my said nephews and nieces, sons and daughters of my late brothers Charles Hay Campbell and Napier Campbell, and during the lifetime of the longest liver of my said nephews and nieces."

On the construction of this clause the present question chiefly depends. Nothing is here said expressly about the disposition of the free income of the residue, and the widow says that the proper implication is that it was given to her. I think that contention may be first disposed of. It is to be observed that the trustees are directed to hold and retain the fee of this portion of the trust-estate during the lifetime of the truster's nephews and nieces, but not during the life of the widow. The absence of that provision is very material, because, where the intention is to give a liferent to the widow, the ordinary direction is to hold during her life. But not only is there no such direction here, but it is studiously omitted, and the time is distinctly specified to be "during the lifetime of my nephews and nieces." Fairfield is to be retained by the trustees during the widow's lifetime, and it is not to be entailed till after her death and that of the nephews and nieces. But the moveable estate is to be retained by them only during the lifetime of the nephews and nieces. That is a strong fact against the claim of the widow, and along with the fact that she is already amply provided for, and that there is no reason to suppose that the truster contemplated giving her more than is provided by the second purpose, I think it must be held that the whole implications of the deed are adverse to her claim.

The next question is, if this is not to go to the widow, what is to be done with it?

The nephews and nieces cannot get any of it. The alternatives are, that the interest is to be accumulated with the capital, or that the free income is undisposed of by the deed. A pretty strong argument in favour of the latter view is founded on the fifth purpose, because, after the widow's death, and during the survivance of the nephews and nieces, there is an express direction to accumulate, and therefore, it is argued, that for the previous period he meant that there should be no accumulation. I feel the force of that argument, but it is not conclusive. Keeping in view what the great object of the testator was, viz., to create an estate, not for present but for prospective enjoyment, no one being called to present enjoyment except the legatees and annuitants and the widow, and the great object being to increase as much as possible the landed estate, which is to descend to the heir of tailzie, I think there is a strong presumption that whatever the moveable estate would yield was *de futuro* to form one great corpus, to be invested in land. That presumption is fortified by subsequent clauses of the deed, and therefore I conclude with the Lord Ordinary that the income was intended, even during the period preceding the widow's [234] death, to be accumulated, and ultimately to be invested in terms of the sixth purpose. I do not found much on the words of the sixth purpose in reference to the free rents, but I think the fair import of the deed is, that the interest of the moveable estate is to be accumulated with the capital, and to be devoted to the same purpose. That accumulation is to some extent restrained by law, but so far as it is not so, I think it must receive effect, and therefore I agree with the Lord Ordinary.

LORD DEAS.—It is impossible to read the trust-deed and doubt that the truster's heirs-at-law *in mobilibus* and heritage are effectually excluded from all claim to his succession. The truster not merely conveys his whole heritable and moveable estate to his trustees, but he directs them what to do with the whole beneficial right to it; and leaves no room for the allegation of intestacy as to any part of it.

The only question requiring consideration is whether the widow is entitled to the annual proceeds of the residue during her life. Now, as your Lordship has observed, she is otherwise amply provided for. Her provision of £250 a-year under the antenuptial marriage-contract, secured on the estate of Fairfield, is sunk under the trust-deed in a larger provision, giving her the right to the whole annual proceeds of Fairfield. It is clear from the deed that one of the main objects of the truster was that his trustees should purchase land from time to time, and so increase the extent and value of the landed estate. The only puzzle is raised by the fact that between the death of the widow and that of the longest surviving nephew or niece there is an express direction to accumulate the annual rents, and there is no such express direction regarding the period during the widow's life. With reference to that puzzle I am disposed to give more weight than your Lordship does to the words in the sixth purpose regarding the previous rents, because these words seem to me expressly applicable to the surplus rents during the widow's life. At same time my conclusion would be the same although I were not so to construe them. The sixth purpose is in these terms:—"Upon the death of my said wife, and of the longest liver of my said nephews and nieces, or as soon thereafter as conveniently may be, my said trustees shall call up and realise the monies invested on securities as aforesaid, in so far as not previously called up and realised (and they are hereby, in all the investments whatsoever on loan to be made in virtue of my settlements, fully authorised to call them up and realise them, and reinvest the monies, and grant discharges and renunciations at pleasure), and with the proceeds thereof, and with any accumulations of the rents and produce arising from my said lands of Fairfield and others, or from previous rents, interest, and annual produce as said is, my said trustees shall, as soon as they may deem it expedient and beneficial so to do, purchase," &c. The accumulations here spoken of, arising from the lands of Fairfield and others, are the accumulations after the death of the widow. What then are the "previous rents, interests, and annual produce," the accumulations of which are to be dealt with in like manner? Nothing else, I think, but those here in question, accruing during the period of the widow's lifetime. The only difficulty in adopting this view is created by the words "as said is," to which it is very difficult to attach any meaning. But apart from these words, the sixth purpose is of itself conclusive, and as everything else in the deed favours the view which has been taken by the Lord Ordinary I cannot think that the mere occurrence of the unintelligible words "as said is" ought to prevent us from giving effect to what appears to be the only sound view of the truster's intention.

LORD ARDMILLAN.—I entirely concur with your Lordship. I think there is no intestacy here, and also that no part of the trust-estate has been left undisposed of. The presumption is that a party conveying his whole estate to trustees, with large discretionary powers, has not withheld any part of it from the trust, and that presumption is borne out by the whole purposes of this deed. As regards the claim of the heir-at-law, and of the next of kin, I have therefore nothing to add. The claim of the widow of Mr. Campbell has been strongly pressed. I am not prepared to say with the Lord Ordinary that there is a presumption in favour of accumulation, but I entirely agree in his construction of [235] the deed as a whole, and I cannot read it as meaning that the widow was to get the annual proceeds of the residue during her life. The fact that the deed provides for the accumulation of the annual rents after the widow's death raises of itself no presumption that it was meant to give them to her during her life, seeing that she was already well provided for, and also seeing that the truster afterwards made three codicils, and with the previous deed before him and under his consideration, he made no alteration on the provision for his wife in his settlement. I have looked into all the authorities I could find, but I can find no Scottish authority going so far as to support the doctrine that the presumption here is in favour of the widow. The case mentioned by Stephens* was, in its circumstances, very peculiar. It was the case of a wife for whom no provision had been made, a case in which, on the terms of the deed and on the circumstances of the case, there was raised a presumption in favour of the wife applicable only to that particular case. Here all the circumstances are the other way; and in the absence of any general presumption, the particular presumption is shut out by the ample provision which the truster has made for his widow. I have therefore no difficulty in concurring.

LORD KINLOCH.—The question now raised relates to the application of the annual proceeds of Mr. Gunning Campbell's moveable estate from his death in 1857 to the end of 1869. I am of opinion that the Lord Ordinary has come to a right conclusion in holding that these belong, along with the capital of that estate, to his *mortis causa* trustees, for the purpose of purchasing lands to be entailed on a defined series of heirs.

It tends to the solution of this question to fix, in the first instance, as I think the Court may do without difficulty, that Mr. Campbell's widow has no right to any part of these funds. I think that this follows clearly from the terms of the trust-deed. A right could only be given to the widow through words of direct bequest, or an implication so clear as to be equivalent. I perceive none such in the deed, but directions wholly to the contrary. I consider the widow limited, by the most express words, to the "free annual income of my said estate of Fairfield and others thereby disponed," she also obtaining the liferent use of Fairfield House and the furniture. There can be no doubt as to what is comprehended in "my said estate of Fairfield and others hereby disponed." It comprises simply the lands, given under that general name, which form the subject of previous disposition in the deed. It cannot, by any stretch of construction, or on any but a mere fanciful theory, he made to comprehend the annual proceeds of the moveable estate, or the produce of any investments on which the funds belonging to that estate are laid out.

The inquiry then comes to be, what is to be done with the annual proceeds of the moveable estate in a question with Mr. Gunning Campbell's heir or executor *ab intestato*? In other words, are these annual proceeds disposed of by the settlement, and how? Or are they undisposed of residue, to fall to the legal representatives? This question is, in my apprehension, to be determined by soundly construing the particular deed in question. The case of any other deed cannot aid in solving the case of this one, except, at the utmost, by furnishing illustrations or analogies which may go to aid the construction. The intention of the testator, in the particular deed, is, as it appears to me, the only legal rule of decision.

It is undoubted that Mr. Gunning Campbell directed the capital of his moveable estate to be employed in the purchase of lands to be entailed. He does so in express terms, the moveable estate being, under the fourth purpose of the trust-deed, to be realised as soon after his death as conveniently might be, and afterwards employed in such purchase, although the execution of the intended deed of entail was not to take place till after the death, not merely of Mr. Campbell's wife, but of certain nephews and nieces specifically mentioned. In the meanwhile the moveable estate, being

* Stephens' Blackstone 6th ed., vol. i. p. 620.

converted into money, shall, it is said, "be laid out and invested at once, or from time to time, either in the purchase in their own names, as trustees foresaid, of such lands and other heritages as my [236] said trustees may, in the exercise of a sound discretion, deem suitable and proper for being entailed as after mentioned, or upon heritable security or securities, also always in their own names as trustees foresaid, all to be held and retained by them during the lifetime of my said nephews and nieces." I think the fair meaning of this direction is, that not only the sums invested, but the annual proceeds from such investments, shall be retained in the hands of the trustees till the time and for the purpose of the intended purchase. It is often the only fair inference from a direction to set aside certain funds for a particular purpose that the intermediate fruits from these funds go along with the capital for the intended purpose. Nothing being said to the contrary, I think that such is the fair inference deducible from the terms of the fourth purpose of this trust-deed.

Then follows the fifth purpose of the trust, but this, as I read it, contains nothing at variance with the provisions of the fourth purpose just referred to. Under this purpose the testator primarily refers to the rents of Fairfield and others to arise after his wife's death, and before the death of the last surviving nephew or niece. These proceeds are to be accumulated for the intended purchase, "and" (it is added) "also from the said lands and others hereby appointed to be purchased, and also from the said investments on securities of the monies arising from my personal or moveable estate." The instruction to accumulate all these during the period posterior to the death of his wife does not, I think, in the least interfere with the prior instruction, as I read it, to retain and accumulate the proceeds of the moveable estate from the period of his own death downwards. Each fund, I think, still retains its own separate period of accumulation.

Finally, under the sixth purpose, Mr. Campbell directs his trustees, at the death of his last surviving nephew or niece, to call up and realise the securities on which the moveable estate was invested, and to purchase the lands to be entailed "with the proceeds thereof, and with any accumulations of the rents and produce arising from my said lands of Fairfield and others, or from previous rents, interest, and annual produce, as said is." Combining this clause with those going before, and reading the whole, not after a strained literal interpretation, but according to a fair construction of the testator's meaning, I arrive, without any doubt, at the conclusion that the proceeds of the moveable estate, from Mr. Gunning Campbell's death downwards, were not undisposed of residue, but were expressly directed to be retained and accumulated with the capital of that estate, for the purchase of the lands to be entailed.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be affirmed.

Counsel for the unsuccessful claimants then craved to be allowed their expenses out of the trust-funds, but the Court refused the motion, as the action had been rendered necessary solely in consequence of their ill-founded claims.

THE COURT adhered to the Lord Ordinary's interlocutor.

TAIT & CRICHTON, W.S.—ALEXANDER STEVENSON, W.S.—HUNTER, BLAIR, & COWAN, W.S.—A. & A. CAMPBELL, W.S.—Agents.

No. 50. X. MACPHERSON, 236. 15 Dec. 1871. 1st Div.—Sheriff of Lanarkshire, M.

MARY EDGAR, Pursuer and Respondent.—*Melville.*

LAW AND BRAND, Defenders and Appellants.—*Sol.-Gen. Clark—Gloag.*

Reparation—Master and Servant—Culpa—18 & 19 *Vict. c.* 108 (*Mines Regulation Act*).—The special rules of a colliery, approved and promulgated for the regulation and guidance of the workmen, in terms of 18 & 19 Vict. c. 108, provided a certain protection for the safety of the workmen. In an action of damages against the coalmasters on account of the death of a collier while working in the colliery,—*held*, on a proof (1) that the coalmasters had failed to provide the protection required by the regulations; (2) that by such failure they were guilty of neglect of duty; (3) (*dub.* Lord President), that the death of the workman was due to this neglect; and therefore (4) that the coalmasters were liable in damages.

[237] Mary Fleming or Edgar brought an action in the Sheriff-court of Lanarkshire against Law and Brand, coalmasters at Drumshangie, near Airdrie, for damages on account of the death of her husband, Joseph Edgar, a collier in the employment of the defenders. The summons set forth that Edgar was killed on 23d October 1869, "while working as the workman or servant of the defenders in the pit called Drumshangie Pit, situated on the lands of Drumshangie, in the parish of New Monkland, belonging to or leased and wrought by the defenders, by and through the culpable negligence and gross recklessness and carelessness of the defenders, or of those acting under them, or for whom they are responsible, in consequence of the engine at said pit having been wrongfully started while the deceased was placing his hutch on the cage, or adjusting the same, at the bottom of the shaft of said pit, for being taken up said shaft, and before the same was ready for being raised, or the safety of the deceased provided for, whereby said cage was lifted before the deceased could escape, and he was thereby raised and crushed betwixt the said cage on which he had placed his hutch and the roof or sides of the pit, and was thereby killed, and which death in any case was caused by the culpable carelessness, fault, and negligence of the defenders, or others for whom they are responsible, in not having taken proper measures for the safety of their workmen while engaged in working in said pit, and specially of the said deceased while working there as aforesaid; and from their not having provided proper means of communicating distinct and definite signals from the bottom of the shaft to the surface, and from the surface to the bottom of the shaft, and not having secured or used due caution for the securing of said signals being safely and properly made from the bottom of the shaft to the surface, and from the surface to the bottom of the shaft, especially for the starting of the engine at said pit for raising and lowering men and material; and also from their culpable recklessness and negligence in not having a bottomer or signalman employed in said pit to make the appointed signals necessary for regulating the ascent of men and materials, which they were bound to do for the safety or their workmen in said pit, and although a bottomer or signalman is provided for in the 'special rules'* for the conduct and guidance of the persons charged with the management, and of the several workmen employed in and about the defender's said colliery, the duties and requirements of such bottomer or signalman being, and they are defined in said rules, *inter alia*, to be, 'to attend during the working shifts in the said colliery; to see the drawers carefully place their loaded hutches on the cage and secure them, and give instructions on that matter; to make the appointed signals necessary for regulating the ascent of men and materials; to examine and report to the underground manager on the state of the signal apparatus, and of the hutches used in the pit, and of the cage wrought in the shaft, and to attend to and answer the signals made by the pit-headman on the pit-head,' and who, it is declared in said 'special rules' shall not leave his post at the pit-bottom until the whole workers of his shift shall have first safely ascended the shaft'; or otherwise and in any case the said Joseph Edgar was killed while engaged as a workman of the said defenders in said pit, on or about the date libelled, through the culpable recklessness and negligence of the defenders, or those for whom they are responsible, in the circumstances above set forth, or otherwise from defects in the machinery and apparatus provided and used in said colliery, or in the construction of said pit and mode of conducting the working of said colliery."

[238] The defenders pleaded;—(2) The pursuer not having averred acts or omissions on the part of the defenders, or those for whom they are responsible, causing the death in question, the defenders fall to be assoilzied, with expenses. (3) The pursuer having failed to aver in the record any facts or circumstances sufficient, even if proved, to shew that the death in question was caused by any wrongous act or omission of the defenders, or of those for whom they are responsible, or by any defects in the construction of the pit and machinery attached thereto, the defenders fall to be assoilzied, with expenses. (4) The defenders having provided the said Joseph Edgar with everything they engaged to do, to enable him to fulfil his engagement in said pit, they are not responsible for the acts of himself, or those of his fellow-workmen, and they therefore fall to be assoilzied, with expenses. (5) The death of the said Joseph Edgar having been caused by the acts or omissions of himself or those of his fellowmen, the defenders are entitled to absolvitor, with expenses.

The facts, as established in a proof, are set forth in the final interlocutor of the

* The special rules are quoted in the opinion of Lord Ardmillan.

Court (*post*, p. 243). The Sheriff-substitute (Logie) found (after various findings in fact, "in point of law, that the defenders having, in terms of law, established rules for the government of their work, and having had said rules approved of by the Secretary of State, and published these for the information of their workmen, the men accepting employment from them were entitled to rely upon these rules being fairly and fully carried out: Finds that, it being the duty of the employers to have had a bottomer to perform the duties prescribed in the special rules already referred to, and, in particular, to give the necessary signals to the engineman, and the said Joseph Edgar having lost his life in consequence of there being no bottomer, and of the defective arrangements and appliances at the pit-bottom, they are liable to the pursuer in damages; and as a solatium for the loss of her husband, finds that £80 sterling is a fair and reasonable sum in name of damages in the circumstances of this case: Therefore repels the defences," &c.

On appeal the Sheriff (Bell) adhered.

The defenders appealed.*

At advising,—

LORD ARDMILLAN.—This is an appeal from the Sheriff-court of Lanarkshire, in an action at the instance of Mrs. Edgar, widow of Joseph Edgar, collier, against Messrs. Law and Brand, coalmasters. The judgment of the Sheriff-substitute and of the Sheriff was in favour of the pursuer.

I think that the case has been fairly and properly presented to us as to some extent a question of fact depending on the direct testimony of witnesses,—to some extent a question of fact depending partly on testimony and partly on reasonable inference or implication,—and to some extent a question of law as applicable to the facts thus ascertained.

The following matters of fact come under the first head, and are proved by the direct testimony of witnesses.

The late Joseph Edgar, whose widow is pursuer of this action, was in the defenders' service as a collier, and he lost his life in the defenders' coal-pit on the 23d October 1869. He was at the time engaged in working in the pit-bottom; he was placing or adjusting his hutch at the bottom of the shaft; the cage was lifted, and Edgar was crushed and killed. There are rules and regulations issued and published under authority of the statute 18 & 19 Vict. c. 108, and these rules are for the conduct and guidance of the management of the colliery, and of the workmen employed. One of the leading rules to be observed by the "owner and agent" of the colliery is rule 7th in the first class, or general rules—[239] "Every working pit or shaft shall be provided with some proper means of communicating distinct and definite signals from the bottom of the shaft to the surface, and from the surface to the bottom of the shaft."

The 8th rule of the special rules, which follow these general rules, bears that "the drawers shall, with proper caution, place their loaded hutches on the cage and secure them there, under the supervision and orders of the bottomer, preparatory to being sent up the pit." Then follow the rules from 9 to 15 inclusive, under the head "Bottomer or Signalman."

These Rules are so important, with reference to this case, that I shall read them all.

"9. The bottomer shall attend, during the working shifts in the colliery, to regulate the number of men who shall ascend on the cage at a time—to keep order among the drawers arriving with loaded hutches at the pit-bottom—to see the drawers carefully place their loaded hutches on the cage and secure them, and give them instructions on that matter—to make the appointed signals necessary for regulating the ascent of men and materials—to examine and report to the underground manager on the state of the signal apparatus, and of the hutches used in the pit, and of the cage wrought in the shaft; and also on the state of the slides or guide rods in which the cage moves. He shall, along with the fireman, attend to and keep in proper order the cube or rarifying furnace in the pit. The bottomer shall attend to and answer the signals made by the pit-headman from the pit-head.

"10. No collier, drawer, or other worker in the pit shall on any pretext be allowed to make signals while the bottomer is on duty.

---

* *Defenders' Authorities.*—Wilson *v.* Merry and Cunningham, May 29, 1868, *ante*, vol. vi. (H. L.) 84; Skip *v.* Eastern Counties Railway Co., Nov. 24, 1853, 23 L. J. Exch. 23; Dynen *v.* Leach, August 18, 1857, 26 L. J. Exch. 221.

"11. The bottomer shall not suffer more than four men at a time to ascend the shaft in any cage; he shall not allow any person to ascend along with a hutch, whether empty or loaded; and he is forbidden to signal the ascent if more than the appointed number shall go on the cage, or if any worker shall attempt to ascend with a hutch.

"12. In the unavoidable temporary absence of the bottomer, the underground manager, roadsman, or some other qualified person, shall make the necessary signals from the pit-bottom, and receive and attend to the signals sent from the pit-head.

"13. The bottomer, or such person acting in his absence, shall make the following signals, being those appointed in this colliery for guiding the ascent of the cage:—

"He shall strike or ring the signal bell at the pit-head once for the ascent of the cage, whether loaded with coals or empty.

"He shall strike or ring the bell signal thrice, in rapid succession, intimating that men are about to ascend; and after a pause, during which a signal shall be made from the pit-head that all is ready, the bottomer shall make the usual ascent signal of one stroke of the bell, whereupon the cage shall be raised.

"He shall strike or ring the signal bell twice when he desires the engine to be reversed, and the ascending cage returned to the pit-bottom, and to remain there.

"14. No deviation from these signals shall be permitted on any account; the signals shall not be made until the cage with its load, whether of men or materials, are securely placed, and everything ready for the ascent.

"15. The bottomer shall not leave his post at the pit-bottom until the whole workers of his shift shall have first safely ascended the shaft."

I entertain no doubt that, according to the true meaning of these rules, it was the duty of the defenders to provide proper means of communicating distinct signals from the bottom of the shaft; that the bottomer or signalman has important functions to discharge both in the supervision of the drawers and colliers, and in the giving and directing of signals; and that his proper post is at the pit-bottom and at the foot of the shaft, no collier or drawer or worker being allowed to make signals while the bottomer is on duty. I am also clearly of opinion that the presence of the bottomer at his post is a protection to the workmen, which they are entitled to expect, on which they are entitled to rely, and which, in this case, it was the defenders' duty to provide.

The defenders appear to have been conscious that this duty rested upon them. In their defences they state that on the day in question a man of the name of [240] "Abercromby had been acting as bottomer." This man Abercromby was examined as a witness. He says—"I never did the duty of bottomer in that pit. I did not do so on the day that Edgar was killed." He again says—"There was no bottomer employed in said pit." Bernard Bannan, a collier, who was present and saw the accident, also states distinctly that there was no bottomer. Edward Cairnie, John Newall, and Arthur M'Gennes, all concur in stating that there was no bottomer at the time of the accident.

It therefore does not admit of doubt, on the direct testimony of the witnesses, that according to the rules, as published and understood in the work, there should have been a bottomer, and that in point of fact there was no bottomer at the time of the accident. It is clear to me on this proof that, even apart from the special rules, it was at common law the duty of the employers to provide a bottomer, if that was necessary for protection of the workmen. It appears that, as too often happens, the unfortunate accident immediately led, but too late for the sufferer, to an improvement in the management. A bottomer was appointed within two days after the accident; and I have no doubt that the appointment tends to promote the safety of the work.

I do not allude to the question raised about "guide-plates." There is some difference of opinion as to the benefit arising from them, and there is no special duty in regard to them. Therefore I do not rest my opinion on the absence of guide-plates; although the evidence in favour of their use appears to me to preponderate; and that, I observe, is the opinion of the Sheriff.

Assuming, as I now do, that it was the duty of the defenders to provide a bottomer; that the presence and the functions of the bottomer were intended and calculated to secure the safety of the workmen; and that there was no bottomer present at the time of the accident; and no bottomer appointed for that pit by the defenders, —I find it impossible to arrive at any other conclusion than that the defenders have been guilty of neglect of duty, or breach of duty, in that matter.

But it is said that the presence of a bottomer in discharge of his duty, at the time of

this accident, would not, or might not, have prevented the accident. In entering on the consideration of this question I must say that, in my opinion, there is no presumption in favour of the defenders. Those who have failed to fulfil their obligation, and to discharge their duty, and to furnish requisite and reasonable protection to their workmen, can scarcely be allowed to suggest that if they had done their duty, and if the protection had been furnished, still the protection would have proved, or might have proved, insufficient. We have some direct testimony of opinion on this point from practical workmen, several of whom say that if there had been a bottomer the accident would, in all human probability, have been prevented. This, I think, is the opinion of Abercromby, and of Bannan, and of Cairnie, and of Newall, and of Patrick Gillooly the elder, and I think the opinion which these practical men give is to some extent supported by the testimony of Mr. Benson, a collier manager for fifteen years, and a witness for the defenders, who admits that the appointment of a bottomer is a safe and proper course. There is, in my opinion, as matter of fair inference from the evidence, a natural, reasonable, and very high probability, that the accident would not have occurred if the defenders had done their duty in appointing a properly qualified bottomer. That is quite sufficient. It cannot be necessary for the pursuer to prove, as matter of certainty, that the accident could not have occurred if a bottomer had been present. The pursuer of such an action as this cannot be bound to exclude the possibility of accident, on the supposition that the defenders had done their duty. No human arrangements can certainly ensure safety, or exclude the possibility of accident. It is easy to speculate on such possibilities. But if the defenders have failed to perform a plain duty, on the performance of which the workmen were entitled to rely, they cannot escape from liability on the strength of such ingenious speculations.

It has still further been suggested by the defenders, though this is also matter of mere suggestion, that there may perhaps have been fault in some other quarter; it may be in the pit-headman or the engineman. I do not know whether it is possible that that may have been the case or not. It is not proved. It does not appear. It cannot be presumed in favour of the defenders without evidence. [241] If it had been the case, the proof thereof was within the power of the defenders. The engineman and the pit-headman were the defenders' servants. They have not been examined. The defenders, who make suggestions in regard to their conduct, have not adduced them as witnesses; they have not explained their absence; and, in their absence, we cannot presume that they would have given testimony tending to relieve the defenders from the consequences of a proved and undoubted fault.

It is also to be observed that the defenders, Messrs. Law and Brand, adduced as a witness for themselves one of the partners only, Mr. Law. That gentleman most candidly and properly states that he took no part in the management of the pit operations—that he sold the coals—that Mr. Brand took charge of the pit—that he, Mr. Law, took no charge of the pit. It thus appears that the defenders adduced as their witness the partner who knew nothing about the matter. Mr. Brand, the partner who knew all about the matter, was not examined. This is the more important when we refer to the evidence of Abercromby in regard to a conversation with the inspector of mines. Abercromby had said to the inspector that they had no bottomer. The inspector turned round to Mr. Brand, and said—"What, Mr. Brand, have you got no bottomer?" Mr. Brand said—"This man (meaning Abercromby) acted as bottomer and every other thing." The inspector then said—"That will not do; one man could not act both as roadsman and bottomer." It is proved by Abercromby that he did not act as bottomer. Now, it is remarkable that Mr. Law only was examined, and that Mr. Brand, who had this conversation with the inspector of mines, and who was the partner taking charge of the pit operations, was not examined. If he had any explanations to offer, he should have appeared as a witness. The explanation given by the defenders on record was negatived on evidence. We have no other explanation from the defenders. It will not do for the defenders to offer conjectures instead of proof, and to substitute ingenious suggestions of possibilities for the testimony of witnesses whom they might have examined, but whom they did not adduce.

Taking the view which I have now expressed of the facts of this case, it only remains for me to say, in a word, that, as the duty of appointing a bottomer rested with the defenders themselves, and as they failed in that duty, and as their failure in duty must be held to have caused this accident, I have no difficulty in concurring with the Sheriffs in finding them liable to the pursuer in damages. The Sheriffs have

awarded the sum of £80, and I do not see any sufficient reason for disturbing their judgment on that point.

LORD DEAS.—I have been made aware of the terms of Lord Ardmillan's opinion, in which I entirely concur, and I think it quite unnecessary to go over again the grounds of judgment, so distinctly stated by his Lordship.

LORD KINLOCH.—I am of opinion that the Sheriff has rightly found the defenders liable in damages.

I conceive that, under the special rules applicable, in terms of statute, to the defenders' colliery, the defenders were bound to have a bottomer employed continuously in the pit. I do not think that the necessity of this was dispensed with by any specialty in the circumstances of the colliery. The scanty extent of the business might require fewer workmen, but the safety of these it was as necessary to protect and preserve.

The duty of the bottomer, according to the regulations, consisted in seeing the hutches properly put on the cage at the bottom of the shaft, and the cage with its hutches, or with the workmen who were to ascend in it to the pit-mouth, safely carried up. For this purpose he was to attend to the signals forming the communication with the pit-headman and engine-man, and giving them notice when the cage was to be drawn up the shaft, and when it was to be left at the bottom. He was specially, in regard to these matters, to instruct all the workmen, themselves presumably ignorant or thoughtless. The presence and services of the bottomer were thus indispensable to the safe working of the pit. His absence was proportionally attended with danger to the workmen.

On the occasion in question, I think the fair inference is, that had a bottomer [242] been employed (as he was not), the accident would not have occurred by which the husband of the pursuer lost his life. It appears that when his hutch was brought near the cage, he had found some difficulty in placing it on the cage, and that he had got on the cage in order to draw it on; itself an act attended with some peril, as the event showed. It appears that when so on the cage, it began to be drawn upwards by the engineman; and that Edgar, having fallen over to the side of the cage, was caught between the cage and the doorhead, or top of the aperture forming one of the openings to the workings, and crushed to death. Such a result was just that which was intended to be prevented by the instructions and intervention of a bottomer; and I am under a strong conviction that if a bottomer had been there, the result would not have occurred. Either the workman would not have been on the cage at all, or the bottomer would have so timed the signals as to make sure that the cage should not have begun to move upwards till the workman was off the cage and in safety.

The only difficulty I have found in the case arises from an impression derived from the evidence of Bannan, the only man present with the deceased, that the cage began to move upwards without any signal at all, inferring *prima facie* some neglect or carelessness on the part of the pit-headman or engine-man. There thence arises the question, whether the accident truly occurred for want of a bottomer, and would not have occurred equally even had a bottomer been there. Another form of the question is, whether the result did not arise by the fault of one or other of those who were collaborateurs with the deceased, and so all claim is excluded against the masters. The point is not unattended with difficulty, and I have given it careful consideration. I have come to the conclusion that nothing has been made out in connection with this point sufficient to affect the master's liability.

In the first place, I do not think it proved that the cage rose without a previous signal. All that Bannan says is, that he did not hear or see a signal. Now, the point is one on which I think the defenders, whose admitted want of a bottomer laid on them the *onus* of establishing freedom from responsibility, were bound to lead clear evidence, at least all the evidence in their power. They were bound to examine the pit-headman and engine-man, who best could know whether or not a signal was given before the cage was raised. They not having done so, or given any good reason why they did not do so, I think it must be held not proved that the cage rose without a signal, and so the foundation of the defenders' case on this point is awanting.

But, secondly, assuming that the cage did rise without a previous signal, I think it still is fairly to be held that had a bottomer been there, the accident would not

have occurred. For, according to the evidence, it was not merely the part of the bottomer to give the signal for raising the cage, but it might in certain circumstances become his duty to give a signal that the cage was not to be stirred till after another signal was given. The mode of doing this was to give two strokes, or, as the witnesses called them, "chaps," of the bell, which indicated that the cage was not to be stirred till another single stroke was given. For aught I can see to the contrary, the bottomer, if there, would have seen it to be his duty to give the two strokes of the bell, which would have operated as a prohibition to the engineman to raise the cage. If he had done so, there is no reason to believe that the cage would have been raised till another signal, which was the signal of safety, had been given. The fact, therefore, of the cage rising without a signal (if such was indeed the fact) by no means interferes with the conclusion that if the bottomer had been there the accident would not have happened.

On these two grounds—1st, that the defenders ought to have had a bottomer in the pit; and 2dly, that it is matter of fair inference that if a bottomer had been there the pursuer's husband would not have met his death—I think the defenders were properly found liable in damages. The Sheriff also preceeds on some other grounds, such as the absence of guide-plates, and the imperfect state of the signal wires. I do not think these made out. I proceed entirely on the want of a bottomer. But I consider this ground to be by itself sufficient.

LORD PRESIDENT.—I concur with all your Lordships in holding that there was [243] a clear breach of duty on the part of the defenders in not having a bottomer in their pit. But this is not all that the pursuer requires to make out in order to establish her case. She must prove not only that there was no bottomer, but that the want of a bottomer was the cause of her husband's death. With regard to this second question I have felt very considerable difficulty, and I still entertain some doubt whether the pursuer has established her case; in other words, whether it is proved that the accident was caused by the absence or want of a bottomer, or rather whether his presence could have prevented the accident. The immediate cause of Edgar's death was the sudden raising of the cage while he was upon it engaged in lifting on to it his hutch. But what the cause of the sudden raising of the cage was, is certainly not established in any satisfactory way. And in the absence of all explanation on this point it is very difficult to say that the raising of the cage was caused in such a way that it would not have happened, and the accident would not have occurred, if there had been a bottomer.

But while I have given expression to these doubts which occurred to my mind, they are not so strong as to lead me to differ from the unanimous opinion of your Lordships.

THE COURT, on 15th November 1871, pronounced the following interlocutor:—"Find in point of fact that the defenders (appellants) carry on business as coal-masters at Drumshangie, near Airdrie, and that the late Joseph Edgar, the husband of the pursuer (respondent), was a collier employed in the defenders' pit at Drumshangie in October 1869: Find that on the 23d October 1869 the said Joseph Edgar was engaged in the service of the defenders, working at the bottom of the shaft in the defenders' said coal-pit, and was, when so engaged, killed in consequence of being crushed and otherwise injured by the lifting of the cage while he was placing or adjusting his hutch at the bottom of the shaft: Find that the presence at the bottom of the pit of a qualified bottomer would have been an important protection to the workmen and to the said Joseph Edgar, and was a protection to which the workmen and the said Joseph Edgar were entitled: Find that, having regard to the due protection of the workmen engaged in the defenders' service in the said coal-pit, and having regard specially to the rules prepared, approved, and promulgated for the regulation and guidance of the workings in said coal-pit, in terms of the Act 18 & 19 Vict. c. 108, it was the duty of the defenders to provide a qualified bottomer to discharge, for protection of the workmen, the duties of the bottomer, as set forth in said rules: Find that at the time of the said accident no bottomer was present, and that there was no bottomer in the said pit, and no bottomer had been engaged or provided by the defenders: Find that the defenders, in thus failing to provide duly for the protection of the workmen by appointing a bottomer in the pit, and in thus failing to fulfil the said rules and regulations, were guilty of neglect of duty or breach of duty: Find that the accident by which the pursuer's husband, the said Joseph

Edgar, was killed was caused by the neglect of duty or breach of duty of the defenders: Find in point of law that, in respect of the said neglect of duty or breach of duty, the defenders are liable to the pursuer in damages and *solatium* for the death of her husband: Find that £80 sterling is a reasonable sum of damages under the circumstances: Therefore refuse the appeal, and decern: Find the appellants liable in expenses; allow an account," &c.

J. C. JUNNER, W.S.—BURN & GLOAG, W.S.—Agents.

No. 51. X. MACPHERSON, 244. 16 Dec. 1871. 1st Div.—Sheriff of Aberdeenshire, M.

JOHN ALEXANDER FORBES, Appellant.—*Scott.*
FREDERICK ADAIR, Respondent.—*Sol.-Gen. Clark—R. V. Campbell.*

Jurisdiction—Process—Civil or Criminal—Medical Act, 1858 (21 & 22 *Vict. cap.* 90), *sec.* 41—*Summary Procedure Act*, 1864 (27 & 28 *Vict. cap.* 53), *sec.* 28.—*Held* that the jurisdiction conferred upon the Sheriff or Justices of the Peace by the 41st section of the Medical Act, whereby they are authorised, on proof of contravention of the statute, to decern for penalties, and, failing payment, to grant warrant for recovery thereof by poinding and imprisonment for a limited period, is of a criminal nature, as defined by the 28th section of the Summary Procedure Act; and consequently that an appeal against a judgment of the Sheriff, dismissing a complaint under the Medical Act, was incompetent in the Court of Session.

John Alexander Forbes, chemist in Aberdeen, presented a petition and complaint to the Sheriff setting forth that Frederick Adair, residing in Aberdeen, "wilfully and falsely pretends to be a doctor of medicine," and by the Medical Act, 1858, section 40, it is enacted that "any person who shall wilfully and falsely pretend to be, or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, addition, or description implying that he is registered under this Act, or that he is recognised by law as a physician, or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall upon a summary conviction for any such offence, pay a sum not exceeding £20."

By section 41 of the same statute it is provided that "any such penalty may in Scotland be recovered by the procurator-fiscal of the county, or by any other person, before the Sheriff or two Justices, who may proceed in a summary way, and grant warrant for bringing the party complained against before him or them, or issue an order requiring such party to appear on a day and at a time and place to be named in such order; and every such order shall be served on the party by delivering to him in person, or by leaving at his usual place of abode, a copy of such order and of the complaint whereupon the same has proceeded; and upon the appearance, or default to appear, of the party, it shall be lawful for the Sheriff or Justices to proceed to the hearing of the complaint, and upon proof on oath, or confession of the offence, the Sheriff or Justices shall, without any written pleadings or record of evidence, convict the offender, and decern him to pay the penalty named, as well as such expenses as the Sheriff or Justices shall think fit; and failing payment, shall grant warrant for recovery thereof by poinding and imprisonment, such imprisonment to be for such period as the discretion of the Sheriff or Justices may direct, not exceeding three calendar months, and to cease on payment of the penalty and expenses."

The prayer of the petition was, that the respondent, on conviction of the offence charged, should be decerned to pay a penalty not exceeding £20, with expenses, and failing payment, that the Sheriff should grant warrant for recovery thereof in terms of the statute.

After a proof, at which no record of the evidence was kept, the Sheriff (Guthrie Smith), found the complaint not proven, and dismissed the petition, with expenses.

Against this judgment the complainer appealed.

The respondent objected to the competency of the appeal, and argued;—The Court has no jurisdiction, the proceedings being of a criminal nature [245] as defined by the Summary Procedure Act, 1864,* and the complainer's remedy was by a suspension in the Justiciary Court.

The appellant argued;—The 28th section of the Summary Procedure Act defines the limits of civil and criminal jurisdiction in cases of this kind, for the express purpose of obviating inconvenience arising from the uncertainty which formerly prevailed. The definition therefore of the proceedings which are to be held of a criminal nature must be strictly construed, and must not be extended to cases other than those enumerated, while it is expressly declared that all others shall he held to be civil. But this case does not fall within those enumerated, because the penalty may be recovered, in default of payment, by poinding as well as by imprisonment for a limited period, and as poinding is a civil diligence, the Legislature evidently did not regard proceedings under the Medical Act as of a criminal nature.

LORD PRESIDENT.—My Lords, this is an appeal against a deliverance of the Sheriff dismissing a complaint for contravention of the 40th section of the Medical Act of 1858. That section of the statute provides that "any person who shall wilfully and falsely pretend to be, or take or use the name or title of a physician, doctor of medicine, licentiate in medicine and surgery, bachelor of medicine, surgeon, general practitioner, or apothecary, or any name, title, addition, or description implying that he is registered under this Act, or that he is recognised by law as a physician or surgeon, or licentiate in medicine and surgery, or a practitioner in medicine, or an apothecary, shall, upon a summary conviction for any such offence, pay a sum not exceeding £20."

The 41st section provides that the penalty enacted by the preceding clause may be recovered "by the procurator-fiscal of the county, or by any other person, before the Sheriff or two Justices, who may proceed in a summary way, and grant warrant for bringing the party complained against before him or them, or issue an order requiring such party to appear on a day and at a time and place to be named in such order; and every such order shall be served on the party by delivering to him in person, or by leaving at his usual place of abode, a copy of such order and of the complaint whereupon the same has proceeded; and upon the appearance, or default to appear, of the party, it shall be lawful for the Sheriff or Justices to proceed to the hearing of the complaint, and upon proof on oath, or confession of the offence, the Sheriff or Justices shall, without any written pleadings or record of evidence, convict the offender, and decern him to pay the penalty named, as well as such expenses as the Sheriff or Justices shall think fit; and failing payment, shall grant warrant for recovery thereof by poinding and imprisonment, such imprisonment to be for such period as the discretion of [246] the Sheriff or Justices may direct, not exceeding three calendar months, and to cease on payment of the penalty and expenses."

We have had no opportunity of seeing how the Sheriff would have followed out the provisions of the 41st section, because he has dismissed the complaint; but if he had found the complaint proved, I think he would have been bound to decern for the penalty, with expenses, and to grant warrant for recovery thereof, failing payment, by

* The 28th section of the Act (27 & 28 Vict. cap. 53) is as follows:—"And whereas much inconvenience has resulted from the uncertainty which exists as to the nature of the jurisdiction conferred by various Acts of Parliament, authorising convictions for offences, and the recovery of penalties, and the enforcement of orders by imprisonment upon summary complaint before Sheriffs, Justices, and Magistrates in Scotland, and it is expedient to define the cases in which such jurisdiction shall be held of a criminal nature: In all proceedings by way of complaint instituted in Scotland, in virtue of any such statutes as are hereinbefore mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required, in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and in all other proceedings instituted by way of complaint, under the authority of Act of Parliament, the jurisdiction shall be held to be civil."

poinding and imprisonment, with a declaration that the imprisonment should endure for a specified time, not exceeding three months, and should come to an end in the event of payment being made.

Now, the first question to be determined is, whether this was a civil or a criminal proceeding within the meaning of the 28th section of the Summary Procedure Act of 1864.

That section proceeds upon a recital of the inconvenience which has resulted from uncertainty as to the nature of the jurisdiction conferred by various Acts of Parliament authorising convictions for offences and the recovery of penalties, and the enforcement of orders by imprisonment upon summary complaint before Sheriffs, Justices, and Magistrates, and that it is expedient to define the cases in which such jurisdiction shall be held to be of a criminal nature; and then it is enacted, that "in all proceedings by way of complaint instituted in Scotland in virtue of any such statutes as are hereinbefore mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment upon such complaint, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required, in case of default of payment, or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation," &c. Now, the first point to be determined is, whether there was here a proceeding by way of complaint, "in virtue of any such statutes as are hereinbefore mentioned"; and it seems to me that that reference is to the preamble of the 28th section itself, in which we find mention made of "Acts of Parliament authorising convictions for offences and the recovery of penalties, and the enforcement of orders by imprisonment upon summary complaint before Sheriffs," &c. These, I think, are very plainly the statutes which are comprehended by the word "such" in the enacting part of the clause, and I am of opinion that the Medical Act is included in the number.

Then the next question is, whether this complaint falls under the definition of the 28th section of the Summary Procedure Act, in respect of its being a case in which the Court is authorised either to pronounce sentence of imprisonment, or in case of default of payment or recovery of a penalty or expenses, to grant warrant for imprisonment for a limited period. Now, certainly, under the 41st section of the Medical Act, the Sheriff is not directly authorised to imprison any person contravening the provisions of the 40th section; what he is required to do is, failing payment of the penalty, to grant warrant for its recovery with expenses by poinding and imprisonment for a period not exceeding three months. Now, that certainly is not quite the same thing that we find in the 20th section of the Summary Procedure Act, for it includes something more, viz., the warrant to poind in default of payment as well as to imprison for a specified period, and my doubt here is, whether the conjunction of these remedies in one warrant prevents the case from falling within the definition in the Summary Procedure Act. There can be no doubt that difficulties of various kinds might arise from the combination in one sentence of the civil remedy of poinding with the warrant to imprison, and if the case is of a criminal nature there does seem some anomaly in the circumstance that the criminal court would have to be resorted to in a suspension of civil diligence; but it is to be presumed that this was in contemplation of the Legislature when enacting the 41st section of the Medical Act, and I think that the case does not cease to be one in which the Sheriff grants warrant for recovery of a penalty by imprisonment merely because he is also empowered to grant warrant for poinding the goods of the convicted person. I am of opinion, therefore, that this case does fall within the [247] description of those defined by the Summary Procedure Act as of a criminal nature, and that we have, therefore, no jurisdiction to entertain the appeal, which must be dismissed.

Lord Deas.—The question raised is one of great general importance, and has received full discussion and careful consideration. I am of opinion with your Lordship that, under the words of the 28th section of the Summary Procedure Act, the case falls within the jurisdiction of the Court of Justiciary, and not of this Court. The sentence which the Sheriff or Justices are bound to pronounce on proof or confession of the offence, under section 41 of the Medical Act, appears to me to fall under the precise definition of what is criminal by section 28 of the Summary Procedure Act, because every case is to be taken as criminal "where, in pursuance of a conviction or judgment

upon such complaint, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required in case of default of payment, or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation." Now, it seems impossible to doubt that a sentence of conviction under the Medical Act would fall under one or other of the members of that clause of the Summary Procedure Act. I do not see that it can be taken out of one or other of these categories simply because poinding as well as imprisonment is ordered. The authority to imprison is granted either as part or as the whole of the punishment, and if nice distinctions were to be taken because something else is included in the sentence besides imprisonment, the effect would be, in place of diminishing the uncertainty which that section of the Summary Procedure Act was intended to remove, to render the subject more perplexing than ever.

LORD ARDMILLAN.—This action is not brought under the Summary Procedure Act. It is not said to be so. Accordingly I do not think that Act to any extent regulates the procedure under the Medical Act. The whole procedure for trying this cause is to be found in the Medical Act. The Summary Procedure Act, however, comes in in a most important manner, viz., to clear the lines of distinction between civil and criminal jurisdiction, and that is a very important question.

If the case turned on the reading of the Medical Act, I should have said that this was a civil cause, though a great deal of good argument might be adduced, and has been adduced, on the other side. But the Summary Procedure Act comes in with its 28th section, whereby, in order to produce increased certainty as to the distinction between civil and criminal causes, it is provided in express terms that "the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent." Now, I am of opinion that up to that point this case does not fall under that definition. But then the clause goes on, "or shall be authorised or required in case of default of payment," &c. If it stopped there it might still be doubted whether the case came under that clause. But it goes on, "or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period" limited to a certain time, &c. Now, I cannot get over these words. I have felt the difficulty of the question, but I think these words, "or recovery of a penalty," are conclusive. It is to be observed that there is a distinction between the sentence and the warrant. I do not think that imprisonment is part of the sentence, but it is of the warrant. I do not think the Sheriff, in the fulfilment of his duty under the Medical Act, could pronounce sentence to be enforced by poinding only, without imprisonment, or by imprisonment only, without poinding. But I agree that the addition of poinding to the warrant for imprisonment does not take the case out of the category described in section 28 of the Summary Procedure Act. If poinding had been resorted to, it would be difficult to decide that the Justiciary Court had power to deal with questions in regard to the validity of the poinding, and that raises the difficulty that if the one compulsitor [248] were adopted, the civil Court might have to decide the question, and if the other were adopted the criminal Court would decide. But after full consideration, I do not see sufficient ground for taking the cause out of the category described in section 28; and therefore, though not without hesitation, I conclude that this is a case of criminal jurisdiction.

As regards this particular case, the pursuer will suffer no hardship, because I think it manifest that, from whatever cause, he had not adduced sufficient evidence to support his case.

LORD KINLOCH.—I am of opinion that, under the provisions of the Summary Procedure Act, 1864, the present must be held a criminal process, and the appeal to this Court incompetent.

The intention of the Summary Procedure Act was to supply, what was much wanted, an easily applied test, by which it should be known whether review should be sought from the Court of Justiciary or the supreme civil Court. Hence it is declared, by section 28, that a case should be held criminal "where, in pursuance of a conviction or judgment, or as part of such conviction or judgment, the Court shall be required, or shall be authorised, to pronounce sentence of imprisonment against the respondent, or shall be authorised or required—in case of default of payment or recovery of a penalty

or expenses, or in case of disobedience to their order — to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation."

By the Medical Act, 1858, section 40, any person improperly assuming the title of doctor of medicine is liable to a penalty of £20; and by section 41 it is provided that the Court awarding this penalty shall, "failing payment, grant warrant for recovery thereof, by poinding and imprisonment, such imprisonment to be for such period as the discretion of the Sheriff or Justices may direct, not exceeding three calendar months, and to cease on payment of the penalty and expenses." It appears to me that this is, *in terminis*, the case contemplated by the Summary Procedure Act, in which, in default of payment, a warrant of imprisonment for a limited period is authorised.

It is true that recovery may be also enforced by poinding; and, irrespectively of the Summary Procedure Act, this circumstance might have made it difficult to decide whether the case was criminal or civil. Questions may still arise as to the precise course of procedure by poinding or imprisonment respectively, which questions may not be easy of solution. But all these considerations are irrelevant in the present inquiry. The sole question at present is, whether a part of the sentence, or of the procedure for recovery, is not imprisonment for a limited period. And this being clear in the affirmative, the review lies with the Court of Justiciary, not the supreme civil Court.

The appeal was dismissed as incompetent.

PEARSON & ROBERTSON, W.S.—LINDSAY, PATERSON, & HALL, W.S.—Agents.

No. 52. X. MACPHERSON, 248. 21 Dec. 1871. 1st Div.—Lord Mackenzie, B.

PETER J. B. M'NAB, Petitioner.—*Rhind.*
PETER M'NAB, Respondent.—*Pattison.*

Process—Petition—Parent and Child—20 & 21 *Vict. c.* 56.—*Held* that a petition by a minor for a *curator bonis* to himself, his father being alive, was competently presented to the Junior Lord Ordinary; and that in such a petition a reclaiming note was competent only on the merits, no change having been made in this respect by the Court of Session Act of 1868.

Parent and Child—Curator bonis.—Circumstances in which the Court, on the petition of a minor, appointed a *curator bonis* to him to supersede his father in the management of his estate.

Peter Jonathan Bladworth M'Nab, a minor fourteen years of age, presented this petition to the Junior Lord Ordinary for the appointment of a *curator bonis* to him.

[249] The petitioner set forth, that under the trust-disposition and settlement of Richard Bladworth, his mother's uncle, he was in right of twenty shares of National Bank stock, the proceeds of which were to be paid to his mother, Sarah Bladworth, during her life, the *jus mariti* being excluded, and the capital to be divided among her children at her death. Sarah Bladworth, on 21st July 1856, was married to Peter M'Nab, the petitioner's father, and died on 5th May 1857. The petitioner, her only child, was born on April 18, 1857. The National Bank shares had been vested in Jonathan Bladworth, brother of the truster, as trustee for his daughter. Shortly after the death of Mrs. M'Nab, the petitioner's father brought an action against Mr. Bladworth, concluding that he should be ordained to execute a transfer of the twenty shares to the petitioner, and obtained decree in absence. On 30th December 1857 Mr. Bladworth executed a transfer in favour of the petitioner and the respondent as his administrator-in-law. The petitioner's father raised a second action, which he afterwards abandoned, concluding that Jonathan Bladworth should be ordained to pay to him, as in his own right, the amount of accumulated dividends on the said shares, and interest. In a third action for payment of the same sums to him as administrator-in-law for the petitioner the respondent was found entitled to a sum of £40, 0s. 6d., being the amount of dividends on said shares since 1854, which the defender had been willing to pay; but it was found that, in respect of the transference of certain shares by Mr. Bladworth to his daughter in 1854, in payment of the dividends on the twenty shares from 1841

down to that date, there was no debt due to the pursuer in respect thereof. The petitioner set forth that he was entitled to the twenty shares and dividends since 1854, and that it was a question whether he was not also entitled to the sums realised by the shares made over to his mother in 1854, on the footing that these sums were her property at the time of her death, exclusive of *jus mariti*. The petitioner further averred:—"On or about 12th May 1871, when the petitioner had attained the age of fourteen years, the said Peter M'Nab induced him to accompany him to the office of the National Bank of Scotland in Edinburgh, and there sign a deed or document. The petitioner did not know what the said document was, or why he was asked to sign it, and it was not read over to him. From inquiries which have since been made it has been ascertained that the said document was a transfer of the said twenty shares National Bank stock. The said Peter M'Nab, on 12th May 1871, received the sum of £574 sterling as the price of the said twenty shares, and thereafter applied it to his own purposes, and used it in the course of his trade as an ironmonger, as if it was his own proper money. The said Peter M'Nab is in insolvent circumstances."

Answers were lodged for Peter M'Nab, the petitioner's father, in which he stated, *inter alia*, that he had acted in the litigations with Mr. Bladworth under the advice of counsel, and that Mr. Bladworth's refusal to account had compelled him to proceed somewhat in the dark. He succeeded "in vindicating the petitioner's rights to the property above-mentioned, and in those proceedings he incurred expenses to a considerable amount. He also, in the year 1861, before his second marriage, invested £120 on the petitioner's behalf in the purchase of a small property at Juniper Green, the conveyance to which was taken in his son's name.

"The respondent has also expended a considerable sum annually on the maintenance, clothing, and education of the petitioner, to an amount much exceeding the dividends on the twenty shares of the National Bank of Scotland, uplifted by him as administrator-in-law of his son.

"As there were no other means for reimbursing the respondent the expenses which he had disbursed on the petitioner's behalf, the petitioner [250] concurred with the respondent in the month of May last in selling the twenty shares of the National Bank stock belonging to him. The proceeds were received by the respondent, and will be duly accounted for at the proper time, and, so far as necessary, will be duly applied and expended in the affairs of the petitioner.

"The respondent is perfectly solvent, and is willing to aliment and educate the petitioner in a suitable manner."

The respondent produced a statement of his expenses in the litigations, amounting to £355, 13s. 9d., which, with the £120 paid for the house at Juniper Green, and interest thereon since July 25, 1861 (£61, 12s. 2d.), amounted in all to £527, 5s. 11d.

The Lord Ordinary ordered a proof before answer.

The respondent having applied for leave to reclaim, the petitioner pleaded that 20 & 21 Vict. c. 56, sec. 7 (Distribution of Business Act), excluded review.

The respondent replied that this was repealed by the Court of Session Act, 1868, and referred to secs. 2, 26, 28, 54, 91, 92, and 107 of that Act.

The Lord Ordinary was of opinion that the clause of the Distribution of Business Act applied, and that no change was made by the Act of 1868; and he reported the case.

The respondent argued that the petition was not competent before the Lord Ordinary, being, in substance, an application for the removal of the father from the office of guardian of his son.*

LORD PRESIDENT.—This is not reported by the Lord Ordinary. You must speak to the question whether we have power to recall the interlocutor of the 15th allowing proof.

Pattison.—If the petition is incompetent, it is not regulated by the Distribution of Business Act.

LORD DEAS.—What is reported to us? What ought to have been done was to refuse leave to reclaim, against which there should have been a reclaiming note.

The Court held unanimously that the 6th section of the Distribution of Business Act was applicable—that the Act of 1868 did not interfere with its operation—and that the Lord Ordinary's interlocutor allowing proof was therefore not subject to review.

---

* Mitchell, &c., July 20, 1864, *ante*, vol. ii. 1378.

Afterwards, in the Outer-House, parties consented to the recall of the interlocutor allowing proof, and asked the Lord Ordinary to report the case, that the judgment of the Court might be had upon it as it stood.

The case was accordingly reported by his Lordship.

The respondent argued that the petition being, in substance, for the removal of a father from the office of administrator,—*i.e.* of one regarded by the law more favourably than a trustee,—was not under the Act of 1857 at all, and was not competently brought before the Junior Lord Ordinary. On the merits, he contended that the circumstances did not warrant the appointment of a *curator bonis*, which had only been made during the father's life, in cases where the application had been consented to, or at all events unopposed by the father.*

The petitioner replied, that the petition was competent before the Junior Lord Ordinary, in respect that it was a petition for the appointment of a *curator bonis*; and that the circumstances, which showed not [251] merely a failure in duty, but a conflict of interest, so far as the father was concerned, required the interference of the Court.† In the case of Johnstone ‡ the application had been opposed by the father, but nevertheless granted; and the case of Barclay § was an authority to the same effect.

LORD PRESIDENT.—It is always a delicate office which the Court has to perform when it is called on to interfere in controlling the rights and authority of a father over his children. But circumstances may arise making such interference indispensable, and the question is in this case whether we have a competent application, with sufficient ground on the merits for sustaining it. As regards the competency, I have no doubt whatever. I think the application was competent before the Lord Ordinary under the Act of 1857, simply because it was an application for a *curator bonis*, and I am not aware that any change has been made since the date of that Act, making such an application incompetent. As regards the merits, I think the respondent has placed himself in a very unfavourable position. The small fortune left to his son by a maternal relative was invested in National Bank stock. That was one of the most suitable and desirable investments for such a fund, and it was therefore a peculiar act of administration to sell it, unless there was a pressing necessity, some immediate requirement, for the benefit of the minor; and nothing of the kind has been suggested. There can be no doubt that the father availed himself of his influence over his son to induce him to sign the transfer, by which the price of the shares was put entirely in his power. The explanation he gives of the use made of the money is this: "In the year 1861 the respondent invested £120 on the petitioner's behalf in the purchase of a small property at Juniper Green, the conveyance to which was taken in his son's name. The respondent has also expended a considerable sum annually in the maintenance, clothing, and education of the petitioner, to an amount much exceeding the dividends on the twenty shares of the National Bank of Scotland, uplifted by him as administrator-in-law of his son." In the previous paragraph of the petition he gives an account of the various actions which he raised against Mr. Bladworth's trustee, and he goes on to say, "As there were no other means for reimbursing the respondent the expenses which he had disbursed on the petitioner's behalf, the petitioner concurred with the respondent in the month of May last in selling the twenty shares of the National Bank stock belonging to him. The proceeds were received by the respondent, and will be duly accounted for at the proper time, and, so far as necessary, will be duly applied and expended in the affairs of the petitioner." The meaning of that paragraph, as explained at the bar, is that the money is to be applied in paying the expenses of these litigations, and that the respondent is willing, when his son is of full age, to

---

* Robertson, July 12, 1865, *ante*, vol. iii. 1077; Buchan *v.* Harvey, Dec. 21, 1839, 2 D. 275; Wardrop *v.* Gossling, Feb. 6, 1869, *ante*, vol. vii. 532; Stevenson's Trustees *v.* Dumbreck, Feb. 18, 1857, 19 D. 462—aff. Feb. 11, 1861, 4 Macq. 86; Johnston *v.* Otto, Feb. 24, 1849, 11 D. 718.

† Govan *v.* Richardson 1633, M. 16,263; Forbes, 1673, M. 16,287; Wilkie *v.* L. Dalziel, 1688, M. 16,311; Boswel, 1747, M. 16,353; Graham *v.* Duff, 1794, M. 16,383; Buchan, *cit.*; Wardrop, *cit.*; Glassford, Feb. 24, 1849, 11 D. 1030; Sawers, March 9, 1850, 12 D. 905; Johnstone, July 11, 1822, 1 S. 558; Barclay, 1698, 4 B. S. 405; Bell's Princ. 2068.

‡ Johnstone, *sup. cit.*,—*vide* Session Papers.

§ Barclay, *sup. cit.*

account to him for the balance. The respondent's counsel was not very willing to make that admission, but fortunately the matter is put beyond doubt by the correspondence between the agents, and particularly the letter of Messrs. Ferguson and Junner of 30th October 1871. The demand made on the respondent was that he should furnish a statement "showing the manner in which the whole moneys belonging to your said son, with accumulations thereon, are now invested, and the present amount thereof." That demand was made on 7th October 1871, so that a considerable time elapsed before the answer was given, and the substance of the answer is this: There is a note of expenses sent, including those of the three different litigations mentioned. Of these no less than £124, 4s. 11d. were incurred in an action, the object of which was to compel Mr. Bladworth to transfer the National Bank shares belonging to his son to the respondent as an individual. Another account of £199, 18s. 9d. was for expenses in another most unreasonable action, in which Mr. M'Nab was very deservedly unsuccessful. The total of these accounts is £355, 13s. 9d., and [252] what the letter of Messrs. Ferguson and Junner says about these expenses is this: "With reference to our recent correspondence and meetings, we have now obtained from Mr. M'Nab the particulars of his disbursements in vindicating the right to the twenty shares in the National Bank of Scotland, left by the late Mr. Richard Bladworth to the late Mrs. M'Nab and her heirs. Of these we enclose a statement." Now, keeping in view the question that letter was intended to answer, what is the meaning of these statements? In the first place, £120 has been invested in a house in Juniper Green, but it yields no present income, because it is subject to a liferent, which has already eaten up one-half of the investment. That certainly must be considered a very bad speculation. The rest of the money is to be invested, how? Simply in paying these law expenses. There is no other meaning in the respondent's statements: he practically acknowledges that that is what he has done, in vindicating, as he says, his son's rights. Now, that appears to me to be so gross a violation of the duty of a parent as the guardian of his son that I think it indispensable for the Court to interfere, and on that ground I am for granting the prayer of this petition.

LORD DEAS.—The first question before us is a very simple one, viz., whether this petition was competently brought before the Junior Lord Ordinary. Unless we shut our eyes to the Act of 1857, it is impossible to doubt that if it was competent anywhere, it was competent before the Lord Ordinary, because the Act says generally—"All summary petitions and applications to the Lords of Council and Session which are not incident to actions or causes actually depending at the time of presenting the same shall be brought before the Junior Lord Ordinary officiating in the Outer-House, who shall deal therewith and dispose thereof as to him shall seem just; and, in particular, all petitions and applications falling under any of the descriptions following shall be so enrolled before and dealt with and disposed of by the Junior Lord Ordinary, and shall not be taken in the first instance before either of the two Divisions of the Court." And the fourth subdivision of the section specifies "Petitions and applications for the appointment of judicial factors, factors *loco tutoris* or *loco absentis*, or *curators bonis*," &c.

It is a different question whether the petition ought to be granted, and it is a question of a kind that always requires consideration. If proof be necessary, there is no doubt that the Lord Ordinary was right in allowing it; but I think that enough is admitted to justify and require the appointment of a *curator bonis* without further investigation. The boy's little fortune came from his mother's uncle, Richard Bladworth, who left it in trust for behoof of his brother Jonathan's daughter and her issue. This daughter was the mother of the petitioner, and is now dead. It is obvious enough that the trustee thought he himself was a good enough custodier of the fund. And we see nothing to create a suspicion to the contrary. But the father brought these actions to which reference has been made, and the shares were ultimately transferred to him. The rest of the trust-funds he was not found entitled to uplift. He succeeded in getting this money into his own hands. It is plain that he applied it to pay the expenses incurred in these litigations. What appears here is sufficient to show that this use of the money was a misapplication of it. It is admitted that he got the boy to sign a transfer of the bank shares, which there was no reason to sell, and that he applied £400 in liquidation of those expenses, which, for aught yet seen, he is not entitled to pay out of the boy's funds. Enough is admitted in the answers and at the bar to authorise the appointment of a *curator bonis*. That does not destroy the father's power, but only provides a manager of the particular fund. I may observe that this

to be fully and legally instructed by a certificate under the hand of the manager of the said association for the time being, and a similar certificate under the hand of the said manager shall be legal evidence of the foresaid notice having been sent to me; and the said association, or [255] the directors thereof, shall then be at liberty, without any further premonition to me or other process of law, forthwith to advertise the subjects above disponed, for public sale, in such newspaper or newspapers, and for such number of times, as the directors of said association shall think fit, and thereafter to sell the said subjects for whatever price the same may bring, any law or practice to the contrary notwithstanding; and my said disponees are hereby authorised to execute articles of roup, to adjourn the sale from time to time, giving such advertisement as said directors shall think proper, and to grant absolute and irredeemable dispositions to the purchasers of said subjects binding me in absolute warrandice: Which articles of roup and disposition and conveyance shall be held as valid and effectual as if executed by myself, but I bind and oblige myself to concur therein if required."

Wylie's estates were sequestrated under the Bankruptcy Act of 1856 in January 1868, and William Roberts, auctioneer in Bathgate, was appointed trustee in the sequestration. The Investment Association intimated to the trustee the existence of the bond and disposition in security, and the bankrupt's failure to pay the monthly instalments of the loan, and requested payment thereof from him (the trustee), but he declined to pay the arrears, or to take up the subjects disponed in security, on the ground that the debt exceeded the value of the property, so that there could be no reversion to the other creditors.

On 23d January 1869 the manager of the Heritable Securities Investment Association intimated to Wylie by letter that failing payment within one month from that date of the arrears due by him the association would either enter into possession of the property conveyed to them in security of their loan or sell the subjects.

Wylie was discharged under his sequestration, but without composition, and he was not reinvested in his estate, and on 14th May 1870 the manager of the Investment Association intimated to the trustee and also to Wylie the intention of the association to remove him from the heritable subjects conveyed to them in security of their loan.

Wylie, however, refused to cede possession to the association of part of the property consisting of a shop and dwelling-house which he himself occupied, and in June 1870 the association presented a petition to the Sheriff against Wylie and the trustee in his sequestration, setting forth the facts above narrated, and that the petitioners had "exercised the powers of entering into possession of the foresaid subjects in respect of the non-payment of said arrears as aforesaid, all in terms of said bond, which is herewith produced and specially referred to, and also the certificate of intimation to the said James Wylie, respondent, under the hands of Andrew Paterson, manager of the said Heritable Securities Investment Association (Limited), dated 14th May 1870, also herewith produced and specially referred to"; but, "that the said James Wylie wrongfully and unwarrantably remains in the occupancy of the shop premises forming part of the said subjects, and of the dwelling-house above said shop premises, being part of the subjects conveyed in security by him as aforesaid, and refuses to remove from the same, although he has no right to remain therein, his right to possess the same having terminated under the foresaid clause of said bond and subsequent intimation, and the present proceedings have been rendered necessary."

The prayer of the petition was to "grant warrant for summarily ejecting and removing the said James Wylie, respondent, his wife, bairns, servants, and dependents, goods and gear, furth and from the said dwelling-house, situated in Armadale aforesaid, occupied by the said James Wylie as aforesaid, and forming part of the said subjects conveyed in security as aforesaid, to the effect that the petitioners may deal therewith in terms [256] of the said bond, and to find the respondent, the said James Wylie, and also the said William Roberts, in case of his opposing the prayer hereof, liable in expenses, and to decern therefor," &c.

This petition was not opposed by the trustee in Wylie's sequestration, but Wylie entered appearance, and a record was made up, in which he denied that the monthly instalments due under the bond and disposition in security to the petitioners had fallen into arrear, or that he had received intimation thereof. He alleged that by disposition, dated 10th January 1868, he had sold his heritable property in Armadale (including the subjects referred to in the petition) to Messrs. Roberton, Heugh, and Company,

wholesale merchants, Glasgow, under burden of the debt due to the petitioners, and under an agreement by Roberton, Heugh, and Company, that he should possess the shop and dwelling-house in question as their tenant. "The respondent, since the term of Martinmas 1868, has been in partnership with William Wylie, merchant and contractor, Armadale, and the business of grocer and provision merchant has been carried on by the firm of William Wylie and Company in the premises from which ejection is sought, and the premises are occupied and possessed by the said firm as tenants under the disponees, under the said disposition and conveyance, dated and recorded so far back as January 1868."

Wylie pleaded;—(1) The respondent having sold the property from which ejection is sought, and conveyed the same to the disponees before named in the conveyance before specified, he then ceased to retain possession under the original heritable title, in virtue of which he granted the said bond. (2) The respondent having obtained right to possess the said subjects as tenant, or partner of the firm tenanting and possessing the said subjects, from the party feudally vested therein, the petitioners have no title to sue a removing of such tenants or possessors. (3) The petitioners have no title, under the bond produced, to eject tenants or possessors possessing under the legal vested proprietors of the subjects. (4) This removing, being of an extraordinary nature, is incompetent in the Sheriff-courts; and, (5) This action involves questions of heritable right, and is therefore incompetent in the Sheriff-court.

The Sheriff-substitute (F. Home) pronounced this interlocutor:—"In respect that the removal sought for in this action is grounded upon a conventional irritancy contained in a disposition to land, and involves the question, not only as to the right to possess said land, but also as to the property of the same, and requires solemn investigation into whether said irritancy has been incurred, and declarator of the same, Finds that the action is incompetent in this Court, and sustains the defender's pleas in law thereanent: Finds also that the clause in said bond and disposition referred to does not give the petitioners the power of ejecting the respondent *de plano*, but only of removing him therefrom, if the said irritancy has been incurred, and that therefore the action should have been one of removal in ordinary form: Therefore, on these two grounds, dismisses the action, reserving to the petitioners to bring their action against the defender as accords of law: Finds the defender entitled to expenses, subject to modification," &c.

The petitioners appealed, and the Sheriff (Monro) pronounced the following judgment:—"Recalls the said interlocutor: Repels the plea that the petition as laid is not within the jurisdiction of this Court: Finds that the summary petition is a competent form of raising the present action: Allows the parties a proof, before answer, of their respective averments on record, so far as not admitted, and to each party a conjunct probation: Grants diligence," &c.*

[257] In the course of the proof allowed by the Sheriff, the petitioners' manager produced the following letter, dated 5th October 1870, received by him from Messrs. MacGeorge, Cowan, and Galloway, the agents for Roberton, Heugh, and Company, to whom he had written inquiring whether they had got a conveyance of the property from Wylie:—"Dear Sir,—Messrs. Roberton, Heugh, and Company have handed us your letter to them of the 4th, with instructions to answer you, as we acted as their agents in Wylie's matter. The facts are these. Wylie was a debtor of Roberton, Heugh, and Company, and on 10th January 1868 we got from Wylie an absolute conveyance of his

* "NOTE.—The question above decided is one of very general application, and [257] is of considerable importance. The power of removal of the debtor, in the event of his falling into arrear of his instalments, is commonly inserted in bonds granted to such associations as that of the pursuers; and unless a summary procedure in the Sheriff-court is competent, the power can scarcely be promptly and effectually exercised. The Sheriff has jurisdiction to enforce agreements as to the possession of heritage; and the present action is raised to enforce a conditional agreement to remove. There is no irritancy of the proprietary right. The foregoing judgment does not affect any question of jurisdiction which may emerge in the course of the cause.

"The following cases are important, both on the question of jurisdiction and as to the summary form of action:—Nisbet *v.* Aikman, Jan. 12, 1866, 4 Macph. 284; Williamson *v.* Johnston, Dec. 23, 1848, 11 D. 332; Gordon *v.* Grant, June 22, 1848, 10 D. 1385."

to be fully and legally instructed by a certificate under the hand of the manager of the said association for the time being, and a similar certificate under the hand of the said manager shall be legal evidence of the foresaid notice having been sent to me; and the said association, or [255] the directors thereof, shall then be at liberty, without any further premonition to me or other process of law, forthwith to advertise the subjects above disponed, for public sale, in such newspaper or newspapers, and for such number of times, as the directors of said association shall think fit, and thereafter to sell the said subjects for whatever price the same may bring, any law or practice to the contrary notwithstanding; and my said disponees are hereby authorised to execute articles of roup, to adjourn the sale from time to time, giving such advertisement as said directors shall think proper, and to grant absolute and irredeemable dispositions to the purchasers of said subjects binding me in absolute warrandice: Which articles of roup and disposition and conveyance shall be held as valid and effectual as if executed by myself, but I bind and oblige myself to concur therein if required."

Wylie's estates were sequestrated under the Bankruptcy Act of 1856 in January 1868, and William Roberts, auctioneer in Bathgate, was appointed trustee in the sequestration. The Investment Association intimated to the trustee the existence of the bond and disposition in security, and the bankrupt's failure to pay the monthly instalments of the loan, and requested payment thereof from him (the trustee), but he declined to pay the arrears, or to take up the subjects disponed in security, on the ground that the debt exceeded the value of the property, so that there could be no reversion to the other creditors.

On 23d January 1869 the manager of the Heritable Securities Investment Association intimated to Wylie by letter that failing payment within one month from that date of the arrears due by him the association would either enter into possession of the property conveyed to them in security of their loan or sell the subjects.

Wylie was discharged under his sequestration, but without composition, and he was not reinvested in his estate, and on 14th May 1870 the manager of the Investment Association intimated to the trustee and also to Wylie the intention of the association to remove him from the heritable subjects conveyed to them in security of their loan.

Wylie, however, refused to cede possession to the association of part of the property consisting of a shop and dwelling-house which he himself occupied, and in June 1870 the association presented a petition to the Sheriff against Wylie and the trustee in his sequestration, setting forth the facts above narrated, and that the petitioners had "exercised the powers of entering into possession of the foresaid subjects in respect of the non-payment of said arrears as aforesaid, all in terms of said bond, which is herewith produced and specially referred to, and also the certificate of intimation to the said James Wylie, respondent, under the hands of Andrew Paterson, manager of the said Heritable Securities Investment Association (Limited), dated 14th May 1870, also herewith produced and specially referred to"; but, "that the said James Wylie wrongfully and unwarrantably remains in the occupancy of the shop premises forming part of the said subjects, and of the dwelling-house above said shop premises, being part of the subjects conveyed in security by him as aforesaid, and refuses to remove from the same, although he has no right to remain therein, his right to possess the same having terminated under the foresaid clause of said bond and subsequent intimation, and the present proceedings have been rendered necessary."

The prayer of the petition was to "grant warrant for summarily ejecting and removing the said James Wylie, respondent, his wife, bairns, servants, and dependents, goods and gear, furth and from the said dwelling-house, situated in Armadale aforesaid, occupied by the said James Wylie as aforesaid, and forming part of the said subjects conveyed in security as aforesaid, to the effect that the petitioners may deal therewith in terms [256] of the said bond, and to find the respondent, the said James Wylie, and also the said William Roberts, in case of his opposing the prayer hereof, liable in expenses, and to decern therefor," &c.

This petition was not opposed by the trustee in Wylie's sequestration, but Wylie entered appearance, and a record was made up, in which he denied that the monthly instalments due under the bond and disposition in security to the petitioners had fallen into arrear, or that he had received intimation thereof. He alleged that by disposition, dated 10th January 1868, he had sold his heritable property in Armadale (including the subjects referred to in the petition) to Messrs. Roberton, Heugh, and Company,

wholesale merchants, Glasgow, under burden of the debt due to the petitioners, and under an agreement by Roberton, Heugh, and Company, that he should possess the shop and dwelling-house in question as their tenant. "The respondent, since the term of Martinmas 1868, has been in partnership with William Wylie, merchant and contractor, Armadale, and the business of grocer and provision merchant has been carried on by the firm of William Wylie and Company in the premises from which ejection is sought, and the premises are occupied and possessed by the said firm as tenants under the disponees, under the said disposition and conveyance, dated and recorded so far back as January 1868."

Wylie pleaded;—(1) The respondent having sold the property from which ejection is sought, and conveyed the same to the disponees before named in the conveyance before specified, he then ceased to retain possession under the original heritable title, in virtue of which he granted the said bond. (2) The respondent having obtained right to possess the said subjects as tenant, or partner of the firm tenanting and possessing the said subjects, from the party feudally vested therein, the petitioners have no title to sue a removing of such tenants or possessors. (3) The petitioners have no title, under the bond produced, to eject tenants or possessors possessing under the legal vested proprietors of the subjects. (4) This removing, being of an extraordinary nature, is incompetent in the Sheriff-courts; and, (5) This action involves questions of heritable right, and is therefore incompetent in the Sheriff-court.

The Sheriff-substitute (F. Home) pronounced this interlocutor:—"In respect that the removal sought for in this action is grounded upon a conventional irritancy contained in a disposition to land, and involves the question, not only as to the right to possess said land, but also as to the property of the same, and requires solemn investigation into whether said irritancy has been incurred, and declarator of the same, Finds that the action is incompetent in this Court, and sustains the defender's pleas in law thereanent: Finds also that the clause in said bond and disposition referred to does not give the petitioners the power of ejecting the respondent *de plano*, but only of removing him therefrom, if the said irritancy has been incurred, and that therefore the action should have been one of removal in ordinary form: Therefore, on these two grounds, dismisses the action, reserving to the petitioners to bring their action against the defender as accords of law: Finds the defender entitled to expenses, subject to modification," &c.

The petitioners appealed, and the Sheriff (Monro) pronounced the following judgment:—"Recalls the said interlocutor: Repels the plea that the petition as laid is not within the jurisdiction of this Court: Finds that the summary petition is a competent form of raising the present action: Allows the parties a proof, before answer, of their respective averments on record, so far as not admitted, and to each party a conjunct probation: Grants diligence," &c.*

[257] In the course of the proof allowed by the Sheriff, the petitioners' manager produced the following letter, dated 5th October 1870, received by him from Messrs. MacGeorge, Cowan, and Galloway, the agents for Roberton, Heugh, and Company, to whom he had written inquiring whether they had got a conveyance of the property from Wylie:—"Dear Sir,—Messrs. Roberton, Heugh, and Company have handed us your letter to them of the 4th, with instructions to answer you, as we acted as their agents in Wylie's matter. The facts are these. Wylie was a debtor of Roberton, Heugh, and Company, and on 10th January 1868 we got from Wylie an absolute conveyance of his

* "NOTE.—The question above decided is one of very general application, and [257] is of considerable importance. The power of removal of the debtor, in the event of his falling into arrear of his instalments, is commonly inserted in bonds granted to such associations as that of the pursuers; and unless a summary procedure in the Sheriff-court is competent, the power can scarcely be promptly and effectually exercised. The Sheriff has jurisdiction to enforce agreements as to the possession of heritage; and the present action is raised to enforce a conditional agreement to remove. There is no irritancy of the proprietary right. The foregoing judgment does not affect any question of jurisdiction which may emerge in the course of the cause.

"The following cases are important, both on the question of jurisdiction and as to the summary form of action:—Nisbet *v.* Aikman, Jan. 12, 1866, 4 Macph. 284; Williamson *v.* Johnston, Dec. 23, 1848, 11 D. 332; Gordon *v.* Grant, June 22, 1848, 10 D. 1385."

property in Armadale in favour of the partners of Roberton, Heugh, and Company. It was not a sale but only a security, the consideration in the disposition being for good and onerous causes. Wylie was sequestrated within a very short period of the date of this deed, and his trustee demanded that we would give up the security. It was reducible, as being granted within sixty days, and we agreed to convey the property to the trustee on being relieved from expenses. Accordingly a disposition was prepared, and was signed by the partners of Roberton, Heugh, and Company, and is now in our possession. We sent to the trustee's agents a note of our expenses, and intimated that we were ready to deliver the disposition on these being paid, but they have never been paid, and the disposition remains undelivered. Roberton, Heugh, and Company never interfered with the property in any shape, never leased the place to any one, nor was there ever a proposal made that they should grant a lease."

The Sheriff-substitute pronounced the following interlocutor:—"Finds that it is admitted by the defender that he granted the bond and disposition in security referred to in the petition: Finds that the said bond contains the condition granted in the article No. 3 of the petitioners' revised condescendence: Finds it proved that the irritancy created by said clause and condition in the said bond has been incurred by the defender falling in arrear of his stipulated monthly payment, and that the petitioners have complied with the stipulated powers as to intimation to the defender of their intention to take advantage of and to enforce said condition as to the removing of the said defender from the said premises and as to entering into possession of the same themselves: Finds that there is no proof that the said defender has legally disposed of the said premises to Messieurs Roberton, Heugh, and Company, or to any other party, nor have the said alleged disponees, Roberton, Heugh, and Company, thought it worth their while to sist themselves, or to interfere in any way in this process; and finds that the said defender is still in possession of the said premises, and has never been dispossessed of the property of the same, either before his sequestration or during its subsistence, after his discharge from the same: Finds, therefore, that the said defender has forfeited his right to [258] retain any longer possession of the said premises as against the petitioners under the said condition of the said bond, and that the said petitioners, on the other hand, have acquired right by the same to remove him summarily therefrom, and to take possession themselves: Therefore decerns in the removing against the said defender James Wylie on said grounds, and against the other defender, William Roberts, as trustee on the said James Wylie's sequestrated estate, in absence, as not having entered appearance in the action, from the premises in question, in terms of the prayer of the petition; and failing their so removing therefrom within fourteen days from this date, grants warrant to eject the said defenders, James Wylie, and William Roberts, as trustee foresaid, with all the defender's goods and effects, in terms also of said prayer: Finds the said defender James Wylie liable in expenses of process," &c.

To this decision the Sheriff adhered.

Wylie appealed, and argued;—(1) The petition was incompetent in the Sheriff-court, both because the case involved questions of heritable right, and also because this was not an ordinary removing in which the Sheriff has jurisdiction in virtue of the A. S. 14th December 1756, but an extraordinary removing without previous warning, which, as such, was competent only in the Court of Session.* The clause in the bond binding the appellant to remove "without any warning or legal process whatever," is in effect a penal irritancy of his right as proprietor. Such clauses are not regarded favourably by the law, and are not allowed to take effect, *ipso facto*, and without an action of declarator in the Supreme Court, even although the parties have expressly stipulated to the contrary.† The Sheriff's judgment could only have been justified by the appellant being either the respondents' tenant, or a vitious possessor, whereas he is neither. He is proprietor of the subjects, and the respondents merely heritable creditors. (2) The stipulations in the bond, on which the respondents found, are not such as the law will enforce. They are inequitable and incompatible with the powers which may be lawfully exercised by the creditor in an ordinary bond and disposition in security, who cannot oust the proprietor in possession by a summary process of

* Macfarlane *v.* Campbell, 1857, 19 D. 623; Waterston *v.* Mason, 1846, 8 D. 944.

† Stair, i. 13, 14—iv. 20, 36; Ersk. ii. 5, 25.

removing.* The heritable creditor has his appropriate legal remedies, either by poinding the ground if his debtor is in possession, or by an action of maills and duties if the subjects are in the occupation of tenants, or by exercising the power of sale; and parties cannot by private paction supersede the common law,† or the result would be not only to encourage oppression on the part of creditors disposed to take advantage of their debtors' necessities, but to enable individual creditors to obtain an unfair preference over others.

Argued for the respondents;—(1) There was here no competition of heritable rights, and the Sheriff had jurisdiction to entertain the case. The respondents did not seek by this petition to enforce the clause in the bond irritating the appellant's proprietary right in the event of the instalments of the loan falling into arrear, but only to settle the question of possession. The appellant bound himself to remove from the premises in the event which happened, without warning or any legal process; but as [259] he eventually refused to do so, the respondents, who could not proceed without legal warrant, were entitled to enforce the obligation in the most summary manner. The competency in similar cases, of proceedings in the Sheriff-court without any action of declarator has been often recognised.‡ In none of the cases cited by the appellant was there any power conferred upon the creditor of entering summarily into possession of the subjects in the event of the debtor's failure to pay. (2) There was nothing illegal in the stipulation that the creditors, as part of their security, should be entitled, on giving the intimation required by the bond, to enter at once into possession of the property in the natural possession of the debtor. The respondents might have declined to lend their money upon any other footing, and the appellant agreed to accept the loan upon these terms. There is nothing immoral in such a transaction, nor is it one prohibited by law, and it must therefore receive effect. The parties no doubt agreed to dispense with a formal poinding of the ground, but *provisio hominis tollit provisionem legis.* This was not an oppressive condition towards the debtor, and the interests of no third party were involved, as the trustee in the sequestration had declined to take any action in the matter.

After hearing counsel the Court appointed the case to be re-argued in presence of three Judges of the Second Division.

At advising,—

LORD COWAN.—This is a petition to the Sheriff of Linlithgow, as Judge Ordinary, for the summary ejection and removal of the appellant from subjects of which he is the undoubted feudal owner, and which are in his own occupancy.

The petitioners are heritable creditors, holding a real security over the subjects for an advance of £550, declared to be payable by instalments of £9, 1s. 6d., each and every month during the period of six years. It is in the exercise of their alleged power under this bond that they seek to have judicial authority and warrant for "summarily ejecting and removing" the appellant, "his wife, bairns, servants, and dependents, goods and gear, forth and from the" subjects occupied by him, "and forming part of the said subjects conveyed in security as aforesaid." The application is directed, not merely against the debtor in the bond (the appellant), but also against the trustee on his sequestrated estate, whose right to the subjects, and the possession of them for behoof of the general creditors of the bankrupt, is, by the terms of the petition, brought directly under challenge.

The heritable bond contains the usual executorial clauses in the event of nonpayment of the stipulated sum at the terms when due, with a power of sale; but, farther, it contains two clauses or conditions altogether novel and unexampled in such securities.

One of these clauses confers power on the creditors, "in the event of any of the said monthly instalments falling into arrear for two months, to remove me or my tenants from the possession or occupancy of said subjects, and to enter into possession

---

* Blair *v.* Galloway, 1853, 16 D. 291, *per* Lord Rutherfurd; Forsyth *v.* Aird, 1853, 16 D. 197; Macfarlane *v.* Campbell, *sup. cit.*

† Forrester *v.* Walker, June 27, 1815, F. C.; Bell's Com. (5th edit.) vol. i. 364; Gilmour *v.* Finnie, 1831, 9 S. 907.

‡ Gordon *v.* Copland, 1805, Dict. *voce* Tack, Appx. No. 11; Forbes *v.* Duncan, June 2, 1812, F. C.; Stevenson *v.* Baird, 1821, 1 S. 84 (N. E. 87); Brown *v.* Peacock, 1822, 1 S. 359 (N. E. 337); Hall *v.* Grant, 1831, 9 S. 612; Nisbet *v.* Aikman, 1866, *ante*, vol. iv. 284.

thereof themselves, to let the same, and to draw the rents thereof, and that one month after a letter under the hand of the manager or law-agents of the said association for the time being has been addressed to me intimating the intention of the said association to remove me as aforesaid, without any warning or legal process whatever; and a certificate under the hand of the said manager or the law-agents for the time of said association that such letter was delivered to me or put into the post-office bearing my known address, shall be legal evidence of said intimation; declaring that my said disponees, in [260] the event of their entering into possession of said subjects, shall not be liable for waste rents or insolvent tenants, or be bound to do exact diligence."

The other clause declares that, upon the lapse of the same period of two months without payment of one monthly instalment, and the expiry of one month after intimation,—precisely as provided in the first clause,—"all interest in and right and claim to the said property hereby disponed competent to me shall be forfeited *ipso facto*"; and the creditors are declared to be then at liberty, "without further premonition or other process of law," forthwith to advertise the subjects for sale, and to sell the same, "any law or practice to the contrary notwithstanding."

It is under the first of these clauses that the present application is professedly brought; and the warrant craved is for the removal of the appellant from a part of the subjects not let to tenants, but in his own occupancy.

In reference to preliminary pleas stated for the appellant to the competency of the procedure and jurisdiction of the Court, the Sheriff-substitute, by his interlocutor of 9th December 1870, dismissed the action on two grounds afterwards noticed; but this interlocutor was recalled by the Sheriff on 21st December 1871. The cause was subsequently disposed of on its merits by interlocutors adverse to the appellant.

In the argument addressed to the Court under this appeal various important questions affecting the competency of the summary procedure thus resorted to by the respondents appear to me to arise for judicial consideration.

The first of these questions is the legality of parties, by private paction, dispensing with established law and practice, in reference to the enforcement of the real security constituted by their bond, *i.e.* dispensing with action of mailla and duties where the subjects are in possession of tenants, and with poinding of the ground where the owner himself is in possession; and in either case with the process of adjudication; and arranging for themselves a mode of procedure hitherto unknown to the law or in practice, for immediate executorial action. Even where the debtor alone is interested in the issue the law will not sanction severe and penal provisions for the enforcement of debt, contrary to established rule, and amounting truly to conventional irritancy of the debtor's right to possession and enjoyment of his property. Nor has the consent of the debtor been held sufficient, in a certain class of cases, to support such an arrangement, when stipulated for by the creditors, and I apprehend no more severe or penal condition could well be inserted in a bond than that, instantly on non-payment and intimation by the creditor, the debtor may be ejected and dispossessed of his property, and his family and his tenants also.

The deeply-seated constitutional principles on which this doctrine was held applicable in the case then before the Court were fully explained in the case of Forrester, June 27, 1815, Fac. Coll., and especially in the opinion of Lord Meadowbank. The Bank of Scotland had there stipulated that the debtor should not be entitled to his legal remedy of suspension, except on consignation of the amount due by the bond, to be certified by their cashier or accountant. The debtor had consented to this, but the Court held it to be an illegal stipulation, interfering with the usual course of legal procedure. Other instances of the same kind have occurred, and been similarly dealt with by the Court. Mr. Bell in his Commentaries (vol. i. p. 382, last edition), referring to the decision in the case of Forrester, which he says was very deliberately considered, states that the provision that no suspension should be competent, unless upon the consignation of the balance, "is not a legitimate or an effectual stipulation." And in the subsequent case of Gilmour, 9 S. p. 907, Lord Moncreiff, Ordinary, whose interlocutor was adhered to, states in his note—"The Lord Ordinary considers it to be a settled point that such a clause is not effectual." Now, it is surely a grave question, requiring deliberate consideration by the Supreme Court, whether the stipulation here sought to be enforced by the most summary of all procedure does not fall under the principle which ruled this class of cases, and within the maxim commented on by Lord Stair (b. i. t. 17, sec. 14), *pacta privatorum non derogant juri communi.*

More especially must the necessity of this course be apparent when it is remembered how greatly the interest of other parties, creditors of the debtor, may [261] be affected by this private consensual arrangement, and how far that equality among creditors doing diligence against their debtor's estate, provided for not less by statute than at common law, may be disturbed, if not destroyed. No publicity is to be given to the defalcation of the debtor or to the intimation made to him by his creditor, and no process or procedure at law whatever is to be followed. While other creditors are prosecuting their diligence in due course, the creditor in a bond with such a provision as this is to be entitled to dispossess the owner at once and *de plano*. That is the basis of this application. It is made to the Judge Ordinary only because the debtor has not complied with the private requisition made on him to get out of the premises. And with this view I am the more impressed because of the petition having been directed against the trustee for the general creditors of the bankrupt, against all of whom this consensual arrangement is asked to be enforced. It does not matter that no appearance was made for the trustee, and that he is decerned against in absence. The application in its prayer is demonstrative of its true nature and proposed effect.

Again, this clause relates to property, but in substance there is really no difference had the consent been with regard to the attachment of the debtor's person,—for example, a consensual stipulation that the debtor should go to prison on the day when payment should have been made, so that the creditor, on the last of the days of grace where the debt is constituted by bill, or on the very day of a bond becoming due, might have instant warrant of incarceration of his debtor. Say that it was matter of arrangement that this should be in the creditor's power, without any charge for payment on letters of horning and caption, would such a clause be held binding? Yet that is the kind of case raised by this application. These views lead me to observe that when the Sheriff-substitute who refused to entertain the application found that the removal sought involved the question not only as to the right to possess but as to the property of the subjects, and required solemn investigation by the Supreme Court, and was therefore incompetent before him, he formed a just appreciation of the true nature of the application. A summary ejection process before the Judge Ordinary is the remedy open to a proprietor against parties who have taken possession of a subject without right or title, and are in truth mere squatters. The petitioners are not in the position of owners in any sense so as to justify such an action, unless indeed it is to be held that, under the second clause in this bond to which I have referred, there was, on account of the defalcation of the debtor to pay for two months, and the intimation of one month longer, *ipso facto* forfeiture of his whole interest in and right and claim to the property, which, however, the counsel for the petitioners was at pains to disclaim as not at all within the argument. Still, it does appear to me—although this view may not be necessary for our present decision—that there is great room for contending that the one clause in this bond cannot be dissevered from the other, and that a question of irritancy arises, not merely of the debtor's right to possess but of his right to and interest in the subjects themselves; and if this be so, then, as involving the effect of the clauses imposing such conventional irritancy, the Supreme Court alone is the Court to which recourse must be had for its enforcement, assuming the provision in itself to be entitled to legal effect. No inferior Court can give effect to a conventional irritancy.

On all these grounds I am of opinion that the interlocutor of the Sheriff should be recalled, and that of the Sheriff-substitute of 9th December 1870 substantially adopted, finding the petition incompetent at all events in the Sheriff-court; and this result appears to me to be supported by the decision in the very analogous case of Macfarlane *v.* Campbell, March 4, 1857, 19 D. 623.

Lord Deas.—The Investment Company, who were petitioners in the inferior Court, are heritable creditors of the respondent. It is quite settled, I take it, that if the petitioners had held a bond and disposition in security in the ordinary and everyday form with which we are all familiar, they could not have taken possession of this property except by means of a poinding of the ground, so far as the subjects were in the natural possession of the debtor, and by means of an [262] action of maills and duties so far as they were in the hands of tenants. The ordinary form of a bond and disposition in security contains an assignation to the rents and to the writs in these terms:—"Moreover I, the said A., do hereby make, constitute, and appoint the said B. and his foresaids my lawful cessioners and assignees, not only in and to the rents, maills, and duties of the said lands and others foresaid, with the pertinents above dis-

poned, that shall fall due from and after the term of Whitsunday last, and in all time thereafter during the not payment and redemption; with full power to them to intromit with and uplift the same," &c.; "but also in and to the writs and evidents, rights, titles, &c.; "surrogating and substituting the said B. and his foresaids in my full right and place of the premises," &c.—(Juridical Styles, vol. i. Heritable Rights, 3d edition.) These clauses may, by a recent statute, be expressed in a shorter form by simply saying, "I, the said A. B., do hereby assign the rents, and I assign the writs." But this makes no difference, because the statute provides that the abbreviated form shall be held to express all that was previously expressed by the full and more ample form; and in order therefore to see what the abbreviated form expresses we must look to the full and more ample form which is thereby held as repeated. Now, notwithstanding the express terms of that assignation, it is perfectly settled that the creditors holding such a security can only proceed either by poinding the ground or by an action of maills and duties—Blair *v.* Galloway, 21st December 1853, 16 D. 291 (Lord Rutherfurd's interlocutor); Macfarlane *v.* Campbell, 4th March 1857, 19 D. 623—29 Scot. Jurist, 290.

Let us now attend to the terms of the novel, and hitherto in our practice unexampled, clauses which are introduced into the bond taken by the Investment Company, the object of which no doubt was to enable them to dispense with the ordinary diligence of the law, which other heritable creditors are obliged to resort to.

The deed is set forth in the petition to the Sheriff. The condition of the loan was that the debtor was to have six years to repay the money, by monthly instalments, but there is a clause to the effect that if he fails to pay any one of these monthly instalments for a period of two months certain consequences are to follow. There is to be 5 per cent. of interest paid upon the arrears if due for one month, 10 per cent. if the period is between one month and six months, 15 per cent. if the period is more than six months, and if the current rate of bank interest at any time exceeds 5 per cent. there is to be an addition to these rates equal to the surplus exacted by the banks beyond the 5 per cent. There is, moreover, a condition that, failing payment within two months, the Investment Company, whom I shall call the petitioners, are entitled to give a written notice of one month, and at the expiry of that time to enter into possession of the subjects, whether in the natural possession of the debtor or let to tenants, for that is plainly the import of that part of the clause to which I am now referring. It runs thus:—"I assign and convey to my said disponees the rents of the said subjects, with power to them and their foresaids, in the event of any of the said monthly instalments falling into arrear for two months, to remove me or my tenants from the possession or occupancy of said subjects, and to enter into possession thereof themselves, to let the same, and to draw the rents thereof, and that one month after a letter under the hand of the manager or law-agents of the said association for the time being has been addressed to me intimating the intention of the said association to remove me as aforesaid, without any warning or legal process whatever." The deed farther bears—"If at any time I shall allow one monthly instalment to remain unpaid for two months after the date of payment thereof, then and in that event, on the expiry of one month after notice shall have been sent to me by the manager or law-agents of said association, all interest in and right and claim to the said property hereby disponed competent to me shall be forfeited *ipso facto*, which failure or neglect to pay to said extent shall be held to be fully and legally instructed by a certificate under the hand of the manager of the said association for the time being; and a similar certificate under the hand of the said manager shall be legal evidence of the foresaid notice having been sent to me"; and the association shall "then be at liberty, without any farther premonition to me, or other process of law, forthwith to advertise the [263] subjects above disponed for public sale in such newspaper or newspapers, and for such number of times, as the directors of the said association shall think fit, and thereafter to sell the said subjects for whatever price the same may bring, any law or practice to the contrary notwithstanding.

The petition, after a narrative of the bond, sets forth that certain monthly instalments therein mentioned being more than two months past due "the said petitioners gave the intimation prescribed by the said bond to the respondent, the said James Wylie, and exercised the powers of entering into possession of the foresaid subjects in respect of the non-payment of said arrears as aforesaid, all in terms of the said bond, which is herewith reduced and specially referred to, and also the certificate of intimation

to the said James Wylie, respondent, under the hands of Andrew Paterson, manager of the said Heritable Securities Investment Association (Limited), dated 14th May 1870, also herewith produced."

Your Lordships will observe that what is thus set forth in the petition is that the power of entering into possession had already been exercised; and what is really sought for comes in substance to be the aid of officers of the law to keep and enforce the possession which the petitioners had taken at their own hands, and which, if they are right at all, they were entitled to take at their own hands. The petition goes on to say that Wylie had been sequestrated under the Bankrupt Statute; that payment had been demanded from William Roberts, the trustee in the sequestration, who declined to take up the heritable property as it would yield no reversion; "that the said James Wylie wrongfully and unwarrantably remains in the occupancy of the shop premises forming part of the said subjects, and of the dwelling-house above said shop premises, being part of the subjects conveyed in security by him as aforesaid, and refuses to remove from the same, although he has no right to remain therein; his right to possess the same has terminated under the foresaid clause of said bond and subsequent intimation, and the present proceedings have been rendered necessary"; and the prayer of the petition is, "May it therefore please your Lordship to grant warrant for, or appoint a copy of this petition, and of the deliverance to follow hereon, to be served on the said James Wylie, and the said William Roberts, trustee foresaid, and thereafter grant warrant for summarily ejecting and removing the said James Wylie, respondent, his wife, bairns, servants, and dependents, goods and gear, furth, and from the said dwelling-house, situated in Armadale aforesaid, occupied by the said James Wylie as aforesaid, and forming part of the said subjects conveyed in security as aforesaid, to the effect that the petitioners may deal therewith in terms of the said bond, and to find the respondent, the said James Wylie, and also the said William Roberts, in case of his opposing the prayer hereof, liable in expenses."

The petition thus proceeds upon the footing that the petitioners have done what they were entitled to do, by entering into possession; that the respondent, nevertheless, wrongfully and unwarrantably remained in the occupancy of the shop and dwelling-house above it; and that the petitioners were therefore entitled to a summary warrant to eject the respondents from the subjects, "to the effect that the petitioners may deal therewith in terms of the said bond." These last quoted words are, undoubtedly, broad enough to include the stipulated irritancy and forfeiture, not only of the respondent's right of possession, but of his right of property. It follows that the Sheriff was called upon, by this petition, to consider the whole questions that might arise under this bond, and the whole consequences which might result from the exercise of the power which the petitioners stated they had exercised. The Sheriff-substitute found the action incompetent; but the Sheriff altered, and found that the irritancy in the bond had been incurred, "therefore, that the defender has forfeited his right to retain any longer possession of the said premises," and consequently decerned in the removing against Wylie, and against Roberts as trustee on his sequestrated estate, "in terms of the prayer of the petition"; and failing this decerniture being complied with within fourteen days, granted warrant to eject Wylie, and Roberts as trustee aforesaid, from the premises, "with all the defender's goods and effects, in terms also of said prayer." Connecting the terms of this judgment [264] with the terms of the prayer of the petition, the natural reading of it would be that the Sheriff decerned in the removing and ejection from the subjects, "to the effect that the petitioners may deal therewith in terms of the said bond,"—that is to say, may deal with them as subjects to which the defender had forfeited all right both of possession and property, and which the directors of the association were entitled forthwith to sell, after such advertisement in a newspaper or newspapers as they thought proper. The Solicitor-General, for the petitioners, disclaimed, at the bar, all intention of construing the judgment as implying a forfeiture of the right of property, and the Sheriff, I persume, did not so intend it; but the Solicitor at same time adhered to the forfeiture of possession, and refused to admit any definite limit to its endurance or its consequences; and, in particular, he declined to admit that the defender could ever again resume possession without paying down the whole principal sum (which he was otherwise to have had six years to pay), with penal interest and expenses.

Such is the sort of case with which the Sheriff was required to deal; and there occur two important views in both of which it requires to be considered,—In the first

place, as in a question with the proprietor in the natural possession of the subjects; and, in the next place, as affecting the rights of other creditors, heritable and personal, of the proprietor.

In either view the proposition is involved that the stipulations in the bond, or rather the penal consequences of these stipulations, could be summarily enforced, and not merely summarily enforced, but enforced by the petitioners at their own hand; for it is on that footing that they set forth in the petition that "they have exercised the powers of entering into possession of the foresaid subjects"; and it is only upon that footing that they could be entitled to obtain from the Sheriff, as a mere matter of course, the summary aid of officers of the law to eject the debtor, whom they describe as "wrongfully and unwarrantably" interfering with their possession. I think that was not a footing on which the petitioners were entitled to proceed, because the questions of irritancy and forfeiture involved were prejudicial questions, upon the decision of which it entirely depended whether and to what extent the petitioners' conclusions could or could not be given effect to. It was no part of the contract that *simul et semel* with the advance of the money the debtor should remove from his shop and dwelling-house, and give the petitioners full possession of the premises, whatever might have been said of a contract of that kind. On the contrary, it was stipulated that the debtor should have six years to repay the money by monthly instalments; and it is only by bringing into play the clauses of irritancy and forfeiture that the petitioners do or can pretend that this leading stipulation of the contract, as to the time allowed for repayment, has been evacuated, and his right to occupy as proprietor terminated. The Sheriff gave him fourteen days to remove, but it might just as well have been fourteen hours, or, if the petitioners are right, they might have gone without the Sheriff's warrant at all, and turned the debtor to the street with, as the prayer of the petition expresses it, "his wife, bairns, servants, and dependents, goods and gear," to the interruption of his trade and the ruin of his credit, however solvent previously he had happened to have been.

As affecting the rights of third parties, the consequences of enforcing such a bond in its terms are still more serious. We are dealing not with this case only, but with a general question, and it is on that footing, as I understand, that the case has been remitted to seven Judges. Here there was a sequestration, and the trustee declines to interfere, because the heritable debt exceeds the value of the property. But this might have been otherwise. Or there might have been prior heritable creditors holding bonds and dispositions in security in the ordinary form, trusting to the ordinary legal remedies hitherto understood to be common to all; and the contention comes to be, that the debtor, pressed by his necessities to obtain a loan beyond the market limit of the security he has to offer, may effectually subject himself to penal clauses, which shall operate a dispensation in favour of a particular heritable creditor with the ordinary procedure by action and diligence of maills and duties and poinding of the ground, [265] which the other heritable creditors must resort to. Both diligences are proposed to be equally dispensed with; for the clause of removal, it will be observed, is made equally applicable to tenants as to the proprietor himself. The power is, "to remove me or my tenants from the possession or occupancy of said subjects, and to enter into possession thereof themselves," &c., one month after notice by letter, "without any warning or legal process whatever." That seems just to be, as Lord Meadowbank said in one of the cases cited, to allow a debtor to dispense, as regards one favoured creditor, with all the ordinary diligence of the law. If that can be done in this case, the debtor might just as well consent to a personal poinding without a charge, or to go to prison without horning and caption, or any warrant for legal diligence which law and practice have recognised. What may be the result of full and deliberate discussions of such questions in an appropriate action in this Court I shall not pretend to say. But I am of opinion that they are not to be prejudged, as they have been here, by a summary warrant of the Sheriff, sanctioning the *brevi manu* procedure adopted by and contended for by the petitioners. The objection is all the stronger that third parties who may be interested cannot be brought into the field under such a petition, which is not of the nature of an action of competition enabling them to vindicate their own rights and interests. On the whole, I concur in holding that the Sheriff's judgment should be recalled, and the petition dismissed as incompetent.

LORD BENHOLME.—I have arrived at the same result, and I think it of great consequence to our decision as a precedent that it should be put upon a clear footing, and

not involved in any obscurity. I do not agree with Lord Cowan in thinking that the clause of irritancy contained in this bond is what the Court has to consider as to its form. It certainly is in a very unprecedented form, and I do not know that there has been any heritable bond of exactly the same kind brought under the notice of the Court. But I think the present is a question of pure jurisdiction, and as such I shall consider it. I think it very plain that this is of the nature of an extraordinary removal. It is extraordinary in this respect, that it is unprecedented; but further, it is extraordinary in the extreme severity of the procedure. The effect of this petition, if it had been acceded to, would be to authorise those parties to enter into possession and to remove the proprietor, and to enable them to let the subjects and draw the rents; for these are the consequences that I think are referred to in the prayer of the petition as to dealing with the lands in terms of the bond. I do not think the words mean that they are to deal with the subject as having changed its property, but merely that the possession shall be changed, and that the right of letting to new tenants shall be held to have been given to the new possessor. Now, that is a very serious matter, and I take leave to observe that the clause in the original bond, although it is not insisted in exactly to the extent to which it goes, gives them power to remove tenants, which I should say is utterly illegal. A tenant has a nineteen years' lease, and in consequence of the failure of his landlord to pay the interest on the bond, it is supposed that the creditor may turn him out! That is a very extraordinary result. The petition does not enforce that claim against any tenant; it confines it to the proprietor. But the clause itself goes that length, and although it is restricted merely to the natural possessor—viz., the proprietor, this clause certainly takes a very extraordinary power to itself in asking it against him. But an extraordinary removing undoubtedly, in the ordinary case, belongs to the Court of Session, and my view upon that matter has been very much strengthened by the case of Macfarlane against Campbell. I had some doubts originally, but they have been entirely dispelled by referring to that case. It differed from the present case in regard to the conception of the clauses in the bond. The clause in that case did not entitle the creditor, upon the default of his debtor, to remove the proprietor; it was a clause which gave him power to remove possessors; and the argument was, that that must apply not only to tenants or squatters without any good title of possession, but also to the proprietor himself, although he had a good title. An argument was urged that such a clause did not even *ex facie* entitle the creditor to extrude the pro-[266]-prietor; but the Court proceeded upon the footing that the clause might be held to extend to the proprietor, the natural possessor; and, in short, that the clause in that bond might be interpreted to mean that which the clause in the present bond bears on its face. The decision in the case of Macfarlane went upon the footing of supposing that the clause was intended, and might be interpreted to extend to the proprietor as the natural possessor. The decision was not put upon any want of words in the clause; it was not put upon this—that the clause was of a doubtful character, and consequently that it ought not to be enforced. The view was this—supposing it is a clause that extends, at least by interpretation, to the proprietor as in the natural possession, the Court are of opinion that it is not competent in an inferior Court. The opinions of the Judges bring that out very distinctly. The Lord Justice-Clerk stated that he adhered to the Lord Ordinary's interlocutor, on the ground that a summary action of removing against a proprietor who was feudally infeft was clearly incompetent in the Sheriff-court:—"I limit myself to that ground." Now, this plainly assumes that the clause in that case had been as imperative and as unmistakeable as the clause in the present case; but his Lordship says, without reference to that question, he confines himself to the ground of decision, that a summary action of removing against a proprietor who was feudally infeft was clearly incompetent in the Sheriff-court. Lord Murray concurs; Lord Wood was absent; and Lord Cowan was content to acquiesce in the ground of judgment proposed. Now, that case is quite enough for me. I think it is a very clear and authoritative judgment, and it commends itself to my mind upon the ordinary principles of law. I am, therefore, fortified in the opinion that I now express, not merely from a somewhat difficult consideration of the principles of law on this matter, but by the decided precedent I have before me, which I think cannot be said not to be applicable to the present case.

LORD ARDMILLAN.—I have the misfortune to differ from the opinion which has been expressed. The diffidence which I naturally feel in such a position, and my reluctance to dissent from the views of those for whom I entertain unfeigned respect, has

led me to reconsider this question again and again, and indeed to endeavour, if possible, to arrive at a result in accordance with your Lordships' opinion. I have been unable to do so. I concur in the result of the judgment of the Sheriff, in so far as regards the question of ejection. It is, therefore, my duty to state, with great respect, but with candour, the opinion which I have conscientiously formed.

The respondent in this action, James Wylie, grocer and spirit-dealer in Armadale, Linlithgow, borrowed from the petitioners £550, and on receiving that money he granted to the petitioners a bond and disposition in security, dated 18th April 1867, by which he conveyed to them in security certain heritable subjects; and by which he obliged himself and his heirs, &c., to pay to the petitioners the said sum of £550 so borrowed by him, by monthly instalments of £9, 1s. 6d. per month, for six years, till the whole sum was repaid. By that deed James Wylie, in security of the said debt, also assigned and conveyed to the petitioners, the lenders of the money, the rents of the subjects; and he expressly conferred on them power, on the said monthly instalments falling into arrear for two months, to remove him from the possession or occupancy of the subjects, and to enter into possession themselves, and to let the same and draw the rents thereof, one month after a letter under the hand of the manager or law-agents of the association has been addressed to him, intimating the intention to remove him. This removal he expressly consents shall be "without warning or legal process"; and he also consents that a certificate by the manager or law-agents that such letter was delivered to him, or posted to his known address, shall be legal evidence, by which I understand legal *prima facie* evidence, of such intimation. There is no difficulty and no question in regard to the construction of this bond. The terms and the meaning of the bond are perfectly clear. There is no doubt in regard to them. The respondent Wylie borrowed and received the money, and subscribed the bond.

The obligations which he undertook as to payment by instalments, as to [267] removing without warning or legal process on getting one month's notice, and as to the acceptance of a letter as sufficient notice, are clearly expressed. Indeed the meaning of them is not questioned, and they form the conditions or consideration in respect of which he received the money borrowed. Now, if nothing has been done but that to which he has expressly assented, his assent being part of the consideration for which the money was lent him, what right has he to complain? *Volenti non fit injuria.* In point of fact, Wylie, the debtor in this bond, having received the money on this consideration, did fail to pay the monthly instalments, and these instalments fell into arrear to a much greater extent than two months. A letter of notice, duly posted, was addressed to him at his residence on 23d January 1869, and this was followed by formal certificate of intimation on 14th May 1870, ample time being given to the debtor; and in June 1870, after every opportunity had been given for payment, the petitioners presented an application to the Sheriff of the county, praying for the summary ejection of Wylie, in terms of his obligation in the bond. The prayer of the petition is simply for warrant to eject. There has been no attempt and no desire to act without warrant, and there is no attempt to enforce any other stipulation than the obligation to remove. It was clearly explained by the Solicitor-General that nothing more than a question of possession is here raised, that nothing more than removal is here craved, and that no demand is now made for forfeiture of the right of the respondent. It is essential that there be no misapprehension on this point.

Before proceeding further in the consideration of the case it is right to guard against misunderstanding on another point. I have therefore to observe that this question arises exclusively between the two parties to the bond. There is no third party here. It appears, indeed, that Wylie was sequestrated; but he had no funds, and he has been discharged without composition. The trustee does not appear, but declines to appear. There is no interest of any third party now involved. The borrower of the money, who received it under certain clearly expressed conditions, is occupying the subjects, retaining the money, and repudiating the conditions on which he obtained it. His defence on record in this action is in all respects false and groundless in point of fact, and not only false and groundless in point of fact, but the falsehood is in regard to matters of fact within his own knowledge. I have no hesitation in saying that, apart from the point of law to which I shall now shortly advert, the defences put on record are without truth or honesty.

It may, however, be, that we are compelled to give effect to a defence in point of law, even though it be plainly contrary to to equity and good faith of the trans-

action. That, however, must be a very clear point of law, bringing with it a very imperative duty of enforcement, which, in a question of possession, in a case between creditor and debtor, and with the interest of no third party involved, can compel a Court of justice to give a triumph to dishonesty. In my opinion there is no such point of law here.

The respondent's plea was presented at the bar, and has, I think, been considered by your Lordships under two aspects.

First. It is said that this obligation on the debtor, if he falls into arrear, to remove without warning or legal process, on getting a month's notice by letter, is an obligation which the law will not recognise, which cannot be enforced at all, in any Court or by any action. I cannot accept that proposition. I see nothing to prevent a Court of justice recognising and enforcing this obligation. Generally speaking, every clearly expressed obligation, granted deliberately, on just and true consideration, if not illegal or *contra bonos mores*, is to be recognised and enforced in a Court of justice. Is this obligation an exception? I think not. It was the consideration in the bond; it was the condition on which the money was given and received, The lender might have said, "I will not lend the money, unless you (the borrower), *unico contextu*, convey the subjects to me, retaining a power to redeem on payment." That would not have been unlawful if the borrower agreed to it. The lender might also have said, "You shall repay me the whole sum within three years, or you shall then convey to me your estate, that I may draw the rents, pay myself, and account for [268] the balance." Or he may, as here, stipulate for payment by instalments, and on failure to pay instalments, stipulate for the power of removing on a month's notice, without other warning, and without legal process, the debtor having a power of redemption, and the creditor being bound to account, and in any view being entitled to no more than his just debt. Any one of these modes of arranging the relations of debtor and creditor in the bond is legitimate, if clearly expressed and mutually agreed to, and if there be no fraud or deception. No fraud on the part of the creditor is suggested here; no doubt can exist on that point, and no doubt is suggested as to the creditor's good faith, or as to the meaning of the deed. On the part of the debtor there has been a failure to pay. On the part of the creditor all the conditions have been fulfilled. He lent the money; he waited till the instalments had fallen more than sufficiently into arrear; he acted with no harshness or pressure, or sharp procedure; he afforded full opportunity for payment; he amply gave the stipulated notice, and in the stipulated manner; and he craves from the Sheriff of the county warrant to enforce the obligation to remove, and to enforce it according to its plain meaning. It is said that every consensual obligation is not enforceable. That may be so; but such cases are exceptional. The general rule is, that a consensual obligation is enforceable. It is vain to say, as has been argued here, that the right of the defender to demand legal process before removing cannot be relinquished, even in express terms. It has often been relinquished by tenants, and summary removing has been sustained. In the case of notice on a bill of exchange, which is a most important matter, it is settled that such notice can be waived, and effect has been frequently given to such a waiver. But the right to demand legal process before removal, the right to refuse to be satisfied with a month's notice to quit given by letter, is surely not less susceptible of distinct waiver, than the right to demand notice of dishonour of a bill.

I do not doubt that there may be, in a bond, a clause so unfair and oppressive that a Court of justice would refuse to enforce it. It might be equivalent to the surrender of liberty or of honour. It might be so cruel and grasping that equity recoils from it, or so immoral that justice rejects it. There is nothing of the kind here. No wrong is done or proposed by this creditor, and the principles of morality are certainly not favourable to this debtor. On the contrary, in my humble opinion, viewing this case as between the debtor and the creditor (for no other interest is now involved), the equity and the honesty of the case is with the creditor. The good faith of the transaction is with the creditor, and in dealing with a consensual obligation that is of the utmost importance. The *incorrupta fides* is truly the *justitiæ soror*. I should regret their separation. It would be to me matter of great regret if the law compelled us to decide against the honesty of the transaction, and to refuse a remedy which good faith requires.

On the first point, therefore, I am of opinion that Wylie's obligation to remove without legal process, and without other warning than a month's notice by letter,

is an obligation which the Court cannot justly refuse to recognise, or refuse to enforce.

The next question is, can this obligation be enforced in any Court by summary procedure? I am of opinion that it can. The plain meaning of the obligation is, to remove on a month's notice without legal process. To avoid protracted legal procedure was the aim and intention of both parties. To insist on the legal process of a declaratory action at the creditor's instance would surely not be in accordance with the meaning of the parties, or with the stipulation in the bond. That cannot be maintained. The plain and honest meaning of the bond is clearly to the contrary. Where there is no obligation to remove without warning or legal process a different course of procedure must be pursued, for there the grounds for removing must be cleared; but here the failure to pay, the falling into arrear, is not disputed, and is proved in the manner agreed on; and the acceptance of a substituted notice, and the obligation to remove without warning or legal process, is, when clearly expressed, sufficient in law to sustain a summary action for removal. Effect has often been given to a waiver of notice in the negotiation of a bill. In many other cases a legal objec-[269]-tion has been held to be waived. This clear and express obligation to remove without legal process is surely a waiver of the right to demand legal process. This has been repeatedly recognised in cases between landlord and tenant; and in my opinion the rule and principle of law is, in this case, quite the same. In the case of Brown *v.* Peacock, 27th February 1822, 1 Shaw, 359, the tenant bound himself to remove at the end of the year without warning or process of removal. The landlord applied to the Sheriff for warrant for summary ejection. The Sheriff sustained the defence that there was no warning; but the Court, adhering to the judgment of Lord Gillies (Ordinary), recalled the Sheriff's interlocutor, and remitted to him to decern in the ejection. This decision is of undoubted authority, and referred to by our more recent writers; and the law and practice in Scotland, in regard to the removal of tenants, is in accordance therewith.

I may also mention the case of M'Laren *v.* Marquis of Breadalbane, 17th December 1831, 10 Shaw, page 163, where the decision in Brown *v.* Peacock was referred to by Lord Moncreiff, whose judgment was adhered to by the Court.

But not only in actions against tenants has this law been applied. In the case of Nisbet *v.* Aikman, 12th January 1866, *ante*, vol. iv. 284, a summary removing was sustained and enforced against a person who was not a tenant, and between whom and the proprietor there was no contract of lease or otherwise. In that case of Nisbet the defender had no title to maintain his possession. He was an intruder. In this case the defender Wylie has no right to maintain his possession. He has bound himself to remove. In Nisbet's case the defender objected to the summary procedure for ejection and removal. The Court, however, sustained the competency of the summary procedure, and the defender was ejected accordingly.

I have carefully considered the authorities on this point, and I have found no decision to prevent my taking the next step in this course of reasoning. I think that if this obligation to remove on a month's notice, without legal process, is such as a Court of justice can recognise and enforce at all, then it can be enforced by summary procedure. An heritable creditor cannot remove the owner of heritable subjects by summary procedure, unless there be a distinct obligation so to remove. But the man who has bound himself to remove without warning, except the month's notice which he has got, cannot demand other warning. The man who has bound himself to remove without legal process cannot insist for legal process before removing. There is, in my opinion, no authority to support such a demand by the party who has given such an obligation, and who has received and retained the money which he got in return for the obligation.

The remaining question is, if summary procedure to enforce ejection is competent, is it competent before the Sheriff?

I think it is. Nay more, I think that a summary procedure for ejection on an obligation to remove is appropriately and peculiarly within the jurisdiction of the Sheriff. The regulation of possession, and the enforcement of obligations in regard to possession is well understood to be the special province and function of the Sheriff. There is no question of competing heritable right here involved. The bond and disposition in security is very clear in its terms, and is registered in the Particular Register of Sasines at Edinburgh. The right of the petitioners to enforce every legal obligation therein contained is therefore unquestionable, and is not disputed. The

obligation to remove without process of law is also clear beyond the possibility of dispute. The creditor has fulfilled and instructed all the conditions which entitle him to remove the debtor from the possession which he undertook to quit. At this stage of the argument it must be assumed that the obligation so to quit possession is not illegal, and is enforceable by summary procedure. I need not remind you that our law, like the Roman law, recognises *jurisdictio in consentientes*, or prorogated jurisdiction. A consent that removal shall be without process of law is just an obligation to surrender possession on the warrant of the Judge competent in questions of possession. If so, I really must say, with the greatest respect to your Lordships, that the petitioners' application to the Sheriff of the county, the Judge Ordinary of the bounds, the fit and appropriate arbiter in questions of possession, was in my [270] humble opinion competent and legitimate, and that the Sheriff had jurisdiction to grant warrant of ejection as craved.

The case of Blair *v.* Galloway was quite different. The creditor held only an ordinary heritable bond, with power of sale, but no obligation to remove, and in that case the debtor was removed.

The case of Macfarlane against Campbell, in 1857, is not of authority on this point, for the facts were very different. In that case there was no express undertaking by the debtor to remove, there was no obligation there, as there is here, to cede possession on getting into arrear, and to cede possession on a month's notice, without warning or legal process. This is pointed out in the note of the Sheriff, who was the late Lord Barcaple, and it is an important distinction between the two cases.

The observation of the Lord Justice-Clerk in the case of Macfarlane is indeed authoritative as applied to the case before him, or to a case where the facts are similar. But it is not applicable to this case, which is quite different, and no case of authority has been quoted to us where, in the question of possession, effect has been refused to a clear obligation in a bond such as we have here. I venture again to repeat, because it is of the greatest importance, that no question but a question of possession is now raised.

Our law has always recognised the jurisdiction of the Sheriff in questions of disputed possession; and, in cases of conventional obligation to remove from possession, it is according to the law and practice of Scotland that the Sheriff can exercise that jurisdiction summarily. This has been recognised in many cases as between landlord and tenant, and in the case of Nisbet, to which I have referred, a person who was not a tenant was summarily ejected by the Sheriff, and the ejection was sustained by the Court. The form of this bond is new. We cannot expect direct precedents. The form has not been introduced by grasping creditors. It has been framed to meet the wants and wishes of persons of small means, desiring to acquire heritable subjects by purchasing with borrowed money to be repaid by instalments. It would be, on every ground, most unfortunate, if, in such a transaction, a breach of good faith should be successful.

Questions have been suggested which it is said may arise in regard to some of the other clauses in this bond, but which are not now before us. I reserve my opinion on these. It may be that the clause of forfeiture of the right is not clearly expressed; it may be that it is not effectual. No attempt is now made to enforce it. The present question relates not to the permanent right, but only to the obligation to remove or to cede possession, so that the creditor may take possession as stipulated, and obtain payment of his just debt. I think there has been some misunderstanding about this. But it was clearly explained by the Solicitor-General.

I shall not detain your Lordships longer. I regret that I am compelled to dissent from this judgment. I would not have done so if I had not felt that a great principle of justice and equity is involved. To my mind it appears—1st, That to refuse to recognise this obligation to remove, on the part of the borrower, who got his money on the strength of that obligation, is against the equity and good faith of the transaction; 2dly, That the enforcement of the obligation by summary procedure, and without other process of law, is according to the plain meaning of the obligation, and is the necessary consequence of its judicial recognition; and lastly, that the procedure for summary ejection or removal is competently and appropriately within the jurisdiction of the Sheriff.

I repeat, that there has been no attempt, and there is no averment of attempt on the part of the creditor to act without warrant.

The debtor states on record that he was in possession of the subjects when the petition for warrant to remove him was presented to the Sheriff; and that is the fact. The question is, whether the law will refuse the creditor the warrant which he asks. I am of opinion that he is entitled to remove Wylie from possession, and to that effect is entitled to the warrant which he craves.

LORD NEAVES.—I concur in the result of the opinions that have been delivered, and I shall state shortly the grounds upon which I do so. In such questions as [271] this, the first point always to be looked at is the jurisdiction of the Court, and the competency of the application in reference to that jurisdiction. In this case I have come to be of opinion that the application made was incompetent in the Sheriff-court, that the Sheriff had no jurisdiction to give effect to the prayer of the petition, and that in substance the interlocutor of the Sheriff-substitute was the correct interlocutor to pronounce in the circumstances, though some remark may possibly be made on certain of the grounds referred to in his note. The jurisdiction of the Sheriff-court depends partly, no doubt, upon statute, but a great deal of it depends upon custom; and in the conflict of jurisdiction between it and the Court of Session there are undoubtedly cases which do not belong to the Sheriff-court but to the Court of Session, and on this point we must look a great deal to practice. Now, the present case is a very peculiar one. I see it suggested that the true ground of application is a personal agreement on the part of the appellant to remove in a certain event, and it is pleaded as if the feudal or dispositive clauses of the deed were of no consequence to that question, and that, if a man grant a letter or an I.O.U., and puts at the end of it, "If not paid within a month after so and so, as certified by your clerk, you shall enter into possession of my house and premises," that personal agreement can be enforced in the Sheriff-court. Now, I entirely demur to that, and for this reason among others, that I am not aware of any instance or example of such a proceeding. A case of that kind comes to this, that a man, without even the shadow of a heritable right, but with a mere personal obligation from a proprietor who still remains the true proprietor, can ask the Sheriff to turn that true proprietor out of his possession. I never heard of such a case, and I do not believe in any circumstances that has ever been attempted. The case referred to by Lord Benholme * shews that even in more favourable circumstances that has not been attempted. That is on the footing that there is nothing but the personal obligation to be founded on, which is said to be the thing here sought to be enforced. It is a bargain independent of all right of a heritable nature; the owner has bound himself to walk out of these premises in a certain event, and that event has occurred, and therefore he must go in the most summary way possible. The clause as framed, indeed, empowered the creditor to put him out without any process. Now, I think it very necessary to distinguish a case of that kind from the case of removing tenants or possessors who are not proprietors. What is requisite there is, that the pursuer of that removing, on the one hand, shall have some title of property as against the possessor, which, being established, is a title to pursue the removing; and then the only parties that are to be removed in the shape of tenants or squatters are either those who never had a title to possess at all, or those who have had a temporary title, but which title has come to an end, either by the arrival of its natural ish, or by the operation of some reasonable stipulation in the deed, which brings the title of possession to an end. The party having no title of possession may be immediately ejected, subject to the consideration which prevails in several cases where warning is required, in order to give a tenant the usual time provided for by Acts of Parliament. That has no application to the present case. Here the condition of parties is the reverse, so far as title is concerned. It cannot be doubted that the proprietor has a title to possess, and the pursuer here has no feudal nor heritable title of any kind, and only sues *ad factum præstandum* on a personal obligation, which he seeks to enforce summarily in this way, to the effect that he shall bring to an end the most valuable part of a proprietor's privileges in his property, viz. that of possession, in a way which is unprecedented in the Sheriff-court. Supposing this pursuer has a heritable right to fall back on, and that he endeavours to dovetail the two together, it might give rise to very nice questions in regard to a competition between the heritable right of the actual proprietor and the heritable right acquired under this bond. It is admitted that there are things stipulated for in this bond that can never be

* Macfarlane *v.* Campbell, 19 D. 623.

enforced. That was explained by the judicious concession of counsel. It is one of the conditions of the bond which the respondent signed, that, on being in arrear a certain number of instalments, his interest in the property should entirely [272] cease. Upon the failure to pay £9, 1s. 6d., these parties, by the letter of the bond, are entitled, of their own authority, to walk into possession, and they stipulate that they shall be exempted from a liability either for waste rents or for the insolvency of tenants. These are certainly most severe penalties, and they are an additional reason why no such result should be declared by a Court like the Sheriff-court, which ought not to interfere as to indulgences in regard to penalties, or to equitable relaxations of the law, but ought only to act where the letter of the law is clearly enforceable. Further, the question what is to happen when possession is entered into, appears to require clearing up. Are the instalments to run on and be due with their 10 and 15 per cent., and with additional interest if the bank raises its rate; or is the debt to be converted into the principal sum already advanced? All these are difficulties left over. There is a power of redemption, but it is on payment of a single sum "as may be arranged" with the creditors, who, I suppose, have the power to refuse any terms they choose. The respondent is to be ousted from his property, and it is to go into the hands of these parties without any obligation to do exact diligence. No one can tell the maximum due by the bond. All these are questions that must be faced in order to extricate the rights of parties here, and it would be most inequitable to turn this proprietor out of the property and put the other into possession with all these clauses lying behind, on which, I conceive, the Sheriff cannot adjudicate. I hold the stipulation, now sought to be enforced, to be to a great extent a penal irritancy or forfeiture of his most important privilege of possession, and no such penal result can be imposed in any other than in this Court. It is not like the ordinary stipulation that a tenant shall remove when certain natural events occur which are plainly equitable and reasonable between his landlord and him; but it is a hard and severe stipulation, by which a property, worth it may be hundreds of pounds, is taken away, thus inflicting very great loss on the party. The Sheriff in his interlocutor deals with it as a case of irritancy and forfeiture. I do not think these are terms which, if they are rightly applicable to the case, as I think they are, are such as the Sheriff has power to pronounce upon. When the matter is brought here we will consider it. I refrain from saying anything more as to the questions raised, except that the very nature of these questions frequently enters into the point of jurisdiction. In many cases there may be a very good jurisdiction *prima facie*, but on the appearance of the other party, and the statement of his pleas, it may cease to be competent before the Sheriff, from its involving competitions of heritable and real rights, of which the Sheriff is not a competent judge. I cannot help thinking that the parties here have tried to put too much into their bond in order to secure what they wished; and a man may, by attempting too much, succeed in getting much less. Vaulting ambition by rising too high may not get seated in the saddle, but fall on the other side; and I think it would have been better if the parties here had tempered their conditions a little more, and endeavoured to stand on conditions which they could *in terminis* enforce.

LORD KINLOCH.—I am of opinion that this process was incompetent before the Sheriff-court, and was rightly dismissed, in the first instance, by the Sheriff-substitute, although I am not prepared to adopt all the expressions of his interlocutor and note.

The question arises on a heritable bond and disposition in security of a very peculiar and stringent character. With some of its most remarkable clauses, such as those irritating the right of property of the debtor in a certain event, we are not now directly concerned, and on these I desire to offer no opinion. The clause with which we have to deal is that which gives power to the creditors, "in the event of any of the said monthly instalments falling into arrear for two months, to remove me or my tenants from the possession or occupancy of the said subjects, and to enter into possession thereof themselves, to let the same, and to draw the rents thereof, and that one month after a letter under the hand of the manager, or law-agents of the said association for the time being, has been addressed to me, intimating the intention of the said association to remove me as aforesaid, without any warning or legal process whatever." The provided [273] notice is said to have been given; and the debtor having failed to go out, the petition with which this process commenced was presented to the Sheriff for summary warrant of ejection.

The object of these proceedings is to recover from the subjects and their rents the

instalments due on the heritable bond. And an argument at once arose, of great strength and cogency, that in the ordinary case such recovery could not be made except by means of the well-known diligences of maills and duties, and poinding of the ground; and that parties could not competently contract to dispense with such diligence, and to give the creditor right to make the same levy at his own hand, without any process whatever, and so to assume a position of great advantage over all other creditors, who were left to the ordinary diligence of the law. The answer was, that parties were entitled, as between themselves, to contract as they pleased; and whatever might be urged by third parties, that the debtor could not fly in the face of his own contract. The rejoinder was, that the law did not permit parties to contract as they pleased, where the object was to supersede and set aside forms and proceedings laid down by the law on considerations of public policy and for the general good of the community.

I do not feel called on to decide at present whether the creditor in the bond can, by virtue of the contract, enter into possession of the subjects without the usual forms of diligence—as, for instance, by a process of declarator and removing before the Supreme Court. It is enough for the disposal of the present case to decide, as I concur in doing, that the creditor could not competently enforce his right by a summary process of ejection before the Sheriff-court. On this point I entertain a clear opinion. The object of the process is, by virtue of a conceived heritable right, to turn out of possession the feudal proprietor of the subjects. The Sheriff cannot decern in the removing without deciding a preliminary question of heritable right—that is to say, deciding that a contract to the effect in question, as to a heritable subject, is a valid and effectual contract. Certainly the proposed removing may, in the strictest sense, be called extraordinary. To such a proceeding I think the Sheriff-court incompetent, according to our best settled principles, and most familiar authorities. Whether the right may be enforced by a process of declarator and removing before the Supreme Court it is unnecessary at present to inquire. It is enough that this summary process of ejection is inadmissible.

If, as it is contended, the contract of the parties sanctions this proceeding before the Sheriff-court, I have no hesitation in holding that the contract is one which cannot be legally enforced to that effect. There is great latitude given to parties to contract away their private rights. But they cannot contract away the established rules of Courts of law, nor confer jurisdiction on Courts to which the law says jurisdiction does not belong. This is what the parties have, on the assumption now made, attempted to do. They have not only contracted that the creditor should, without the usual forms of diligence, enter on the land for recovery of his heritable debt; but further, *ex hypothesi*, that if the debtor refuse to give effect to the contract, the Sheriff shall enforce it by a summary warrant of ejection. This, I am of opinion, no contract of parties can render admissible or effectual.

LORD PRESIDENT.—The granter of this bond acknowledges to have received in loan the sum of £550; but the leading obligation which he undertakes is not the ordinary obligation to repay that sum with interest, but it is to pay the sum of £9, 1s. 6d. sterling "each and every month during the period of six years from and after the date of delivery of these presents, and that in full repayment of the said sum of £550 and interest thereon." All the rest of this bond—every clause of it—is intended either to secure the payment of these instalments or to enforce payment; and the clause with which we are more immediately concerned, the clause of removing as it is called, is to come into operation as soon as one of these monthly instalments has fallen into arrear for two months, and a notice has been given by the company that they intend to enter into possession. Now, the first question which arises is, whether, upon the occurrence of these events, the creditor in this bond can lawfully en-[274]-force the clause of removing against the debtor; and that involves the question whether such a clause is effectual to a party possessed only of a temporary and redeemable title, against another party who is feudally vested in the estate in absolute property. That is a question of considerable importance, and it is one upon which I am not going to give an opinion. But it appears to me very clearly not to be a question that can be competently tried in the Sheriff-court. And yet, according to my view of the case, it stands upon the very threshold of the dispute between these parties. Another question which will inevitably require to be considered before possession can be given under this clause of the bond is to what effect that possession can be given and taken; and this general question involves a number of very difficult particulars. Is that portion of the bond which provides that the creditor entering into possession of the subjects shall not be liable for waste rents or insolvent

tenants, or be bound to do exact diligence, binding between the parties? It appears to me that, before any course of possession can be begun under this clause, it is of the utmost importance to settle whether that is one of the conditions of the possession. But, again, to what effect is this possession to be had and continued? Is it to the effect only of taking payment out of the proceeds of the estate as they fall due of as much as will keep down the monthly instalments of £9, 1s. 6d. as they fall due? or, supposing the produce of the estate to be more than sufficient for that purpose, to what is it to be applied? Is it to be applied to reduce the principal sum of £550, which there is no obligation to repay except by the prescribed monthly instalments? or is it to be paid over by the party in possession to the proprietor of the subjects? Again, how long is this possession to last, and how may it be brought to an end? There is a clause which provides that the debtor, on giving two months' notice to the manager of the company, may, at any time during the currency of the six years, redeem the subjects upon certain conditions. Does that mean that he cannot redeem the subjects upon any other condition? Does it mean that he cannot redeem the subjects, and re-enter into possession himself, upon paying up all that is due? Does it or does it not mean that? And again, does it mean that, after the six years have expired, the debtor is then to be entitled to re-enter into possession? or does it mean that he is never to re-enter into possession if he allows the six years to expire? All these are possible constructions of this clause, and it seems to me that it would be against all precedent and practice to allow possession to be taken under a bond of this kind, in virtue of this unprecedented clause, without defining what are the rights of the possessor under a possession so to be taken. Now, that is the proper subject of an action of declarator, and I am not aware of any other form of process by which these rights and powers can be defined; and for that reason again it appears to me that this proceeding is entirely incompetent in the Sheriff-court. No doubt the debtor has bound himself to flit without any warning or legal process whatever; but then, if such a removal necessarily presupposes the decision of the questions that I have now been considering,—if it necessarily presupposes that it is clear law that the irredeemable title shall in this matter yield to the redeemable, and that every one of the most unfavourable suppositions which I have suggested as to the meaning of this clause is clearly the right one against the debtor, then I say that it is impossible for a party to bind himself to this effect; nay, if he had said in so many words—"And when this occurs I shall submit to be summarily ejected by warrant of the Sheriff,"—I should have held that to be an incompetent obligation, not binding upon the debtor. It is exactly the same thing as if the parties had contracted thus:—"And instead of this obligation being enforced by a declaratory removing in the Court of Session, to which otherwise it would be necessary to resort, we consent that that process shall be had in the Sheriff-court." This is an obligation of no effect. It is an attempt to create a jurisdiction against the law, and no parties can do that. No parties can vest the Sheriff with a jurisdiction to entertain a declarator of property. They may indeed make the Sheriff arbiter in a particular event or case. That is a different affair. But they cannot vest him with judicial power to entertain a declaratory process, or pronounce a declaratory judgment affecting questions of real property. For these reasons I come to the conclusion, with [275] your Lordships, that this petition in the Sheriff-court of Linlithgowshire was incompetent; and I purposely abstain from giving any indication of an opinion as to what the result of a declaratory action in this Court, with conclusions for removing, may be if it shall be resorted to.

We shall recall all the interlocutors subsequent to that of the Sheriff-substitute of 9th September 1870, and find the petition incompetent.

The following interlocutor was pronounced:—"Recall all the interlocutors set forth in the appeal subsequent in date to the Sheriff-substitute's interlocutor of 9th December 1870: Of new find the petition incompetent, and dismiss the same, and decern: Find the petitioners (respondents in this Court) liable in expenses," &c.

DAVID MILNE, S.S.C.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

[*Principle applied*, Scottish Property Investment Co. Building Society *v.* Horne, 1881, 8 R. 737.]

No. 54. X. MACPHERSON, 275. 22 Dec. 1871. 1st Div.—B.

JOHN MOINET AND OTHERS (Samuel Aitken's Trustees), of the first part.—*Watson—M'Laren.*

SAMUEL AITKEN WRIGHT AND OTHERS, of the second part.—*Millar—Duncan.*

Succession—Vesting—Conditio si sine liberis—Survivorship—Accretion.—A testator directed his trustees to hold one-half of the residue of his estate for one of his sisters in liferent, and on her death to pay the interest to her children equally until the majority of the youngest, when the capital was to be divided among them, or the survivors of them then alive. *Held* (1) that in virtue of the implied condition *si sine liberis decesserit*, the issue of those children who survived the testator, but predeceased the liferentrix, were entitled *per stirpes* to the shares which would have fallen to their parents had they survived the term of payment; but (2) (*diss.* Lord Kinloch) that such issue were not entitled to participate in the share of one of the beneficiaries who survived their parents, but predeceased the liferentrix, intestate and without issue.

Opinion, by Lord Kinloch, that as the bequest was in favour of the children of the testator's sister and the survivors as a class merely, without any declaration that the share of a predeceaser without issue should accresce to the survivors, the issue of those who predeceased the period of division were entitled *per stirpes* to take equal shares with the surviving beneficiaries.

Samuel Aitken, by his trust-disposition and settlement dated 14th October 1835, conveyed his whole property, heritable and moveable, to trustees, with directions to pay one-third of the annual produce to his father, one-third to his aunt Jane Aitken during her lifetime, for behoof of herself and his sister Priscilla, his aunt Elizabeth, and his grandmother, and one-third "to my sisters Margaret and Elizabeth equally, share and share alike, and their children equally, *per stirpes*, failing them,"—that is to say, the children equally to succeed to their mother's share, failing their mother. Various provisions followed as to the effect to be produced on this division by the deaths of the parties. The ninth article, which contained the ultimate destination of the residue, was in these terms:—"Upon the decease of the last survivor of my father, sister Priscilla, aunts Janet and Elizabeth, and my said grandmother, I appoint the annual produce of the residue of my estate to be equally divided betwixt my sisters Margaret and Elizabeth during their lives, and upon the decease of either of them such deceaser's share thereof shall be equally divided among such deceaser's children, and on the youngest child attaining majority, or twenty-one years of age, I appoint my trustees to divide among such children, or survivors of them then alive, the one-half of the residue of my estate, and they shall retain the other half for behoof of the surviving sister, to whom the annual produce of such half shall be annually paid; [276] and at her decease such produce shall be divided equally among her children until her youngest child attains the age of twenty-one years, when the trustees shall divide the said half equally among the said children, or survivor of them, then alive."

Mr. Aitken died in 1847, unmarried; but the ninth purpose did not come into operation until the death of his aunt Elizabeth in 1858.

At that date the testator's sister Elizabeth (married to Mr. Harroway) was dead, so that the liferent of one-half of the residue provided to her did not take effect; but she left several children, all of whom survived the term of payment, and received their several shares of the succession.

The testator's other sister Margaret (married to Mr. Wright) died in September 1870, and from 1858 up to that time enjoyed the liferent of the half of the residue of the trust-estate provided to her. She had ten children, of whom three predeceased her unmarried, and without issue; two who died during the lifetime of the testator, Mr Aitken; a third, Alice, who survived the testator, but died in July 1870.

Three others of Mrs. Wright's ten children predeceased her, but left issue, viz.:—Eliza (Mrs. Lloyd), who died in 1862; Margaret (Mrs. Vennimore), who died in 1866; and Alexander, who died in April 1870.

The other four children survived their mother.

In these circumstances questions arose after the death of Mrs. Wright in September 1870 (1) Whether the families of those of her children who predeceased her, leaving issue, were entitled to the shares of the residue of Mr. Aitken's estate which would have fallen to their parents had they survived the term of payment? and (2) If so, whether they were entitled to participate in the share of Alice Wright, who survived their parents, but died in July 1870 predeceasing their mother, the liferentrix?

For the determination of these points this special case was presented to the Court by Mr. Aitken's trustees and Mrs. Wright's four surviving children, craving an opinion and judgment in answer to the following queries;—"I. Are the children of the said Alexander Wright, Mrs. Lloyd, and Mrs. Vennimore, entitled, in virtue of the implied condition *si sine liberis decesserit*, or otherwise, to a share of one-half of the residue of the truster's estate liferented by Mrs. Margaret Aitken or Wright? II. If this question be answered in the affirmative, are the children of the said Mr. Wright, Mrs. Lloyd, and Mrs. Vennimore respectively entitled to one-seventh or to one-tenth only, or otherwise to what share of the one-half of said residue?"

Mr. Aitken's trustees argued;—(1) This is not like the case of a number of simple bequests to different individuals *nominatim*. It is a family settlement for the distribution of the whole of the residue of the testator's estate among his nephews and nieces, to whom, having no children of his own, he stood *in loco parentis*. The extension of the implied condition *si sine liberis* to such cases is now quite settled. Each individual of the favoured class is a conditional institute, but if any predecease the period of division their issue are entitled, *per stirpes*, to the share which would have fallen to the parent. (2) As two of Mrs. Wright's ten children predeceased the testator they were necessarily excluded from the succession, and so also was Alice Wright, who, although she survived the testator, died without issue before her mother, the liferentrix, so that the contingent provision to which she or her issue would have been entitled as members of the favoured class, had she or they survived the term of payment, lapsed in favour of her surviving brothers and sisters and the children of the predeceasers. No doubt she survived those who predeceased their mother, leaving children; but the deed contained no clause of accretion which could exclude their issue. The fund therefore was divisible into [277] seven equal shares among Mrs. Wright's four surviving children and the issue, *per stirpes*, of those who died before her.*

Argued for Mrs. Wright's surviving children;—(1) By the terms of the deed the provision in favour of the testator's nephews and nieces was made conditional upon their surviving the liferentrix. Until her death no right vested in any of the children which was capable of being transmitted to their issue. (2) At all events, the issue of those who predeceased Alice Wright were not entitled to participate in her share, which, as it only accresced after the death of their parents, fell to the survivors.†

At advising,—

LORD PRESIDENT.—My Lords, the trust-settlement of the late Mr. Samuel Aitken which we have now to consider is occupied, in the first place, with directions to his trustees to pay debts and legacies, and with a number of provisions appropriating the income of the trust-funds to the use of his father, his grandmother, his aunts, and his sister, and it is not until we reach the ninth purpose of the settlement that we find any disposal of the fee of the residue of the estate, which is not to take place until the decease of the last survivor of the testator's father, sister Priscilla, aunts Janet and Elizabeth, and his grandmother. Even then the ultimate division of the fee is not to be made, for the truster's two sisters, Margaret and Elizabeth, are still to enjoy a liferent of the whole estate each to the extent of one-half, and on the death of either of them her share is to be equally divided among her children, the term of payment being postponed until the majority of the youngest child, when the division is to be made among the children or the survivors of them then alive.

---

* Mackenzie *v.* Holt, 1781, Dict. 6602; Wallace v. Wallace, 1807, Dict. *voce* Clause, Appx. No. 6; Thomson's Trustees *v.* Robb, 1851, 13 D. 1326; M'Gown's Trustees *v.* Robertson, 1869, *ante*, vol. viii. 356; Sturrock *v.* Binny, 1843, 6 D. 117; Douglas's Executors, 1869, *ante*, vol. vii. 504.

† Cockburn's Trustees *v.* Dundas, 1864, *ante*, vol. ii. 1190; Thornhill *v.* Macpherson, 1841, 3 D. 399; Richardson's Trustees *v.* Cope, 1850, 12 D. 855; Newton *v.* Thomson, 1049, 11 D. 452; Laing *v.* Barclay, 1865, *ante*, vol. iii. 1143; Young *v.* Robertson, 1862, 4 M'Q. 337; Graham's Trustees *v.* Grahams, 1868, *ante*, vol. vi. 820.

Now, we are here concerned with only that half of the estate which was liferented by Margaret, and the state of her family is explained in the special case to be as follows:—She had altogether ten children, of whom only four are now alive, and six are dead. Two of the six, Jane and Bertha, predeceased the testator without leaving issue, and a third named Alice, who survived the testator, died on 13th July 1870, also without issue. The three other children who are now dead, Eliza, Margaret, and Alexander, all left issue, and survived the testator, but predeceased their mother, the liferentrix.

In these circumstances the first question to be disposed of is, whether the families of Eliza, Margaret, and Alexander, respectively, are entitled to that share of the residue of Mr. Aitken's estate which would have fallen to their parents had they survived the liferentrix, and the answer to that question depends upon the construction and effect of the ninth clause of the settlement, which is in these terms:—"Upon the decease of the last survivor of my father, sister Priscilla, aunts Janet and Elizabeth, and my said grandmother, I appoint the annual produce of the residue of my estate to be equally divided betwixt my sisters Margaret and Elizabeth during their lives, and upon the decease of either of them such deceaser's share thereof shall be equally divided among such deceaser's children, and on the youngest child attaining majority, or twenty-one years of age, I appoint my trustees to divide among such children or survivors of them then alive the one-half of the residue of my estate, and they shall retain the other half for behoof of the surviving sister, to whom the annual produce of such half shall be annually paid; and at her decease such produce shall be divided equally among her children until her youngest child attains the age of twenty-one years, when the trustees shall divide the said half equally [278] among the said children or the survivor of them." Here, then, we have a general family settlement directing division of the residue of the testator's estate equally among the immediate descendants of his two sisters, with a clause of survivorship, the effect of which, I think, is, that those who survive the testator are conditional institutes in that half of the estate liferented by their mother. In that respect this deed seems to me to present a complete contrast to that which we have just had under our consideration in the case of M'Call,* and to let in the *conditio si sine liberis*, and my only difficulty arises from the words used in regard to the disposal of the income from the death of the survivor of the two sisters among her children until her younger child shall attain majority. There can be no doubt, I think, that the word "children" cannot there be extended to include "grandchildren," but I think the fair construction is to hold that the children of the first deceaser of the sisters, who presumptively were to have the fee at her death, were in the meanwhile to enjoy the income until the majority of the youngest. I think it would be difficult to put any other meaning on the words consistently with the general meaning of the clause, and that the *conditio si sine liberis* is not excluded.

But then there is another question which requires our attention. Two of Margaret's ten children predeceased the testator, so that at his death it was only the eight who survived who had any prospect of succeeding, and of these eight, one named Alice died without issue so recently as 13th July 1870, only a few months before her mother, and she was predeceased by those of the family who died leaving issue. The question therefore arises whether Alice's share goes to those of her brothers and sisters who survived the term of payment, or whether the children of her predeceasing brother and sisters are also entitled to participate in that share? I am of opinion that the principles which regulated the decisions in the cases of Young *v.* Donaldson and Graham *v.* Graham are here applicable, and that, although the issue of a child predeceasing the term of payment are entitled to the share which would have fallen to the parent in his own right, they are not entitled to that portion of a lapsed share which the parent would have taken had he survived the period of division. Now, here it must be observed that none of Margaret's children can take in his or her own right, unless he or she survives the term of payment, and of course the share of a child who predeceases the term of payment without issue must in terms of the deed go to the survivors; it is a condition of the survivor taking the lapsed share that he should outlive the person to whom that share would have fallen. I am of opinion, therefore, that while the children of Mrs. Lloyd, Mrs. Vennimore, and Alexander

* M'Call *v.* Dennistoun, advised of the same date, reported *postea*, p. 281.

Wright are respectively entitled, each family, to that share of the residue liferented by the testator's sister Margaret, which would have fallen to their parents had they survived, they are not entitled to participate in the share of Alice, but that Alice's share falls to be equally divided among the four brothers and sisters who survived her.

LORD DEAS and LORD ARDMILLAN concurred.

LORD KINLOCH.—This case must be decided on the same general principles as are applicable to that of M'Call just determined. I am of opinion that in this case an opposite result is to be arrived at, and the *conditio si sine liberis* given effect to.

Mr. Samuel Aitken, the testator, died unmarried. His settlement is made in favour of his nearest relatives, and is a very marked expression of a conscious obligation to make a suitable provision for these. The primary direction of the settlement, after payment of debts and certain small legacies, is to divide the annual produce of the testator's entire estate into three equal portions. One of these is to be paid to his aunt Janet Aitken during her lifetime, to be applied for the maintenance of herself, the testator's sister Priscilla, his aunt Elizabeth Aitken, and his grandmother, all of whom seem to have resided together. Another was to be paid to the testator's father during his life. The remaining third was to be paid "to my sisters Margaret and Elizabeth equally, share and share alike, and their children equally, *per stirpes*, failing them,—that is to say, the children equally [279] to succeed to their mother's share, failing the mother." Various provisions follow as to the effect to be produced on this division of the annual proceeds by the death of these various parties. And the ninth provision bears—"Upon the decease of the last survivor of my father, sister Priscilla, aunts Janet and Elizabeth, and my said grandmother, I appoint the annual produce of the residue of my estate to be equally divided betwixt my sisters Margaret and Elizabeth during their lives; and upon the decease of either of them such deceaser's share shall be equally divided among such deceaser's children; and on the youngest child attaining majority, or twenty-one years of age, I appoint my trustees to divide among such children, or survivors of them then alive, the one-half of the residue of my estate; and they shall retain the other half for behoof of the surviving sister, to whom the annual produce of such half shall be annually paid; and at her decease such produce shall be divided equally amongst her children, until her youngest child attains the age of twenty-one years, when the trustees shall divide the said half equally among the said children, or survivors of them then alive." An after codicil confers some personal legacies which do not affect the present question.

A controversy now arises as to the shares of three children of Margaret Aitken or Wright, who predeceased their mother, the liferentrix of one-half of the residue, leaving issue. The liferentrix now being dead, the question is, whether the shares of these three children have passed to their issue, or have devolved on their surviving brother and sisters.

I am of opinion that the former of these is the true legal conclusion in the case. The fund was settled evidently by way of provision on the mother in liferent, and her children, or the survivors, in fee. I consider this to be precisely the case in which the law holds it to be the implied will of the testator that children should succeed to their parent's share in preference to surviving brothers and sisters. The children of the testator's sister were favoured as a class, and with no individual preference of one over another. Their maintenance was very clearly the chief object in view—first, through means of their mother's liferent, and afterwards through division of the produce amongst the children till the youngest attained twenty-one. I have no doubt that, under the provisions of the settlement, all the children surviving the mother shared in the annual division, even though some of them should die unmarried before the youngest attained twenty-one, simply because so the will of the testator prescribes. If any of them die before their mother, I have equally little doubt that the implied will of the testator must be held to carry their share to their children in preference to the surviving brothers and sisters. I consider this to be a very clear and ordinary exhibition of the application of the *conditio si sine liberis*. Its application arises out of the simple fact that the testator was here providing for certain near relations as a class, and providing for them out of the feeling of a moral obligation so to do; in which case all the presumptions of affection are in favour of the children of any one of them taking in room of the parents, and not being excluded for the benefit of their surviving uncles and aunts.

I am therefore of opinion that the first question put to us must be answered in the affirmative. But a subordinate question has been raised before us, viz.—Supposing the children to come in place of their parent, whether they are entitled to any more than the parent's proper share as one of ten children, and are not excluded from all participation in the shares belonging (as assumed) to three children who predeceased their mother without issue. Of these three children, two, Jane and Bertha, predeceased the testator; the third, Alice, lived till 1870. It is argued that the shares of these predeceasers, or at all events the share of Alice, passed by accretion to the brothers and sisters surviving the widow, exclusive of the children taking under the *conditio si sine liberis*. And reference has been made to some recent authorities, as deciding that children so taking only take the parent's proper share, and not that which accresced by survivorship to the parties alive at the date of the vesting.

I am of opinion—though in this having the misfortune to differ from your Lordships—that there is no good ground on which to limit the right of the children as is proposed; and that the present case does not afford *termini habiles* for applying the doctrine of the authorities referred to. In these other cases the [280] right was given to certain individuals *nominatim*, and the share of a predeceaser without issue accresced by virtue of an express provision in favour of survivors. Thus, in the leading case of Young *v.* Robertson, the provision was that the estate of the testator was to be paid or accounted for "after the death of the last liver of me and my said wife, equally to and among John Macdougall, lieutenant in the Honourable East India Company's service at Madras; William Macdougall, indigo planter at or near Calcutta, sons of my late niece, Mrs. Catherine Donaldson or Macdougall; Young or Thomson, wife of Dr. Thomson, physician in Perth; Young or Richardson, wife of Dr. Richardson, physician or surgeon in the Honourable East India Company's service in Bengal; and Eliza Young, lately residing in Perth, now wife of Allan Cuthbertson, accountant in Glasgow, all children of the late Mrs. Elizabeth Donaldson or Young, equally, or share and share alike, and to their respective heirs or assignees; declaring that if any of the residuary legatees shall die without leaving lawful issue before his or her share vest in the parties so deceasing, the same shall belong to and be divided equally, or share and share alike, among the survivors of my said grandnephews and grandnieces equally." Another grandnephew, Thomas Young, was afterwards added to the number of those thus specifically called. Thomas Young died before the widow, leaving a son, John Lawford Young; and whilst it was held that by force of the *conditio si sine liberis* the son became entitled to his father's own proper share, it was decided that the share of another grandnephew, William Macdougall, who had predeceased without issue, went by force of express destination to the survivors at the date of the widow's death. It was so determined in conformity with a series of previous decisions, of which some Judges doubted, but which was held to fix the point beyond the reach of argument.

The more recent case of Graham's Trustees differed as to the terms of the deed, which were very peculiar, but involved the same specialty of a destination to parties called *nominatim*, with an express conditional institution in favour of the survivors.

In the present case there is nothing of this kind. The provision is not in favour of individuals called *nominatim*, with an accretion expressly declared in favour of survivors at a particular date. It is in favour of a class, and of the survivors of that class alive at a period mentioned. The survivors take in their own right, not by virtue of any declared accretion of a predeceaser's share. The predeceasers without issue were simply in the position of never having right at all under the terms of the instrument. Thus Alice Wright, who predeceased her mother, had no right given her by the deed, and no right accresced from her to any one. Whether she survived any of her brothers or sisters or not seems to me utterly immaterial, for the survivorship of the deed was not of one of the brothers or sisters over the others during the life of the mother, it was survivance of the mother herself. The death of Alice gave no right to her surviving brother and sisters. They only acquired right by surviving the mother, and their right was then a direct one in their own persons by virtue of such survivance. All this, I think, arises directly out of the terms of the deed; and it is by these, I think, the case must be ruled, as I think it is on the difference of phraseology in these material respects that the decisions in the other cases must be held rested. The difference of phraseology is, in such a case, the all-in-all. The present case, as I view it, does not comprise any question as to the share of a predeceaser without issue, for

no such share ever existed. The entire question lies between the survivors taking in their own right, and the children of predeceasers claiming to take in room of the parent. Whenever the children are found entitled to take, there is, to my mind, no doubt as to what it is they shall take. It is just the equal share which the parent, if surviving, would have taken with the actual survivors. There is no question as to an accrescing share, for no accrescing share has existed.

In this view, I think the second question should be answered to the effect of declaring that the fund must be divided into seven shares, equally appropriated to the four surviving children, and the issue *per stirpes* of the three who predeceased leaving children.

[281] THE COURT pronounced this interlocutor:—"Find and declare that each of the families of Alexander Wright, Mrs. Eliza Lloyd, and Mrs. Margaret Vennimore, are entitled *per stirpes* to one-eighth share of that one-half of the residue of the truster's estate liferented by Mrs. Margaret Aitken or Wright: Find and declare that the parties hereto of the second part are entitled, equally among them, to the one-eighth share of the said one-half of the residue which would have belonged to their sister, Alice Gertrude, had she survived the period of payment, and decern."

JOHN AULD, W.S.—JOHN T. MOWBRAY, W.S.—Agents.

[*Referred to*, Bowman *v.* Richter, 1900, 2 F. 624.]

No. 55. X. MACPHERSON, 281. 22 Dec. 1871. 1st Div.—B.

HENRY M'CALL AND OTHERS (John M'Call's Residuary Legatees), of the first part.—*Shand.*—*Balfour.*

JAMES WALLIS DENNISTOUN AND OTHERS, of the second part.—*Sol.-Gen. Clark*—*Marshall.*

Succession—Legacy—Pietas paterna—Conditio si sine liberis.—A testator bequeathed £1000 "to each of the children" of a deceased sister who should "be alive" at the death of his wife, or of himself if the longest liver. He was survived by his wife and by all the legatees, but some of them predeceased the widow, leaving issue. *Held* that the bequest being conditional upon the legatees surviving the widow, there was no room for the application of the *conditio si sine liberis* in favour of the issue of those who predeceased her.

John M'Call, merchant in Glasgow, by his trust-disposition and settlement dated 27th October 1823, directed his trustees, after payment of debts, &c., to pay to his widow the annual income of his whole estate, and after the decease of his widow, "or upon my own decease, in case of my surviving her, my said trustees shall dispose of and divide my estate and effects as follows:—They shall pay to each of the children of my late brother, Samuel M'Call, who shall be alive at the period of my said wife's decease, or of my decease, in case of my surviving her, the sum of £1000 sterling, which sums (and also the sums provided to the children of my sisters, Helen Wallis and Mary M'Kerrell), in the case of such of them as shall be minors or unmarried at the above period, shall be paid on their respectively attaining majority, or (if daughters) on majority or marriage, which ever shall first happen; to each of the children of my late sister, Helen Wallis, by Henry Wallis, Esq., of Maryborough Lodge, in the county of Cork, who shall be alive at the respective periods foresaid, the sum of £1000 sterling, to be paid as above-mentioned; to each of the children of my sister, Mary M'Kerrell, by Fulton M'Kerrell, Esq., of Paisley, who shall be alive at the respective periods above mentioned, the sum of £1000 sterling, to be paid as aforesaid; to my sister, Sarah M'Call, the sum of £1000 sterling, and to my sister, Margaret M'Call, the sum of £1000 sterling, which sums shall be paid to my said sisters at the first term of Whitsunday or Martinmas occurring after the decease of the said Isabella Smith, or my decease, if I shall survive her, or as soon thereafter as conveniently may be, with the legal interest thereof from said term of payment, and the sums payable, as aforesaid, to

the children of my deceased brothers and sisters shall also bear interest from the death of my said wife, or my death, as aforesaid; and further, my said trustees shall pay the sum of £500 sterling to Sarah Crawford, wife of James Crawford, lately of Port-Glasgow, with interest as aforesaid: And lastly, my said trustees shall account for and pay the residue and remainder of my said estate, after making good the provisions herein contained, to the said Thomas M'Call and James M'Call, my brothers, equally between them, [282] and to the heirs of the body of them, or of either of them, in place of the deceaser or deceasers, *per stirpes*, and in case of the decease of either of them without heirs of his body, or failing such heirs, then to the survivor of them and the heirs of the survivor."

To this settlement the testator subsequently appended the following codicils:—"Ibroxhill, 29th January 1829.—I hereby bind and oblige my trustees and executors under this settlement, after the decease of my wife, Isabella Smith, or upon my own decease in case of my surviving her, to pay to my niece, Eliza M'Call, wife of Archibald Smith, £1000; to my niece, Sarah M'Call, daughter of my brother Thomas, £1000, and to my nephews, James and John Wallis, £3000 each, in addition to what I have already left them." "Ibroxhill, 1st December 1830.—In consequence of the death of my brother, Thomas M'Call, I hereby require my trustees and executors under this settlement, after paying the several bequests already stated, or which may still be added, to pay over the whole residue and remainder of my estate to my brother, James M'Call, and to the heirs of his body; and to withdraw my late brother Thomas and his heirs from any share of the residue of my estate: And in place thereof I hereby direct my trustees, after the decease of my wife, Isabella Smith, or upon my own decease in case of my surviving her, to pay to each of the children of my late brother Thomas who shall be then alive the sum of £1000, with the exception of Sarah and Eliza, who are mentioned in the codicil above: My nephew, John Wallis, being dead, I desire that my bequest to him in the above codicil should be divided thus, £2000 of it to his brother, James Wallis, and £1000 of it to his sister, Margaret Wallis." "Ibroxhill, 24th October 1831.—I hereby revoke the legacies left by the foregoing will to my sisters, Sarah and Margaret M'Call, of £1000 each, and to Mrs. Sarah Crawford of £500, and in lieu thereof, I desire my trustees and executors to pay to my sisters Sarah M'Call and Margaret M'Call an annuity of £100 each, and to Mrs. Sarah Crawford an annuity of £50, and these annuities to be payable from the first term after my decease, and to continue all the years of their respective lives: I leave and bequeath to the Glasgow Royal Infirmary £100, to the Glasgow Old Man's Friend Society £100, and to the poor of the parish of Govan £100: This last bequest to be at the disposal of the clergyman, and to be given to aged persons who are not able to work, and in such way as the clergyman may think best. I hereby nominate and appoint my nephew, Thomas M'Call, of Craighead, an executor to this my last deed and settlement: And I leave and bequeath to him, in addition to what I have already left him, £3000, and to his brother, John M'Call, £1000, payable at the decease of my wife, or at my decease if I survive her: The above legacies to charitable purposes to be paid at first term after my decease, and free of any legacy duty."

Mr. M'Call, who had no children, died in 1833, survived by his wife, who enjoyed the liferent of the trust-estate until her death in 1871.

Mrs. Wallis, the testator's sister, left three children, who all survived Mr. M'Call, but one of them, Margaret, wife of George Dennistoun, predeceased Mrs. M'Call, the liferentrix, leaving one child, James Wallis Dennistoun, who, on Mrs. M'Call's death, claimed the legacy of £1000, which, in terms of the trust-deed, would have been payable to his mother as one of the children of Mrs. Wallis, had she been alive at the death of the truster's widow.

A similar claim was made by George Dunlop and Colin Dunlop, grandchildren of Thomas M'Call, the testator's brother, whose death is referred to in the codicil of 1st December 1830, their mother, Mrs. Dunlop, having predeceased the liferentrix.

[283] These claims being disputed by Mr. M'Call's residuary legatees, a special case was presented to the Court craving an opinion and judgment upon the following question:—"Is James Wallis Dennistoun, the only child of Mrs. Margaret Wallis or Dennistoun, and the party hereto of the second part, entitled to payment of the legacy of £1000, which, under the trust-disposition and settlement of the said John M'Call, would have been payable at the death of the truster's widow to the said Mrs. Margaret Wallis or Dennistoun, as one of the children of the truster's sister, the deceased Helen

Wallis, if the said Mrs. Dennistoun had been then alive? Or, has the said legacy lapsed in consequence of Mrs. Dennistoun having predeceased the truster's widow?"

A question in precisely the same terms *mutatis mutandis* was stated in regard to the claim by the Messieurs Dunlop.

Argued for the residuary legatees;—This is not the case of a fund divisible among a particular class of legatees, but it is a special bequest of £1000 to each nephew or niece of the testator conditionally upon the legatee surviving a specified period. Unless they did so the legacy did not vest, and as there is no destination beyond the legatee, there is no room for holding that, according to the presumed will of the testator, the bequest should devolve upon the issue of those who predeceased the term of payment.*

Argued for Mr. Dennistoun and the Messieurs Dunlop;—It is now quite settled that the *conditio si sine liberis* may receive effect, even in the case of collaterals, where the testator having no children of his own, makes a provision in favour of brothers and sisters, or their issue.† In the absence of anything to indicate an opposite intention on the part of the testator it must be presumed that the same affection which induced him to nominate the parent would lead him to put the children in room of the parent. The word "children" admits of being so construed as to include "grandchildren." ‡

At advising,—

LORD PRESIDENT.—My Lords, the special case before us raises a question as to the construction of the settlement of the late Mr. John M'Call, who died in 1833. His whole estate was liferented by his widow, who survived until the 8th February 1871, and until her death there were no legacies payable, nor could any division of the estate take place. The fourth purpose of the settlement provides that after the death of the widow the trustees "shall pay to each of the children of my late brother, Samuel M'Call, who shall be alive at the period of my said wife's decease, or of my decease in case of my surviving her, the sum of £1000 sterling," payable on their attaining majority, or, if daughters, on their majority or marriage. Then there is a similar provision of £1000 to each of the children of his sisters, Mrs. Wallis and Mrs. M'Kerrell, who might be in life at the death of his wife, or of himself if he be the survivor. The other provisions of the deed, along with those of a codicil dated 28th January 1829, it is not necessary to notice; but by a subsequent codicil of 1st December 1830 the testator appointed James M'Call to be his sole residuary legatee, and directed his trus-[284]-tees to pay to each of the children of his deceased brother Thomas a bequest of £1000, in terms which are nearly identical with, and are in effect the same as those of the provisions in favour of the children of his other brother and his sisters, to which I have already alluded. We are immediately concerned with two of these provisions, those, namely, in favour of the children of Mrs. Wallis and of Thomas M'Call; and as the questions raised as to these are exactly the same, I shall deal with one only. Mrs. Wallis, the testator's sister, who was not in life at the date of the settlement, left eight children, of whom three are still in life; four predeceased the testator; and one, Mrs. Dennistoun, survived him, but predeceased his widow, the liferentrix, leaving an only son, James Wallis Dennistoun.

In these circumstances the question has arisen whether Mr. Dennistoun, as in right of his mother, is entitled to the legacy of £1000, which under Mr. M'Call's settlement would have been payable to her had she survived the liferentrix. The opposing parties are Mr. M'Call's residuary legatees.

Now, the terms of the bequest are rather peculiar. The direction to the trustees is—pay £1000 to each of the children of Mrs. Wallis who shall be alive at the death of the testator's widow, or at his own death in the event of his being the survivor. This is not the case of a fund divisible among the children of a person named as a

---

* Thomson's Trustees *v.* Robb, July 1851, 13 D. 1326; Douglas's Executors, Feb. 5, 1869, *ante*, vol. vii. 504; Hamilton *v.* Hamilton, Feb. 1838, 16 S. 478; Grant's Trustees *v.* Grant, July 1862, 24 D. 1211, per Lord Kinloch.

† Wallace *v.* Wallace, 1807, Dict. *voce* Clause, App. No. 6; Christie *v.* Paterson, 1822, 1 S. 543 (N. E. 478); Mackenzie *v.* Holt, 1781, Dict. 6602.

‡ Binning *v.* Binning, 1767, Dict. 13,047; Magistrates of Montrose *v.* Robertson, 1738, Dict. 6398; Rhind's Trustees *v.* Leith, Dec. 5, 1866, *ante*, vol. v. 104; Halliday *v.* M'Callum, Nov. 9, 1869, *ante*, vol. viii. 112; M'Gown's Trustees *v.* Robertson, Dec. 17, 1869, *ante*, vol. viii. 356; Wood *v.* Wood, January 1861, 23 D. 338; Williams on Executors, vol. ii. 1014.

class, but it is a provision or bequest in favour of each individual of certain children generally described, and of course if any one of these separate bequests fails, the benefit thence arising enures to the residuary legatees, or if not disposed of by the settlement, to the next of kin of the testator.

The question then comes to be whether there is room for the application of the *conditio si sine liberis*, and I am of opinion that there is not. The bequest is, I think, very clearly made conditional on each child surviving a certain term. Under the settlement each child is to receive £1000, not each child of Mrs. Wallis, nor each of her children surviving the testator, but each child surviving the term of payment, viz., the date of the death of the testator's widow or of himself, whichever of them might happen to be the longest liver. In the event which happened Mrs. M'Call survived her husband, and the term of payment was therefore postponed till her death. But then she was predeceased by Mrs. Dennistoun, so that the case is not so much that of a legacy which has lapsed as that of a failure of the conditon on which the bequest was given. In that state of matters it is impossible to hold that the *conditio si sine liberis* can have any application, and therefore I am of opinion that neither the claim of Mr. Dennistoun nor that of Messrs. George and Colin Dunlop can be sustained, and that both the questions appended to the special case should be answered in the negative.

LORD DEAS.—After the explanations given by your Lordship of the circumstances and position of this case I have not a great deal to add.

It is always right, in questions of this kind, to distinguish between the case of a party dealing with his own children and a party dealing with the issue of his brothers or sisters. In the case of a parent there is always an implied institution of the issue of his children in the place of these children. In order to such institution it is not necessary to have anything more than the relationship. We have many instances of that in the books, amongst others, Dixon, 10th June 1836, 14 S. 938, and Grant's Trustees, 2d July 1862, 24 D. 1211. Both of these cases proceeded upon that principle; they were both cases of parents. When we come to cases of uncles or aunts dealing with their nephews and nieces, we find that there has been applied to these cases, to a certain extent, the same rule. This is mainly on the presumption of implied will. This presumption attaches to the case of such parties acting *in loco parentis* to their collateral descendants, but by no means so strongly as in the case of parents providing for their direct issue. In the case of nephews and nieces something more is required to raise the presumption than in the case of parents and children, and consequently in the case of collaterals there have been introduced rules, somewhat technical in their nature, as to the effect of clauses of survivorship, &c. In the case of parents the *pietas paterna* is sufficient to indicate the implied will; and in the [285] cases of Dixon and Grant's Trustees, already mentioned, it was that principle rather than the *conditio si sine liberis*, properly so called, which was given effect to. The condition *si sine liberis* comes more properly into operation in the case of nephews and nieces than in the case of direct descendants.

It was upon the principle of implied will, resulting from the *pietas paterna*, that the majority of the Court held, in the case of Grant's Trustees, that what was destined to Robert Grant went to his children. It humbly appeared to me at the time, and does so still, that in dissenting from that judgment Lord Curriehill overlooked, to some extent, the distinction between the case of a parent and the case of collateral relations, on which that judgment rested. The presumption even in the case of a parent may be overcome, but it requires a great deal more to overcome it in that case than in the case of a collateral relation.

The case we have now to deal with is one of nephews and nieces. I look mainly to the terms of the deed in order to see what was the testator's intention, and I find in the deed enough to shew that he did not intend that the provisions should descend to the children of predeceasing legatees.

The deed is very special. There is as much in it about brothers and sisters as about nephews and nieces. It is not a deed whereby the testator divides his whole estate among his nephews and nieces. His brothers and sisters also come in. In the original deed great distinctions were made among the sums bequeathed to the several beneficiaries, and these distinctions are increased by the subsequent codicils. The provisions are throughout of a mixed and unequal nature, and the terms of the deed and codicils, taken altogether, appear to me to be such as to overcome any presumption

which might otherwise have arisen from the relationship of the parties. We are not called upon here to affirm general rules as to the effect of bequests to classes and of clauses of survivorship, &c. There is sufficient here to shew that the testator did not intend children to come in place of their parents, and that the *conditio si sine liberis* does not apply.

LORD ARDMILLAN.—I am much disposed to deal with this case as depending rather on the construction of the deed of Mr. John M'Call, now before us, than on the ascertainment of the origin or of the principles of the well-known presumption or implication termed the *conditio si sine liberis decesserit*. Accordingly, though I have very carefully considered the subject, and consulted all the authorities which have been quoted, or which I have been able to discover, I shall not attempt any general exposition of the historical origin or the abstract principle of this condition. I shall only explain, in a sentence, the view which I entertain, so far as it relates to this question. I think that the doctrine has two aspects, in the one of which it is presented in a case where the settlement is by a father or grandfather, and in the other of which it is presented where the settlement is not by a father or grandfather, but by a collateral—for instance, by an uncle, as in the present case. In the first of these cases the presumption on which the condition rests appears to me to spring from the recognition of the *pietas paterna*. There are several cases in our books in which the issue of predeceasing children have been found entitled to the share which their parent could have claimed, but in which the presumed intention from the paternal relation was the true ground of decision, and in which no special reference is made to the rule in the Roman law, known as the *conditio si sine liberis*. I may mention the case of Binning *v.* Binning, 21st January 1767, M. 13,047; and the cases of Wood *v.* Aitchison, 26th June 1789, M. 13,043; Dixon *v.* Dixon, 10th June 1836, 14 S. and D. 938. In these and other cases the presumption or implication in favour of the issue of a predeceasing child received effect mainly on the ground of presumed will arising from relationship. Even in the case of a settlement by a father the presumption may be overcome by the words of the deed, but if not so overcome it receives effect as the implied will of one presumed to act *ex pietate paterna*.

In the second class of cases, where the deed is not by a father, and where the *pietas paterna* is not applicable, the *conditio si sine liberis* has indeed repeatedly [286] received effect. The extension of the rule is now settled, and it is too late to question it. But in these cases, since the presumption does not derive aid from the *pietas paterna*, its support must be found within the words of the deed. It is, in such a case, a presumption of implied will, arising partly, it may be, from the real evidence of affectionate relations, but mainly from the construction of the words of the deed; and when I add, that the true meaning of the doctrine of implied will in these cases is, that the issue are preferred to the substitutes on the ground of an implied condition in the substitution, *si sine liberis institutus decesserit*, I use the words of Lord Kilkerran and of Lord Corehouse, on whose authority, remaining, as I think, unshaken to this day, I may safely leave this point.

In the present case the deed of settlement is not by a father. Mr. John M'Call, the testator, died without children on 18th October 1833. By his trust-deed he directs his trustees to pay the whole annual proceeds of his estate to his wife for her life, and after her death he directs his trustees to pay "to each of the children of my late brother, Samuel M'Call, who shall be alive at the period of my wife's decease, or my decease in case of my surviving her, the sum of £1000." Under this particular bequest there is no claim at present, but I have read it to explain the deed more completely. We next come to a bequest under which a claim is made. The testator directs his trustees to pay "to each of the children of my late sister, Helen Wallis, by Henry Wallis, Esq., who shall be alive at the respective periods foresaid, the sum of £1000 sterling." Then, by codicil of 1st December 1830 the testator directs his trustees, in exactly similar terms, to pay to each of the children of his late brother, Thomas M'Call, who shall be alive at the death of Mrs. M'Call, £1000, with the exception of two of Thomas's children, to whom separate bequests had been previously made.

In regard to these sums payment is directed to be made in the case of such of the children as shall be minors or unmarried at Mrs. M'Call's death, or his own death if he survive her, on their respectively attaining majority or marriage.

In construing this deed, I have to observe that there is no vesting till the death

of Mrs. M'Call, who died in February 1871, having long survived her husband, and having enjoyed the liferent of the whole estate. In the next place, there is no sum for division into shares,—no sum given to a class of children or grandchildren of the brother and sister of the testator. Each separate child of Helen Wallis is separately bequeathed £1000, if he or she be alive at the date of Mrs. M'Call's death. Each child of Thomas M'Call gets the same sum on the same clearly expressed condition of survivance of Mrs. M'Call. No child of Thomas M'Call, or of Helen Wallis, could get more than £1000 under this deed, and no child of either could have any right to the provision unless alive to receive payment on the death of Mrs. M'Call. The predecease of one or more children of the brother or of the sister of the testator did not augment the sum to be paid to each of the survivors. There was no accretion of the shares of predeceasers, or, more correctly speaking, the legacies of predeceasers, for there were no shares, since every legacy was separate, and predecease did not operate so as to increase the fund for distribution among survivors. There is no clause of survivorship within a class—there is no substitution or destination over—there is really no provision to a class at all. The bequest is separate and particular, to each child, and the bequest to each child is not a share of a fund, but is a definite sum, and the condition of survivorship is personal, attaching personally to each child, so that no child in either family of Thomas M'Call or of Helen Wallis can have right to the sum bequeathed, unless alive at the date of Mrs. M'Call's death.

If I am correct in this construction of the deed the position of the parties claiming in this special case is this:—

Helen Wallis, sister of John M'Call, died before the date of the trust-deed, and is referred to as "my late sister." Her daughter, Margaret Wallis, wife of George Dennistoun, survived the testator, but predeceased his widow. To her, therefore, no bequest of £1000 under this deed did come, or could come. She was not alive at the date of payment or at the date of vesting. Therefore I [287] think that her child cannot claim the bequest which his mother could never have taken, since she did not fulfil the condition of survivance.

In like manner Thomas M'Call having died before the date of the codicil of 1st December 1830, his daughter, Mrs. Helen Wallis M'Call or Dunlop, survived the truster, but predeceased his widow. She did not and could not receive a bequest of £1000, for she was not alive at the date of payment or of vesting. Her children, George and Colin Dunlop, cannot, in my opinion, now claim the bequest which she herself could not have received, since she did not fulfil the condition of survivance.

Bearing in mind that this is not the deed of a father—that there is therefore no presumption, *ex pietate paterna*, that there is no provision to a class, and no clause of survivorship within a class, and no destination over, but that personal and individual survivance of the day of payment and of vesting is a condition of the bequest to each child—I have come to be of opinion, as matter of construction, that from the whole terms and tenor of this deed the *conditio si sine liberis* is not implied.

I therefore think that the questions put in this special case should be answered in the negative.

LORD KINLOCH.—The question now before us regards the application of the *conditio si sine liberis* to the circumstances set forth in the special case. The point to be determined is, whether, in regard to a bequest of £1000 to each of the children of a sister and brother, the bequest is to be understood as passing to the children of these children, in place of lapsing in the residuary disposition.

That the principle known by the name of the *conditio si sine liberis* has received a very extensive application in our law is beyond a doubt. And, kept within proper limits, the principle is a wise and beneficial one. It simply involves the enforcement of an implied will in the testator that the children of the person primarily favoured shall come into his room, in preference to those to whom otherwise the fund would pass. The result is to deny effect to the bare literality of the deed, and to call by implication those who are not called in direct terms. This consideration fairly enforces great caution in the use of the principle. But, soundly used, the result of its application is simply to accomplish the grand aim of effectuating the intention, expressed or fairly presumable, of the person giving the bequest.

The simplest exhibition of the principle is in the case where a childless father has executed a settlement in favour of a third party, and has had a child born to him, but has died before executing a new settlement. The implied will of the father has been

held so clear and strong as to warrant the Court in setting aside the settlement in favour of the succession of the child. In this case the child interested is the child of the granter of the deed. But the principle has been equally applied in favour of the children of the grantee in a bequest where the relation of the parties was such as to imply a similar preference to those over the parties who would otherwise take. For a time the doctrine was confined to the case of descendants—of children and grandchildren only. But by an extension, the soundness of which has been sometimes doubted, but which now must be held to be firmly settled in our law, it has been made also to comprehend the case of collaterals, of brothers and sisters, nephews and nieces. In these cases, as well as the others, the principle has a potential application. In other words, there may occur an enforcement, in the case of collaterals as well as of descendants, of an implied will in the testator to prefer the children of the person primarily favoured to those who would otherwise receive the benefit.

But in all cases whatever, even in that in which children are most favoured, there is at best nothing higher than a presumption, the strength of which will vary with circumstances, and may be wholly overcome by other considerations arising out of the terms of the deed, or the relation of the parties. Of this the case of collaterals affords peculiarly an illustration. The essential character of children is, speaking generally, always the same. But the position of a collateral may vary from that of the closest intimate to that of the merest stranger. A man's niece may have lived with him from infancy, and managed [288] his household, and been to him as a daughter, or she may have resided all throughout in a different quarter of the globe. Hence it is especially necessary in the case of collaterals to consider very carefully the circumstances of the case, and the terms of the settlement, in order rightly to determine whether it shall be held the implied will of the testator that the bequest should go to children, though not named, or shall be held a simple legacy, personal to the party favoured.

In the present case I am of opinion that there are no sufficient grounds for introducing the *conditio si sine liberis*, and that the bequests brought in question must be considered simple legacies, falling by the predecease by the legatees of the term of vesting.

The settlement was made by a gentleman of the name of M'Call, who left a widow but no children. He bequeathed to his widow the liferent of his whole estate. On her death he appointed sums of £1000 each to be paid "to each of the children of my late brother, Samuel M'Call, who shall be alive at the period of my said wife's decease." He appointed similar legacies of £1000 each to be paid to each of the children of his sisters, Mrs. Helen Wallis and Mrs. Mary M'Kerrell, alive at the same date. He also gave to his sisters, Sarah and Margaret M'Call, similar legacies of £1000 each. The residue of his estate he provided to "Thomas M'Call and James M'Call, my brothers, equally between them, and to the heirs of the body of them, or of either of them, in place of the deceaser or deceasers *per stirpes*; and in case of the decease of either of them without heirs of his body, or failing such heirs, then to the survivor of them, and the heirs of the survivor."

By a codicil annexed to the settlement he appointed a further sum of £1000 to be paid to each of his nieces, Eliza and Sarah M'Call, and to two nephews, James and John Wallis, £3000 each, "in addition to what I have already left them."

By an after codicil, executed after the death of his brother, Thomas M'Call, he recalled the bequest of half the residue given to that gentleman and his family, and conferred the whole residue on his brother, Samuel M'Call, "and the heirs of his body." But he directed a sum of £1000 to be paid to each of Thomas's children alive at his wife's death, except Sarah and Eliza, who had already received that further sum in the first codicil. He also declared this—"My nephew, John Wallis, being dead, I desire that my bequest to him in the above codicil should be divided thus, £2000 of it to his brother, James Wallis, and £1000 of it to his sister, Margaret Wallis."

By a third codicil he substituted for the legacies to his sisters, Sarah and Margaret, annuities of £100 each. And he gave to his nephews, Thomas and John M'Call, additional legacies of £3000 and £1000 respectively.

Having regard to these provisions, I cannot come to the conclusion that the sums of £1000 each, provided to each of the children of his brothers and sisters, are to be held as going to the children of these children, in the event of the children themselves predeceasing the widow, the liferentrix. The testator does not say that they shall so go, although the words used by him in disposing of the residue show that he had

distinctly in view the case of his legatees having issue, for he provides for the devolution of the residue on the children of the residuary disponee, failing the father. If he had intended a similar devolution in the case of the £1000 bequests, the probability is that he would have similarly expressed it. Not only so, but he expressly declares that these bequests shall only be payable to the parties favoured in the event of their being alive at the widow's death. This is as nearly as possible an express declaration that, if the parties died before the widow, these bequests should lapse. He had evidently clear before him the possibility of their predeceasing the widow; yet he not only does not call their children in that event, but uses words distinctly implying that, unless on their survivance, payment of the bequest shall not be made at all. Doubtless he gives the bequest to his nephews and nieces as such, and therefore it may be fairly held on the ground of relationship; but there is nothing to show that he stood, or considered himself to stand, in any peculiarly parental relation to the tolerably large plurality of objects, to each of whom he [289] bequeaths this £1000 indiscriminately. His deed and codicils, taken together, show conclusively that the arrangements of his settlement partook in no sound sense of the nature of family provisions, but were dictated entirely by personal, if not capricious, selection and preference. The devolution in the second codicil of the bequest to his nephew John Wallis, on John's brother and sister in unequal proportions, indicates how careful he was in providing by express directions for every such devolution. To sustain the *conditio si sine liberis* in the two particular cases now in question would, with any regard to consistency, involve a devolution on children in the case of all the legacies together given to relations in the settlement, for no real difference lies amongst them; and this could scarcely be held. Finally, the residuary disponee was a brother of the testator, whom *in dubio* he will be presumed to favour, rather than a remoter kinsman. On the whole matter, I have come very clearly to the conclusion that these sums of £1000 each must be considered as simple legacies, personal to the parties favoured, and lapsing into the residuary disposition when the parties did not fulfil the condition of surviving the widow.

I am of opinion that the questions put to us should be answered accordingly.

The following interlocutor was pronounced:—"Find and declare that the claimant, James Wallis Dennistoun, party hereto of the second part, is not entitled to payment of the legacy of £1000, which, under the trust-disposition and settlement of the deceased John M'Call, would have been payable at the death of the truster's widow to his mother, Mrs. Margaret Dennistoun, as one of the children of the truster's sister, the deceased Helen Wallis, if the said Mrs. Margaret Dennistoun had been then alive: Find and declare that the claimants, George Dunlop and Colin Dunlop junior, parties hereto of the third part, are not entitled to payment of the provision of £1000, which, under the codicil of 1st December 1830, appended to the trust-disposition and settlement of the deceased John M'Call, would have been payable at the death of the truster's widow to their mother, Mrs. Helen Wallis Dunlop, as one of the children of the truster's brother Thomas, had she been then alive, and decern: Find the parties of the second and third parts liable to the parties of the first part in expenses, and remit to the Auditor," &c.

J. & R. D. Ross, W.S.—J. & F. Anderson, W.S.—Agents.

[*Distinguished*, Gauld's Trs. *v.* Duncan, 1877, 4 R. 691.]

No. 56. X. MACPHERSON, 289. 23 Dec. 1871. 1st Div.—Lord Jerviswoode, B.

JAMES MACKNIGHT, Clerk to the Water of Leith Sewerage Commissioners, Pursuer.—*Sol.-Gen. Clark—Watson—Hall.*
W. AND D. MACGREGOR, Defenders.—*Lord-Adv. Young—Balfour.*

Public Burden—Assessment—Statute.—The Edinburgh and Leith Sewerage Act of 1864 made provision for equalising the incidence of the expense of constructing sewers as between the owners of present and future buildings using such works, by authorising the Commissioners to levy an assessment in respect of the use of their sewers upon subjects built subsequently to the construction of these sewers. *Held* that it was reasonable to assess the owners of new buildings for the use of the sewers at the same rate as had been levied from owners for their construction, the statute having provided for an equitable application of any surplus which might be accumulated by such assessment.

By the Edinburgh and Leith Sewerage Act, 1864 (27 & 28 Vict. c. 153, sec. 18), the Commissioners are authorised to make sewers, and to assess the owners of lands and heritages within their respective districts to the extent of 2s. 6d. per pound of rental. The 47th section enacts that "the owners of all lands, houses, or other property, any sewer, outfall, [290] or drain from which shall, after construction of the said main and branch sewers and works, be connected with the same, shall be liable in payment to the Commissioners of a reasonable sum of money for the use of the said main or branch sewers and works, which the commissioners are hereby authorised and required to fix and exact in respect of all such lands, houses, or other property: Provided always that such lands, houses, or other property shall not have been assessed for the expense of making such main or branch sewers or works; but if such lands, houses, or other property shall have been so assessed, and shall have been built upon, enlarged, or altered after the assessment for making such main or branch sewers and works was imposed and levied, the owners thereof shall be liable in payment to the Commissioners of such reasonable sum of money as aforesaid." The 85th section enacted that sums received by the Commissioners exceeding the amount required for the purposes of the Act should be paid back to the corporations of Edinburgh and Leith, in the same proportions as they had been assessed, and that they should be bound to apply them towards the repayment of any sums of money borrowed by them in virtue of the Act; or, if these should have been repaid, the sums so received from the Commissioners should "be held or applied for the benefit of the Edinburgh district or Leith district respectively in such way and manner as the said corporations respectively should fix and determine."

The Commissioners fixed the reasonable sum to be paid by owners becoming liable under the 47th section for the use of the main or branch sewers or works at 2s. 6d. per pound of rental, with the proviso that every such owner should be entitled to deduct the proportion of the assessment for the construction of said works which he could instruct as having been paid from the ground on which his subjects were built.

The present action was brought by the clerk to the Commissioners against Messrs. W. and D. Macgregor, builders in Edinburgh, proprietors of certain buildings in Edinburgh and Leith which had been connected with the sewers since the date of their construction, to recover an assessment of 2s. 6d. per pound of annual value imposed under section 47 of the Act, under deduction of the assessment previously levied on the stances, which had been assessed as agricultural subjects under sec. 72 for the expense of making the works.

The defenders maintained that the pursuer was not entitled to exact the sums claimed, in respect that they were not reasonable sums within the meaning of sec. 47; and averred,—"The Commissioners did not require to levy so large a sum for any legitimate purposes of their trust. The cost of making the drains or sewers in question had been already defrayed by previous assessments, and provision is made by the statute for raising otherwise the funds requisite for their maintenance and repair. If the Commissioners were permitted to levy the rates which they demanded these would

not only defray the whole charges of maintenance, but would lead to the accumulation of a large fund in their hands, which they had no statutory authority to create. Farther, large areas of ground were now being built upon within the districts over which the assessing powers of the Commissioners extend; and the levying of such rates as the Commissioners seek to recover from the present defenders would lead to the entire exemption of the tenements which are being and will be built upon the said ground, or, at all events, to their being assessed at a rate altogether infinitesimal when compared with the rate claimed."

The Lord Ordinary pronounced (8th December 1871) an interlocutor allowing the parties a proof of their respective averments, against which the pursuer obtained leave to reclaim.

[291] LORD PRESIDENT.—I have never been quite able to understand why the Lord Ordinary allowed a proof in this case. There are sufficient grounds disclosed on the face of the record to lead me unhesitatingly to a conclusion in favour of the pursuer. The statute provides, in the first place, for the construction of the sewage works, and that is to be done by means of an assessment, to which there is this limitation, that no one in the district either of Edinburgh or of Leith is to be called on to pay more than 2s. 6d. in the pound on his total rental. The assessment is laid on accordingly, and the 2s. 6d. in the pound is levied and paid to the Commissioners, and used in the construction of the works; and I take for granted that a similar assessment is levied for the maintenance of the works; at least there is such a power given under the statute. But it was foreseen by the Legislature that while the existing property in the district was to bear the burden of constructing these works, other property would in course of time come into existence, which would get the benefit of them, and contribute nothing to the expense of their construction, unless some provision were made for that purpose. This consideration led to the enactment of the 47th section, the object of which, as I understand it, is to equalise the cost on reasonable terms between the property existing at the time when the assessment was first laid on and property since then brought into existence; and I must say it seems to me a good and intelligible piece of machinery for working out that object. It provides that the Commissioners shall have power to impose on such new properties a reasonable assessment for the use of the works, if they have already paid no such assessment. If they have not already paid their natural share towards the expense of constructing these works, they are to be liable to the Commissioners in payment of a reasonable sum for the use of them. Accordingly, the defenders having erected such buildings as this clause contemplates since the construction of these works, the Commissioners say to them, You must pay us a reasonable sum for the use of these works, to equalise the burden of their construction between you and those who originally bore the expense. But the defenders reply, You do not need the money, because you have already laid on an assessment sufficient to meet the whole expense, and you have no authority to accumulate a fund which is not required. But the statute provides, by section 85, that if there is any surplus of the assessment required for the purposes of the Act it is to be paid over by the Commissioners to the corporations of Edinburgh and Leith respectively, in the proportions in which the respective districts contribute to the construction of the works. If the corporations have borrowed money for the purposes of the Act, such surplus so repaid to them by the Commissioners is to be used towards the repayment of any sums so borrowed; or if these have been repaid, the money so received from the Commissioners is to be applied as seems best, in the estimation of the corporations, for the benefit of their respective districts,—that is, of course, for the purpose of diminishing the existing assessment. The effect is just to relieve the ratepayers who bore the whole expense of constructing the works to the extent to which it is imposed on those who have built new properties which now receive the benefit of that expenditure.

If that, then, be the object of the statute, the only question is, whether the demand made by the pursuer is reasonable under section 47. Now, I think nothing could be more reasonable than to put these gentlemen and the original ratepayers on a footing of equality, and under section 85 that will give proportional relief afterwards, though indirectly, to them as well as to those who paid the original cost of the works. I think, therefore, that the Lord Ordinary's interlocutor must be recalled, and that the pursuer is entitled to decree in terms of the conclusions of the summons.

LORD DEAS.—I am clearly of the same opinion. This Act was passed in 1864 for the purpose of improving the drainage of the district of Edinburgh and Leith. It is

not disputed that the existing ratepayers at that time paid 2s. 6d. in the pound on their rental to defray the expense of the works authorised by the Act, and the statute provided that the owners of property coming in future to enjoy the benefit of these works should pay a reasonable share of the expense of [292] their construction. Now, what is a reasonable share, unless that which puts them on a footing of equality? The argument of the Lord-Advocate comes to this, that new buildings are to contribute nothing at all towards that expense. It appears to me that that would be much the same case as if an individual proprietor had built houses on a few acres of ground, and for the benefit of these houses had at great expense made a drain to the sea, and a neighbouring proprietor should come and say, I shall take the benefit of your drain without paying you anything for the cost of its erection, as my use of it will not cause you any more expense than you have already incurred. The fair answer would surely be that he must pay a reasonable share of the original expense of constructing the drain, as well as contribute to its future maintenance. I think there is no difficulty created by the possible existence of a surplus of the assessment, because, as your Lordship has explained, that is expressly provided for by section 85 of the statute.

LORD ARDMILLAN.—I am of the same opinion. If this system of drainage had been executed very long ago, so as to have fallen into a state of dilapidation, and so that the new ratepayers were to be put to the disadvantage of paying for what was originally good, but had ceased to be so, in that case I think a proof might have been necessary. But these works were executed no longer ago than 1864, and it cannot be alleged that it is any disadvantage to the owners of property coming into existence since then, to be put on a footing of equality with the ratepayers existing at the time when the assessment was laid on. They receive exactly the same advantage as the original ratepayers. If it could be contended that there were defects in the construction of the works, or that the lapse of time had seriously deteriorated them, and that the existing rate was therefore now unreasonable, that would be a ground of argument against equalising the original and the present ratepayers. But we have here no such ground and no such argument; nothing of the sort is alleged, and therefore I entirely agree with your Lordship in thinking that the Lord Ordinary has erred in allowing a proof, and that the pursuer is entitled to decree.

LORD KINLOCH.—I am of the same opinion, and very clearly. It is plain that these gentlemen must pay a reasonable sum towards the cost of these works, notwithstanding that the whole expense of their construction has been defrayed. The only question is, as your Lordship has stated, what is a reasonable sum; and I cannot conceive anything more reasonable than that they should pay the same as other owners of property have done for the enjoyment of the same benefit. Any surplus thereby created will remain for general behoof. The purpose of the assessment is to furnish a common fund, the benefits of which the whole ratepayers of the district are to share, and I cannot therefore see any ground for exempting the defenders from contributing in the same proportion with the original ratepayers.

THE COURT pronounced an interlocutor decerning in terms of the conclusions of the summons.

JAMES MACKNIGHT, W.S.—LINDSAY & PATERSON, W.S.—Agents.

No. 57. X. MACPHERSON, 292. 23 Dec. 1871. 2d Div.—I.

CHARLES MORTON (Liddell's Curator).—*Pattison—Asher.*
HENRY LIDDELL.—*Marshall—Paul.*

Bankruptcy—Right in Security—Catholic Security.—A creditor in security of his debt held a first bond over heritable subjects in A. belonging to the debtor. The creditor subsequently obtained a corroborative security over heritages in D., belonging to a third party. The creditor assigned the debt and both securities. The assignee, at a date when his debtor was solvent, relieved the D. subjects of all liability, thereby throwing the whole burden on the A. subjects. The debtor having been sequestrated, a question arose between the creditor and a posterior [293] bondholder over the A. subjects. *Held* that the creditor was entitled to relieve the D. subjects, without prejudice to his right to full payment out of the A. subjects.

In 1833 James Liddell and Henry Spears, copartners under the firm of Liddell and Spears, having obtained a cash-credit with the Commercial Bank in name of their firm to the amount of £1500, along with Hugh Coventry granted a bond and disposition in security in favour of the bank over certain heritable subjects in Auchtertool belonging to James Liddell.

In conformity with the Act 54 Geo. III. c. 137, which authorises heritable securities for cash-credits, provided the principal and interest be limited to a certain definite sum to be specified in the security, not exceeding the amount of the principal sum and three years' interest at 5 per cent., the bond declared that the principal sum which should become due was limited to the sum of £1500, and the interest to the further sum of £225, and principal and interest together to the sum of £1725.

On 12th January 1836 the amount due, including £93 of interest, and £36 as the expense of the assignation aftermentioned, was £1675. This sum was paid to the bank by Alexander Watson, who obtained an assignation from the bank of the debt and the security.

Watson having required further security it was arranged in 1837 or 1838 that Mrs. Elizabeth Davidson or Liddell, and her sister Mrs. Isabella Davidson or Beveridge, and her husband, should grant in his favour a disposition in security of two third parts of certain heritable subjects in Dunfermline belonging to them. This deed was granted on 10th and 11th December 1839.

In March 1838 George M'Callum, W.S., in name and on behalf of Henry Liddell (the second party to the special case aftermentioned), paid to Watson £700 of the £1675, and took from him a disposition, assignation, and translation in security, to that extent, of the said debt, and penalty corresponding thereto, and of the Auchtertool and Dunfermline subjects, subject to the preferable burden of the remaining £975.

In 1852 the debt of £975 was paid by the debtor, and the securities to that extent discharged.

The Dunfermline subjects were sold in 1864, but not under the bond; and Henry Liddell, who then held both them and the Auchtertool subjects as a security for the £700, granted a discharge of his security over the subjects sold, but received no part of the price.

James Liddell died in possession of the Auchtertool subjects in 1867, and his estates were sequestrated in 1868. Thereafter the Auchtertool subjects were sold by the trustee in the sequestration, with consent of the heritable creditors, and under reservation of all questions of preference *inter se*, the price being payable at Martinmas 1869. The price was insufficient to satisfy the claims of the heritable creditors. Mr. Charles Morton, W.S., as *curator bonis* for General John Liddell, claimed £2000 under a bond and disposition in security granted by James Liddell over the Auchtertool subjects, dated 18th June, and recorded in the Register of Sasines 5th August 1851.

Henry Liddell claimed to be ranked and preferred preferably to Mr. Morton for payment of the £700 and three years' interest thereon at 5 per cent., amounting to £105.

Mr. Morton objected to this claim, and maintained (1) that as the security created over the Auchtertool subjects was by express terms restricted to £1725, and as the debt under the bond, which to the extent of £700, was assigned to Henry Liddell, amounted to £1675 at the date of the assignation in Henry Liddell's favour, no more than £50 could be [294] added thereto in name of interest, and he (Henry Liddell) was not entitled to be ranked preferably to Mr. Morton for any more than £700 of principal, and the share of £50 effeiring thereto. (2) That Henry Liddell was bound, before ranking on the price of the Auchtertool subjects, in a question with Mr. Morton, a postponed creditor thereon, to give credit for the price of the Dunfermline subjects sold with his consent, the Dunfermline subjects having, by the same deed by which he acquired right to the £700 and the Auchtertool security, been assigned to him in further security of the said sum and interest.*

A special case was presented to the Court by Mr. Morton and Mr. Henry Liddell containing the following questions, on which the opinion and judgment of the Court

* The following authorities were referred to:—2 Bell's Comm. (5th ed.) 523, 524, 626; Scottish Provident Institution *v.* Littlejohn and Black, Dec. 13, 1855, 180, 207; Kemp's Trustees *v.* Ure, Jan. 15, 1822, 1 S. 223; Stewart *v.* Maxwell, Jan. 11, 1814, F. C.; Miller *v.* Baird, Nov. 24, 1749, M. 12,721.

were asked:—"1. Whether the said Henry Liddell is entitled to be ranked preferably in a question with the said Lieutenant-General John Liddell, and Charles Morton as his *curator bonis*, on the price of the said heritable subjects for payment of the said sum of £700, with three years' interest thereon, at the rate of 5 per centum per annum? Or, Whether the claim of the said Henry Liddell upon the proceeds of the said subjects, as prior heritable creditor, by virtue of the said security rights in his favour, can, in a question with the said Lieutenant-General John Liddell, and his *curator bonis* as postponed heritable creditor, be admitted to any greater extent than £700 of principal, and £50 in full of all interest? 2. Whether, before ranking on said proceeds for said debt the said Henry Liddell is bound, in a question with the said Lieutenant-General John Liddell, and his *curator bonis*, to account for and deduct . . . the proceeds of the said heritable subjects at Dunfermline?"

At advising,—

LORD JUSTICE-CLERK.—The first question we have to decide under this special case is, whether Henry Liddell is entitled to three years' interest on the £700, or whether he is only entitled to so much interest as would, with the £975 and £700, make up the full sum of £1725 contained in the cash-credit bond, viz. £50? The second question is, whether General Liddell's curator is entitled to insist that Henry Liddell shall draw from the Dunfermline subjects a proportional share of this debt so as to disburden to that extent the Auchtertool subjects.

As to the first question, the cash-credit bond was granted under the statute of George III., by which a security over heritable estate for future debt was to a certain extent rendered legal, but on the condition that the amount should be definite and specific, and be so stated in the bond. The object was that postponed creditors should know exactly to what extent the debtor could still pledge his heritable estate. Now, under this bond the amount of the principal is distinctly stated at £1500, and three years' interest at 5 per cent., £225—in all £1725. The bond is therefore good for that sum, but for no more. In 1852 the bond was paid up to the extent of £975, but by that time another security had been constituted over the estate for £3000, and the moment the property was disburdened of the £975 the discharge inured to the second creditor. The original creditor had still a debt of £700, but it was never intended to constitute three years' interest on that £700 a charge on that property, for the £975 and £700 were themselves made up partly of principal and partly of interest. The full amount of the bond was £1725, and Henry Liddell's claim cannot be admitted to a greater extent than the £700 and £50 of interest, which, along with the £975, make the full amount of £1725. Henry Liddell maintained that, [295] even if this were so, there ought to be disallowed from the £975, and so added to the interest on the £700, the amount of the "penalty" corresponding to the £975. It is not necessary to consider that argument, or to investigate the composition of the £975, which is discharged, but I doubt whether the argument be sound. All that the Act requires is that a specific sum should be stated which shall be the measure of the liability under the bond, but it is not required that it should be stated of what that sum is composed. The second branch of the first question will therefore be answered in the negative.

The second question is not one of the ranking of a catholic security, and therefore some of the questions that were argued to us do not arise. The original security was constituted in 1834, and when in 1838 it was assigned, the assignee, being dissatisfied with the security, obtained collateral security over heritable subjects not belonging to the debtor. Thereafter, and during the solvency of all parties, Henry Liddell, being satisfied with the original security for the balance still remaining unpaid, discharged the collateral obligants, and four years afterwards the postponed creditor has come forward maintaining that the assignee was not entitled to do so, because, if he had not granted the discharge, these obligants would have been bound to contribute rateably towards payment of the postponed creditor's debt. I am not at all satisfied that even in bankruptcy that would have been so. But no such question arises, as the discharge was granted when all parties were solvent. Mr. Bell (Commentaries, ii. p. 419, M'Laren's edition) lays down the doctrine without limitation thus: "It has been decided that a catholic creditor may, before the bankruptcy of his debtor, renounce his security over part of the estate to the effect of limiting his security to the rest, although it should turn out that the portion thus included were subject to a secondary security, which of course suffers by the restriction." The case of Kemp's Trustees *v.* Ure was special, and does not affect the general question. Here the transaction was carried

through four years before the debtor's insolvency, and the discharge was not granted capriciously or emulously for the purpose of defeating the postponed creditor's rights. The second question must therefore be answered in the negative.

The other Judges concurred.

THE COURT, on 8th December 1871, pronounced the following interlocutor:—"Find and declare that under the security rights in his favour the claim of Henry Liddell, as prior heritable creditor over the proceeds of the heritable subjects, cannot, in a question with Lieutenant-General John Liddell and his *curator bonis*, be sustained to any greater extent than £700, and £50 in full of all interest; and also find and declare that, before ranking on said proceeds for said debts, the said Henry Liddell is not bound to account for and deduct . . . the proceeds of the said heritable subjects at Dunfermline, and decern: Find no expenses due to or by either party."

MORTON, WHITEHEAD, & GREIG, W.S.—J. N. FORMAN, W.S.—Agents.

No. 58. X. MACPHERSON, 295. 9 Jan. 1872. 1st Div.—Lord Jerviswoode, B.

MRS. ELIZA RANKINE OR HORN, AND ANDREW HORN, HER HUSBAND, Pursuers.—*Macdonald—Rhind.*

MESSRS. SANDERSON AND MUIRHEAD, Defenders.—*Lancaster.*

Process—Bankrupt—Title to Insist—Caution for Expenses.—The pursuer of an action of damages became bankrupt, and the trustee in the sequestration declined to become a party to the proceedings. *Held* that the bankrupt was not entitled to carry on the suit without finding caution for the expenses of process.

Process—Title to Insist—Pursuer Married Woman—Curator ad litem—Caution for Expenses.—A married woman, with concurrence of her husband, as [296] her administrator-in-law, raised an action of damages for personal injury. By antenuptial contract her husband had renounced his *jus mariti* and right of administration over her whole estate, and having become bankrupt during the dependence of the suit at his wife's instance he and the trustee in his sequestration assigned to her all claims which they or either of them might have against the defender in connection with the subject of the action. *Held* that notwithstanding the husband's bankruptcy the wife was entitled to insist in the action with his concurrence as her administrator-in-law, without the appointment of a *curator ad litem*, and without finding caution for expenses.

This was an action of damages at the instance of Mrs. Eliza Rankine or Horn, wife of Andrew Horn, spirit-dealer in Edinburgh, "with consent and concurrence of the said Andrew Horn as administrator-in-law for his said wife, and the said Andrew Horn for his own right and interest," against Messrs. Sanderson and Muirhead, builders in Edinburgh.

The pursuers averred that on 6th March 1871 the defenders, who had been employed to repair a part of the pavement in Princes Street, left the work in an unfinished state, without having placed a barricade or lamp, or a watchman to warn foot passengers, and that, in consequence of their culpable negligence in this respect the pursuer, Mrs. Horn, who was walking along the street in the evening, stumbled and fell, and sustained severe personal injury. It was also alleged that, owing to this occurrence, Mrs. Horn was prevented for nearly three months from attending to her husband's shop, and that he had during that time to manage the business himself, without her assistance, in consequence of which his health had severely suffered from overwork and anxiety.

After the action was raised Horn became bankrupt, and the dependence of the process was intimated to the trustee in his sequestration, who declined to sist himself as a party, but the pursuers produced an assignation dated 9th November 1871, by which Horn, and the trustee and commissioners on his sequestrated estate, conveyed to Mrs. Horn, exclusive of her husband's *jus mariti* and right of administration, and of any right competent to the trustee, all claims which they or either of them might have

against the defenders "in connection with the subject-matter of the said action of damages, or under said action, with all right, title, and interest competent to us or either of us therein."

The pursuers also produced an antenuptial contract of marriage between them, dated 26th August 1846, whereby Horn renounced his *jus mariti* and right of administration "over the real and personal, heritable and moveable, means, estate, and effects of the said Eliza or Elizabeth Rankine or Marshall, and whole rents, interests, and other income arising furth thereof, declaring that the same shall not be affectable by the debts or deeds, legal or voluntary, of me, the said Andrew Horn, nor by the diligence of my creditors: And declaring that the same shall be at the disposal of the said Eliza or Elizabeth Rankine or Marshall in any way she may direct, by any writing under her hand, without the consent and concurrence of me, the said Andrew Horn; and, in particular, declaring that she, the said Mrs. Eliza or Elizabeth Rankine or Marshall, shall at all times be entitled during the subsistence of our said intended marriage to sue for, uplift, and discharge all debts, and sums of money, and rents of heritable subjects due and to become due to her, in her own name alone, and without the concurrence of me, the said Andrew Horn; and all debtors, tenants, factors, agents, and others owing, or who shall become owing, any money to her, shall be as safe by paying to and getting her receipt alone as if the same was signed by me, the said Andrew Horn: And, in further security to her, I, the said Andrew Horn, do hereby dispone, assign, convey, and make over to and in favour of the said Mrs. [297] Eliza or Elizabeth Rankine or Marshall, and her heirs and assignees, all and every right and interest which I, the said Andrew Horn, when said marriage is celebrated, may or can have, as husband of the said Eliza or Elizabeth Rankine or Marshall, in any manner of way."

The Lord Ordinary, on 17th November 1871, "in respect the trustee on the pursuer's sequestrated estate has failed to sist himself as a party to this process, appoints the pursuer to find caution for expenses within the next ten days"; and on 5th December, his Lordship, in respect "of the failure of the pursuer to find caution, in terms of the preceding interlocutor of 17th November last, dismisses the action, and decerns: Finds the defenders entitled to expenses," &c.

The pursuers reclaimed, and argued;—In virtue of the renunciation of the *jus mariti* and curatorial powers of the husband, contained in their marriage-contract, and of the assignation in favour of Mrs. Horn by the trustee in her husband's sequestration, she was completely vested with the claim of damages, and was entitled to insist in the action, in so far as it was laid at her instance, without finding caution for expenses.*

The defenders argued;—The husband by his bankruptcy is disqualified from acting as his wife's curator, and she is therefore suing without a curator, and upon her own showing there will be no one accountable to the defenders for their expenses in the event of her losing the suit. In any event, therefore, a *curator ad litem* should be appointed to Mrs. Horn.† But farther, the renunciation in the antenuptial contract does not extend to the present claim for damages, but only to the property belonging to Mrs. Horn before marriage, and the right to sue for pecuniary damages for personal injury was competent only to the husband.‡ The assignation by the trustee was a mere device to avoid liability for expenses.

LORD PRESIDENT.—It is necessary to distinguish between the two heads of damage claimed in this case. The pursuer, Mrs. Horn, says that she suffered serious injury in her person, for which she claims reparation from the defenders. But it is also alleged that, in consequence of her being disabled, the other pursuer, Mr. Horn, suffered in business by losing the benefit of her assistance in the shop, and also that his health suffered from overwork. He is bankrupt, and his trustee declines to sist himself, and he offers no caution, and therefore he cannot sue for his own behoof. But the other part of the claim is exclusively for the personal injury suffered by Mrs. Horn, and the question is, whether, in respect of the bankruptcy of her husband, and the trustee's failing to sist himself, and the husband's failure to find caution, her claim also falls to be dismissed, and that is a question of some delicacy.

---

* Graham *v.* Hunter's Trustees, 1831, 9 S. 543; Waddell *v.* Waddell, 1837, 16 S. 79; Willox *v.* Farrell, 1849, 11 D. 1206; Gale *v.* Bennet, 1857, 19 D. 665; Finlay *v.* Hamilton, 1748, Dict. 6051; Fraser, Pers. and Dom. Rel. vol. i. 278.

† Cullen *v.* Ewing, 1830, 9 S. 31.

‡ Milne *v.* Gauld's Trustees, 1841, 3 D. 345; Smith *v.* Stoddart, 1850, 12 D. 1185.

As a general rule, there is no doubt that a wife raising an action for payment of damages on account of injury would only be demanding money that would immediately become the property of her husband. But there are several specialties in this case. There is, in the first place, the universal renunciation of the *jus mariti* by the husband, and a question of delicacy might be raised in regard to that, whether it applies equally to *acquirenda*, and if it was intended to do so, whether the present claim is of such a nature as to fall under the description in the marriage-contract of rights competent to the husband "over the real and personal, heritable and moveable, means, estate, and effects," of his wife. The only conclusion I have formed in regard to that matter is, that it is a question of difficulty. But observe between whom that question, if it arose, [298] would be. It would be between Mrs. Horn and the trustee. But the trustee not only says that he does not assert any right to this claim, but he has assigned any right he has to Mrs. Horn, which removes any difficulty in regard to the marriage-contract, and makes her right complete. If the defenders have been guilty of the neglect alleged, they are undoubtedly liable for the injury done to Mrs. Horn, and when she sues them on that ground all they are entitled to demand is to be satisfied that she is in a position to discharge the claim. Now, I do not doubt that, taking this assignation and the marriage-contract together, she is in that position, and therefore I think she is the proper pursuer in this action.

A question was raised as to whether Mrs. Horn should have a *curator ad litem*. I see no necessity for that. She is living in family with her husband, and nothing is alleged against their domestic felicity, and he is the proper administrator-in-law for her. I have yet to learn that bankruptcy deprives a husband of that character. He is not only entitled but bound to act in that capacity, and to concur with his wife in the prosecution of her claim. She is not bankrupt, and cannot therefore be called upon to find caution, and to ask her husband to find caution is out of the question. I come to the conclusion, therefore, that while the Lord Ordinary is quite right so far as he dismisses the action and decerns in regard to the claim of Mr. Horn, if he intended to dismiss it so far as Mrs. Horn is concerned I think that judgment would be unjust and improper. I think the objection to her title is ill-founded, and that she is entitled to sue in her own name, without caution.

The other Judges concurred.

The following interlocutor was pronounced:—"Recall the interlocutor: Find that the pursuer, Andrew Horn, having failed to implement the interlocutor of 17th November 1871, by finding caution for expenses, is not entitled to sue this action for his own right and interest, or to recover damages in respect of the loss alleged to be sustained by him in the 7th article of the condescendence: Therefore, in so far as regards the pursuer, Andrew Horn, for his own right and interest, dismiss the action, and decern: But find that the pursuer, Mrs. Eliza Horn, is entitled, with consent and concurrence of her husband, as her administrator-in-law, to insist in this action for her own right and interest without finding caution for expenses; and remit to the Lord Ordinary to proceed with the cause: Find the pursuer, Mrs. Horn, and her husband as her administrator-in-law, entitled to expenses since the date of the Lord Ordinary's interlocutor reclaimed against; allow an account," &c.

W. G. Roy, S.S.C.—Murray, Beith, & Murray, W.S.—Agents.

No. 59. X. Macpherson, 298. 9 Jan. 1872. 1st Div.—M.

Duke of Atholl, Complainer.—*Sol.-Gen. Clark—Lee.*
Alexander Robertson, Respondent.

Process—Petition—Citation.—In a petition and complaint for breach of interdict, citation was made upon the respondent by leaving a copy at his dwelling-place in Edinburgh, the address of which had been furnished by his known agent. The respondent was also cited edictally, and a copy of the petition and complaint was sent to his known agent, who stated that the respondent had gone to London, and that the copy had been forwarded to his last known address there. *Opinions* by the majority of the Court (*dub.* Lord Deas) that the citation was sufficient.

The complainer having asked the case to be continued, and afterwards produced an affidavit that intimation had been made to the respondent personally of an interlocutor appointing him to appear at the bar, with certification, the Court granted warrant to apprehend in respect of his failure to appear.

[299] This was a petition and complaint at the instance of the Duke of Atholl against the respondent Robertson for breach of an interim interdict against passing Dunkeld Bridge without payment of the pontage-duties exigible under the Act 43 Geo. III. cap. 33, or in any way obstructing or interfering with the collection of the pontage-duties.

Warrant for service upon the respondent having been granted on 31st October, an execution was produced at the bar on 14th December, when the case was in the Single Bills, bearing that the respondent had been cited on 2d November, by leaving a copy at his dwelling-place in Broughton Street, Edinburgh, in respect he could not be found personally. A letter was produced from Mr. J. M. Macqueen, S.S.C., as agent for the respondent, dated 19th September 1871, and bearing that Mr. Robertson's address was at the said house.

It was further stated on behalf of the complainer that the petition and complaint had also been executed edictally, and that a copy of the complaint and deliverance had been sent to Mr. Macqueen as the respondent's known agent. A letter was produced from Mr. Macqueen, dated 4th November, bearing that Mr. Robertson had gone to London about a fortnight before, but that the copy had been forwarded to him at his last known address there. The complainer moved that the respondent should be ordained to appear personally at the bar, under certification that if he failed to do so warrant of apprehension would be granted.

It was argued that the citation at Broughton Street was sufficient, that being sufficiently instructed to be the respondent's dwelling-place. These proceedings under the Act of Sederunt of July 1828 were judicial proceedings, to which the provisions of the Act of Sederunt, 14th December 1805, in regard to citation, applied; and therefore the forty days' citation at the dwelling-place was good. But if Broughton Street were not to be regarded as the respondent's dwelling-place, then he had no known dwelling-place in Scotland within the forty days, and under the 6 Geo. IV. cap. 120, sec. 53, and Act of Sederunt 1868, the edictal citation, coupled with intimation to the respondent through his known agent, was sufficient.

There was on the same day in the Short Roll a reclaiming note for Mr. Robertson against a judgment of Lord Gifford in a cause in which Mr. Macqueen's name appeared as his agent. But on that cause being called no appearance was made for the reclaimer. It was stated that no letter had been received from Mr. Macqueen to the effect that he had ceased to act as agent, though the cause had been continued that notice might be given to him, and such notice had been sent.

LORD DEAS suggested that the complainer's agent might have asked Mr. Macqueen for the last known address in London to which he had sent the complaint and deliverance; and his Lordship expressed difficulty about sustaining the citation.

LORD ARDMILLAN did not think the complainer could be required to do more than he had done.

LORD PRESIDENT concurred with Lord Ardmillan. His Lordship thought the citation might be held sufficient.

LORD KINLOCH concurred with Lord Ardmillan and the Lord President. The proceedings were *periculo petentis*.

Counsel for the complainer said that as one of their Lordships was of opinion that something more might be done he would move the Court to continue the cause until next Wednesday.

The cause having been so continued, a certificate was produced that the [300] petition and interlocutors had been sent to the respondent's address in London by registered letter, with notice of a motion that the respondent be ordained to appear personally at the bar, under certification that if he failed warrant of apprehension would be granted.

On the motion of the complainer, the following interlocutor was pronounced:—"Having resumed consideration of the petition and complaint, on the motion of the complainer appoint the respondent to appear personally at the bar of this Court on the 9th day of January next, at ten o'clock A.M., under certification that if he do not

obtemper this order warrant for his apprehension will be issued, and appoint intimation of this order to be made to the respondent personally."

On the 9th January, there being no appearance for the respondent, an affidavit was produced by the complainer, sworn to by James Haworth, clerk to Messrs. Connell and Hope of Princes Street, Westminster, and bearing—"I duly intimated to Alexander Robertson of Dundonnochie, the respondent in the foregoing petition and complaint, personally, the interlocutor above copied, of date 20th December 1871, pronounced by the Lords of the First Division of the Court of Session in Scotland, in the petition and complaint of which the foregoing is a printed copy, and this I did by delivering to the said Alexander Robertson, personally, a printed copy of the foregoing petition and complaint, having annexed thereto a copy of the said interlocutor, at the door of the said Alexander Robertson's lodging in Gray Street, Blackfriars' Road, in the county of Surrey, on the 22d day of December 1871."

THE COURT pronounced the following interlocutor:—"Having resumed consideration of the petition and complaint, with the affidavit of intimation of the interlocutor of the Court, dated 20th December last, to the respondent personally, No. 19 of process, and heard counsel for the complainer, in respect that the respondent, Alexander Robertson, has failed to appear at the bar of this Court in obedience to the order contained in the said interlocutor of 20th December last, and no appearance being made for the said Alexander Robertson, on the motion of the complainer grant warrant to macers of Court and messengers-at-arms, or other officers of the law, to search for, take, and apprehend the person of the said Alexander Robertson now or lately residing at No. 69 Broughton Street, Edinburgh, respondent, and if so apprehended during session to incarcerate him in the jail of Edinburgh, or other jail in Scotland, and thereafter, with all convenient speed, to bring the person of the said Alexander Robertson to the bar of this Court on any sederunt day during session, to answer in the matter of the said petition and complaint, and if so apprehended during vacation to incarcerate the said Alexander Robertson in the jail of Edinburgh, or other jail in Scotland, therein to remain till the first sederunt day of the ensuing session, and on that day to bring the person of the said Alexander Robertson to the bar of this Court to answer in the matter of the said petition and complaint, and if necessary for the purpose of so apprehending the person of the said Alexander Robertson, grant warrant to open shut and lockfast places; as also grant warrant to magistrates and keepers of prisons to receive and detain the said Alexander Robertson as aforesaid: Further, authorise execution hereof to pass on a copy hereof certified by the Clerk of Court, and decern *ad interim*."

TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 60. X. MACPHERSON, 301. 9 Jan. 1872. 2d Div.—Sheriff of Dumfriesshire, I.

DONALD CAMERON, Pursuer and Respondent.—*Fraser—Hall.*
JOSEPH FLETCHER, Defender and Appellant.—*Millar—Macdonald.*

Master and Servant—Gamekeeper—Wrongous dismissal—Reparation—Damages—Culpa.—Held that the remedy of a gamekeeper who had been improperly dismissed before the expiry of his engagement was an action of damages, and not a claim for the wages which he would have earned if he had continued his service.

This was an action in the Sheriff-court of Dumfries by Donald Cameron, gamekeeper, against Major Fletcher, of Kelton House, Dumfries. The summons concluded for "first, the sum of £36, 10s. 8d. sterling, being the money-wages of the pursuer as a gamekeeper with the defender, at the agreed on rate of 16s. per week, from the 11th day of July current till the term of Whitsunday next, 26th May 1871, when the pursuer's engagement with the defender, as a yearly servant, would have naturally terminated, with the interest thereof, at the rate of £5 per centum per annum, from the date of citation to follow hereon till payment; and (second), the further sum of £5 sterling, being the amount of the pursuer's stipulated allowance for rent of a house

and garden, in addition to his said money-wages, for the year from Whitsunday 1870 to Whitsunday 1871, with the interest thereof at the foresaid rate, from the date of citation to follow hereon till payment, said money-wages and allowance for rent being now due and payable to the pursuer by the defender in consequence of his wrongful dismissal by the defender, on or about the 8th day of July current; or otherwise, the defender ought to be decerned to pay to the pursuer the sum of £50 sterling, being damages sustained by the pursuer in consequence of the defender having wrongfully dismissed the pursuer from his said service on or about the said 8th day of July current, with the interest thereof."

The defence was "(1) That the pursuer was not a yearly servant, but engaged by the week. (2) That assuming that he was a yearly servant, the dismissal was justifiable, in respect of the pursuer's disobedience to, or neglect of, lawful orders."

No proof was led in the Sheriff-court, but the following letters from the defender to the pursuer were produced by the pursuer:—

"69 Lowther Street, Whitehaven, 7th April 1865.—Sir,—Yours with enclosure to hand this morning. I have not yet engaged a gamekeeper, but have had correspondence about two or three; however, your testimonials are so satisfactory that I have no hesitation in engaging you, if you agree to accept 16s. per week, and commence at once. Should this suit you, please to loose no time, but go over to Conheath and see if Mr. Leckie (the farmer there) will let you have the house that the late keeper had. I will expect to hear from you by return.—I am, yours truly, Jos. FLETCHER."

"69 Lowther Street, Whitehaven, 10th April 1865.—Sir,—Your reply to hand. I did not mean to find a house, inasmuch as I have not one; otherwise would have no objection. If you can arrange with Mr. Leckie for the cottage I will pay the rent for you. I may probably be over about the middle of next week, when I can give you instructions.—I am, yours, &c., Jos. FLETCHER."

The defender afterwards gave in an additional condescendence, stating that the pursuer had obtained other employment since his dismissal, and stated the following pleas:—(1) The pursuer's claim being essentially one [302] of damages, he is not entitled to reparation beyond the amount of loss actually sustained. (2) The pursuer having only been out of employment from the date of his dismissal till the term of Martinmas 1870 he is not entitled to claim wages from the pursuer except for that period.

The pursuer pleaded;—(2) The pursuer is entitled to his full money-wages as libelled, in reparation of the wrong sustained by him through the defender's breach of contract, and as a *solatium* to his wounded feelings. Or, alternatively, he is entitled to the amount of damages concluded for, and interest thereon. (3) The amount of the pursuer's wages, or of the damages due to him, was due at the date of the pursuer's wrongous dismissal, and cannot be affected by any subsequent events.

The following interlocutors were pronounced by the Sheriff-substitute (Hope):—"Dumfries, 14th October 1870.— . . . Finds that by letter dated 7th April 1865 . . . the defender offered to engage the pursuer as gamekeeper, if he agreed 'to accept 16s. per week, and commence at once": That by letter dated 10th of said month of April . . . the defender further undertook to pay the rent of a cottage for the pursuer in addition to the wages offered in the previous letter: That the defender has not produced the letters to him from the pursuer, to which . . . these letters are the replies, or any subsequent letters: That the pursuer entered the service of the defender as gamekeeper on or about the 17th of April 1865, and continued therein until the 11th day of July 1870, when he left the same in consequence of having been dismissed by the defender: That during the said term of service the defender paid the pursuer wages at the agreed on rate of 16s. per week, but that not at the expiry of each week, but at irregular intervals: . . . That from said term the pursuer, in connection with his said engagement by the defender, became the occupier of a house in Glencaple, the rent of which was £5 per annum: . . . Finds in law, (1) That in the circumstances the letters . . . must be held to contain the terms of the contract between the parties, and that parole proof in regard to said terms is incompetent; (2) That in the absence of any express stipulation in the contract the duration of the pursuer's engagement falls to be regulated by the presumption of law; (3) That the engagement of the defender at a wage of 16s. per week even without an undertaking by the defender to pay the rent of a house, would not raise a presumption in law that the engagement was by the week; (4) That the presumption of law in the case

of a gamekeeper, in the absence of any express stipulation to the contrary, is that he is engaged by the year: Therefore repels the first head of defence, and decerns, reserving the question of expenses; and *quoad ultra* allows the defender a proof of the averments in his second head of defence, and to the pursuer a conjunct probation."

"Dumfries, 7th February 1871.— . . . In respect of the defender's failure to lead proof, holds him as confessed on the matter of the wrongous dismissal of the pursuer alleged in the summons, and therefore repels the second head of defence."

"Dumfries, 15th March 1871."— . . . The Sheriff-substitute found that the pursuer had obtained new employment, but "that the defender is not entitled to found on said new engagement as a ground for diminishing any sum which might otherwise be due by him to the pursuer in respect of the wrongous dismissal; that the pursuer, in the circumstances, is entitled to full wages from the date of his dismissal until the term of Whitsunday 1871, together with the sum of £5, being the agreed on allowance for house rent to be made to him by the defender for the year ending at said last-mentioned date: Therefore repels the pleas in law for the de-[303]-fender contained in the additional condescendence, . . . and sustains the pleas in law for the pursuer contained in his answers thereto; . . . ordains the defender to make payment to the pursuer of the sums of £36, 10s. 8d., being the wages due as aforesaid, and £5 in name of house rent, with interest on said sums respectively as libelled, and finds him liable in expenses; allows an account thereof to be given in," &c.

The Sheriff (Napier) adhered.

The defender appealed, and after hearing counsel the Court, before answer, allowed a proof to both parties of their respective averments.

The proof was taken before Lord Benholme, and thereafter counsel were heard again.*

At advising,—

LORD BENHOLME.—When this case first came before the Court your Lordships ordered additional proof. I am glad that course was taken, for I am inclined to think that this case depends solely on the special contract between the parties.

In the first place, I find no satisfactory proof of there being any special custom or usage.

I think the Sheriff is right. But I think it is in name of damages and not of wages that the pursuer is entitled to recover. The grounds upon which I rest my judgment are these:—The contract seems to have been constituted by letters. Two letters were sent by the gamekeeper (the pursuer) to his master, and to these two letters two replies were written by the master. The gamekeeper has produced the part of the correspondence which should be in his hands, but the master has failed to produce the portion of the correspondence which he should have; and he further states that he has not destroyed the letters, and gives no satisfactory reason for their non-production. Looking to the terms of the two letters produced, and taking the terms of the letters not produced to be substantially what the pursuer swears, I think we must hold that the pursuer stipulated for a house. I think, in justice to the pursuer, we are bound to take his account of the terms of his own letter.

I think we can decide this case without interfering with any previous decision, or setting up any precedent. I think that every case which has occurred has been decided on its specialties. There was one strong case of a man who was deprived of his salary by the firm which employed him ceasing to exist. The contract there came to an end without any fault of the master, just as if he had died. There was no *culpa* in that case. That cannot be said of the present case. There was *culpa* here, and that enables me to arrive at the same conclusion as the Sheriff. I am not able to say that as wages alone the pursuer would be entitled to the whole year's earnings. But the defender does not justify his dismissal, and we may affirm the judgment of the Sheriff as damages. Looking to the whole circumstances under which this man was thrown out of employment, and may be supposed to have suffered

* *Defender's Authorities*:—Armstrong *v.* Bainbridge, Nov. 12, 1848, 9 D. 29 and 1198; Rae *v.* Leith Glass Works Company, M. 13,989; Puncheon, M. 13,990; Hoey *v.* M'Ewan and Auld, *ante*, vol. v. 814; Stuart *v.* Richardson, Hume, p. 390; Erskine, Inst. 3, 3, 16; Bentinck *v.* Macpherson, Feb. 25, 1869, 6 Scottish Law Reporter, 376; Tait's Justice of the Peace, p. 460 (4th ed.); Baird *v.* Don, Jan. 16, 1779, 5 Brown's Supp. 514.

injury, he is entitled to damages for the dismissal, which was a violation of the master's contract.

The other Judges concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor appealed against: Find that the defender engaged the pursuer as [304] gamekeeper from the 17th of April 1868 at the rate of 16s. of weekly wages: Find it sufficiently established by the facts proved that this engagement was by the year, and that it included an obligation on the part of the defender to find a house for the pursuer: Find that the defender illegally dismissed the pursuer from his service on the 11th July 1869: Find that the defender is liable to the pursuer in the sum of £40 in name of damages in respect of such dismissal: Find the pursuer entitled to expenses in both Courts, and remit," &c.

JOHN GALLETLY, S.S.C.—JAMES SOMERVILLE, S.S.C.—Agents.

No. 61. X. MACPHERSON, 304. 10 Jan. 1872. 1st Div.—Lord Gifford, M.

ANDREW M'INTOSH AND SON, Pursuers.—*Sol.-Gen. Clark—Balfour.*
ROBERT AINSLIE, Defender.—*Marshall—Johnstone.*

Novation—Delegation—Agent and Principal—Bill of Exchange—Misrepresentation.—A factor received instructions from his constituent to pay £60 to account of the contract price of work in course of being executed for him. The factor had in his hands sufficient funds belonging to his principal to meet the payment, but of this the creditor was ignorant, and he was induced by the factor to take £20 in cash, and his promissory note for £40, bearing to be for value received for his constituent. On the completion of the work the creditor tendered his account for the balance of the price, £55, 10s. 6d., giving credit for "cash per D. M'L. (the factor) £60." The debtor again referred him to his factor, who again made a payment in cash of 10s. 6d., and gave his own promissory-note for £55 "for value received in balance of account for carpenter work executed at" his constituent's farm. On the factor's insolvency and failure to retire the promissory-notes, *held* (1) that his constituent had not been relieved of the debt by delegation; and (2) that the inaccurate statement innocently made in the account rendered by the creditor, to the effect that he had received £60 from the factor in cash, whereas he had only got £20, was not such a misrepresentation as to operate as a bar to his recovery of the £40, his debtor not having suffered any loss thereby.

In October 1868 Messrs. Andrew M'Intosh and Son, contractors, Redcastle, in the county of Ross, made two written offers for the execution of certain alterations and repairs upon the buildings and offices on the farms of Muirton and Chapelton, belonging to Mr. Robert Ainslie. The price of the work, according to the estimates contained in the offers, was £235, 10s. 6d. The offers were verbally accepted by Mr. Ainslie at a meeting between the parties, and the work was commenced. After certain portions had been completed, M'Intosh and Son wrote to Mr. Ainslie, on 9th January 1869, "we humbly beg, in accordance with your proposal when settling 'the contract,' the favour of a remittance for £120 to account," and on the 11th January Mr. Ainslie sent them a cheque for that amount. On 7th May 1869 M'Intosh and Son wrote to Mr. Ainslie, "we beg to be excused for asking the favour of another remittance of £60 to account for Muirton works." Mr. Ainslie referred them to his factor, Mr. Donald M'Lennan, whom he instructed to pay the amount. M'Lennan had in his hands funds of Mr. Ainslie's sufficient to meet this payment, but of this M'Intosh and Son were not aware, and they were induced by M'Lennan after some delay to take £20 in cash, and his promissory-note for the balance of £40, payable one month after date (6th July 1869) "for value received in account of Mr. Ainslie of Muirton."

On 6th July 1869 M'Intosh and Son wrote to Mr. Ainslie in these terms,—"Sir,—

Having completed the works at Muirton last week we [305] will feel much obliged by your remitting to us at your convenience, balance of contract (viz. £55, 10s. 6d.)

Amt. of contract for works at Muirton			£230 0 0
Do. Do. at Chapelton			5 10 6
Cr. Jany. 14, 1869,—			£235 10 6
Cash, per cheque	£120 0 0		
Do., p. D. M'Lennan	60 0 0		180 0 0
Balance still due			£55 10 6

We are," &c.

To this letter Mr. Ainslie replied on the following day,—" Gentlemen,—Mr. M'Lennan will pay you the balance of your account.—Yours," &c.; and on the 11th July he wrote to M'Lennan saying,—" The contractor for the Muirton repairs wants the balance of his account, £55, 10s. 6d. Please pay him." M'Lennan on this, as well as on the former occasion, had in his hands funds belonging to Mr. Ainslie more than sufficient to meet the payment which he was instructed to make, but of this M'Intosh and Son were ignorant, and he induced them to take payment of 10s. 6d. in cash, and his own promissory-note, payable two months after date (16th July), for the balance of £55, " for value received in balance of account for carpenter work executed at Muirton Mains, square of offices, and dwelling-house." This promissory-note was subsequently renewed on 20th September 1869, in the form of a bill accepted by M'Lennan for £50, payable four months after date, although he was still in possession of funds belonging to his constituent more than sufficient to pay the amount due to M'Intosh and Son.

Thereafter M'Lennan became insolvent, and having failed to retire either the promissory-note of 6th July for £40, or the bill of 20th September for £50, M'Intosh and Son, by whom they were discounted, had to pay the amount, and they requested Mr. Ainslie to indemnify them, but as he refused to do so, they raised this action for the unpaid balance of their account.

The defender pleaded;—(2) The defender should be assoilzied, with expenses, in respect that the pursuers accepted M'Lennan's promissory-note and bill in lieu and satisfaction of the debt due to them by the defender, and that said debt is thus extinguished by delegation. (3) In any view, the pursuers having failed to follow the defender's instructions as to receiving payment of the sums of £60 and £55, 10s. 6d. from M'Lennan, and having failed to inform the defender that payment had been applied for and had not been obtained, having taken M'Lennan's note and bill without the knowledge or authority of the defender, and having thus prevented the defender from realising the funds then belonging to him in the hands of M'Lennan, they cannot now claim payment from the defender, who should therefore be assoilzied, with expenses. (4) The pursuers having, in the state of accounts rendered by them in July 1869, given the defender credit for the sums of £120 and £60 as paid in cash to account of the contract price of the works, are not entitled now to claim payment of any part of the sums so paid, and their claim cannot in any view exceed the balance of £55, 10s. 6d., under deduction of the sum of £5, 10s. 6d. admittedly paid to account thereof.

After a proof the Lord Ordinary decerned in terms of the conclusions of the summons, with expenses.*

---

* NOTE.—" There is no dispute between the parties as to the work done by [306] the pursuers for the defender, or as to the contract price due therefor. The total contract price earned by the pursuers under the two contracts was £235, 10s. 6d.

" Neither is there any dispute that the pursuers, to account of this contract price, received certain sums, for which they give credit in the present action.

" The only question is, whether the pursuers are bound, in addition, to give credit for certain other sums contained in bills or promissory-notes which the pursuers took from Mr. Donald M'Lennan, the defender's factor, but which bills or notes Mr. M'Lennan has failed to pay, or to retire. The defender's plea is, that he furnished Mr. M'Lennan with sufficient funds to pay the pursuers in cash; that he told the pursuers to apply to M'Lennan for payment; and as the pursuers, without the defender's consent, and without notice to the defender, have chosen to take bills from Mr.

[306] The defender reclaimed, and argued;—1. The pursuers, by taking the promissory-notes of the factor, who had no authority to grant them, in [307] place

---

M'Lennan instead of cash, they have, by so doing, taken M'Lennan as their sole debtor, and have discharged the defender to the extent of these bills. Mr. M'Lennan has become insolvent, with considerable funds of the defender's in his hands.

"There is a good deal of force, in an equitable point of view, in the defender's plea; but, after full consideration, the Lord Ordinary has found himself unable to give it effect as operating in law as a discharge to the defender of the debt which he was admittedly owing to the pursuers.

"(1) In substance the defender's plea is, that the acceptance of Mr. M'Lennan's bills amounted to delegation, that is, to the substitution of Mr. M'Lennan as the full and only debtor instead of the defender, and to the entire and final discharge of the defender. Now, delegation is never to be presumed; *in dubio*, a new obligant will be held as corroborative of the original obligant, and not as being substituted for him. Even novation, which is a mere change of obligation,—the obligant remaining the same,—is never presumed, and there is a still stronger presumption against delegation, which requires more elements to complete, and to instruct it.

"In the present case there is really nothing to instruct delegation beyond the bills themselves. There was no discharge granted by the pursuers when they took the bills, not even a receipt for the amount thereof. There was no delivering up of any document of debt; there was no letter or any document whatever expressing or implying that Mr. M'Lennan was to come in place of the defender.

"The terms of the bills or notes themselves do not imply discharge of the defender, for they expressly bear that they are granted as for work done for the defender, and for which the defender is directly liable.

"It is quite fixed that taking a new obligation or document of debt from a debtor himself, for example, a bill, note, or bond, does not innovate the old debt or obligation. It is thought that the circumstance that the bill is granted by the debtor's factor cannot *per se* have the effect of liberating the debtor.

"(2) The Lord Ordinary holds it to be proved that the defender's factor, Mr. M'Lennan, had no power to grant bills in the defender's name, or binding the defender, and that the bills in question were granted without the defender's authority. But this does not make the case stronger for delegation, but rather weaker. The defender can hardly say that he is discharged of his admitted and just debt by an act done without his authority, and without his knowledge or consent. The bills, it appears, were granted because the pursuers were pressing Mr. M'Lennan for the money. Mr. M'Lennan ought to have paid money; but he said he had it not, and the bills were granted as an interim accommodation to the pursuers, who might raise money by discounting them. But it would be very strong to hold that this operates as a final discharge to the defender, the admitted debtor, whether the accommodation bills were paid or not. This is not an action upon the bills, which do not in the least bind the defender, but it is an action upon the defender's original and admitted debt, which has never been discharged.

"(3) Indeed it was almost admitted in the argument by the counsel for the [307] defender that the mere granting of the bills would not by itself be enough, but that it must be taken along with the fact that, at the time of granting the bills, M'Lennan, the defender's factor, had sufficient funds of the defender to pay in cash, but chose rather to pay in bills.

"Now, if it be once admitted, as it must be, that the granting of the bills would not have constituted delegation, if M'Lennan had had no funds, it is difficult to see how his having funds should make a difference. For the pursuers did not know or suspect that M'Lennan had funds. This seems quite established. M'Lennan assured the pursuers that he had no funds, and for this reason he proposed a bill. The pursuers had no reason to doubt M'Lennan's word, and the defender is not entitled to say that he, the defender, is to profit by M'Lennan's fraud. Delegation is a question of intention, and the state of mind of the pursuers, who believed M'Lennan to have no funds, is far more important than the latent and unknown fact that he really had funds.

"But even the defender himself did not know that his factor had funds—he merely guessed or supposed it—for it was not till long after that the factor's accounts were

of a cash payment as directed by the defender, must be held to have taken M'Lennan as their debtor.* 2. If they acted upon any other foot-[308]-ing, they were bound to have intimated to the defender that his factor had failed to make payment as directed, but so far from doing that they stated in their account of 6th July 1869 that they had received £60 in cash from M'Lennan. Had the defender been made aware that instead of his creditors receiving payment out of the funds entrusted to his factor the latter was granting his own promissory-notes he would at once have called M'Lennan to account, whereas, by the pursuers' misrepresentation, he was kept in ignorance until after M'Lennan became insolvent, and the money was irrecoverable. In any view, therefore, the pursuers are barred from insisting in their claim for the £40 for which they took M'Lennan's promissory-note.

Argued for the pursuers;—1. Delegation requires the consent of the creditor, and is not to be presumed. The factor, from whatsoever cause, finding it inconvenient to make an immediate payment of the whole debt, granted the promissory-notes, not in payment *pro tanto* of the sums due, but to enable the pursuers by discounting them to raise the amount. But that was not payment of the debt, and

---

rendered. The Lord Ordinary knows of no authority for holding that the fact of delegation or no delegation may be dependent upon the result of an accounting, of which the creditor, who is said to have taken a new debtor, was not cognisant, and with which he had nothing to do.

"(4) The only remaining view urged by the defender was a sort of personal bar against the pursuers. The defender argued that the pursuers were told to get payment from the factor; their taking bills or notes without notice to the defender was said to be an act of bad faith, which precluded them from making any claim upon the defender, whether the notes were paid or not.

"Without denying that there may be some foundation for this complaint, it is thought to be insufficient as an answer to the pursuers' admitted and proved debt.

"The Lord Ordinary really cannot blame the pursuers very much for believing the statements of the defender's own factor, and taking the bills as interim accommodation. There was nothing to make them suspect fraud or unfair dealing. To intimate to the defender would imply that they doubted his factor's word, and would have been really putting the pursuers in a worse position than that they now occupy.

"Then it is not said or proved that the defender has discharged his factor, or settled with him on the footing that the payments were made in cash and not in bills. On the contrary, the factor's accounts were not rendered to the defender till after 30th November 1869, and this was after the defender had got notice from the pursuers' agents that they claimed the sums in these bills as still due by the defender. The defender cannot say that he has lost anything, or discharged any debt, or parted with any security by reason of his factor having granted the bills. On the contrary, he was told of the bills, and that he was still held liable for the amount before he knew how his accounts with his factor stood.

"On the whole, the original debt due by the defender to the pursuers having been fully established and constituted, the Lord Ordinary thinks that the entire onus lies upon the defender to show that the balance of that debt has been discharged, and that the defender has been discharged of all liability therefor. He thinks that the defender has failed to show this; and accordingly the defender is still liable in the balance of the pursuers' account, which is admittedly due and unpaid.

"The only thing approaching a discharge on which the defender can found is the pursuers' letter of 6th July 1869, in the note annexed to which they give credit for £60,—£40 of which turns out to have been M'Lennan's first bill granted that very day. The answer seems to be satisfactory, that this cannot [308] be founded upon as a receipt, for it is unstamped, and was not intended as such; that the pursuers have sufficiently explained the entry, by disclosing the facts about the bills, which were ultimately dishonoured and unpaid, and that the defender cannot qualify any loss or prejudice which he has sustained by reason of the pursuers' conduct. The defender himself must be primarily liable for his own factor's dishonesty or bankruptcy."

* Buchannan and Co. *v.* Somerville, 1779, Dict. 3402; Chiene *v.* Western Bank, 1848, 10 D. 1523.

it was not discharged.* 2. As to the second question, the defender's ignorance of his factor having given the promissory-note for £40 is immaterial, because he has not suffered any loss by not being aware of the fact. He is neither proved to have lost money by M'Lennan, nor is it proved that if he had known of the promissory-note he would have acted otherwise than he did. Assuming that the promissory-note for £40 had never been granted at all, the pursuers' mistake in stating that they had received £60 in cash in place of £20 could not prevent them from now recovering the money. It was not a fraudulent misrepresentation, intended to mislead, but a mere mistake, which had caused no injury to the defender.

At advising,—

LORD PRESIDENT.—The debt sued for in this case is part of the contract price of certain work executed by the pursuers for the defender, in terms of two written offers, dated 14th October 1868, which he verbally accepted. Now, the contract so constituted contains no provision for payment of any part of the work by instalments; but on the 9th of January 1869 the pursuers wrote to the defender asking "the favour of a remittance for £120 to account," which they say in that letter is "in accordance with your proposal when settling the contract."

This request was agreed to by the defender, who sent a cheque for the £120, and on the 7th May following the pursuers again write to him, and beg "to be excused for asking the favour of another remittance of £60 to account," &c. Now, this mode of making their demand is quite in accordance with what I previously said, that under the contract they had no absolute right to obtain payment by instalments, although, from the terms of their first letter, and the defender's compliance with their request, it may be inferred that there had been some verbal undertaking on his part to that effect. In answer to the pursuers' letter of 7th May 1869 the defender referred them to his factor, Mr. M'Lennan, and at the same time instructed him to pay them the £60 which they asked to [309] account. It is admitted by the pursuers that the factor had in his hands funds belonging to the defender sufficient for that purpose, but it is neither admitted nor proved that they were aware of that at the time. Then the pursuers, having gone to M'Lennan as factor, asked payment of the £60, and it appears that he told them he had not in his possession funds sufficient to meet their demand, but that he could pay them £20, and offered to give them his promissory-note for the balance. This offer, however, was not made at first, but some time afterwards, in the beginning of July, Mr. M'Lennan having in the meantime paid £20 to the pursuers, who were expecting the other £40, for which Mr. M'Lennan, having assured them that he had not the money, eventually gave them his own promissory-note at one month's date, which expressly bears "for value received in account of Mr. Ainslie of Muirton."

A transaction of the same nature took place on a subsequent occasion, in payment of a balance of £55, 10s. 6d., due to the pursuers upon their account for work done to the amount of £235, 10s. 6d., and the question is, whether, to the extent of the promissory-notes granted by M'Lennan for £40 and £55 respectively, there has been a discharge of the debt *pro tanto* by delegation? But before proceeding to deal with that, I ought to mention another piece of evidence afforded by a letter from the pursuers to the defender, dated 6th July 1869, in which they acknowledge receipt of "Cash per cheque, £120." "Do. per D. M'Lennan, £60." The object of that statement was to show the amount of the balance due beyond the £120 and the £60 paid to account, and in stating these two payments there is no doubt an inaccuracy in saying, "Cash per D. M'Lennan, £60," because the pursuers only got £20 from M'Lennan in cash, with his promissory-note for £40. Now, apart from this letter, the effect of which I shall afterwards consider, I must say that I think it very clear that no delegation was intended or effected. It is very necessary to keep in view what delegation is, and it is nowhere more accurately defined than by Erskine (iii. 4, 22), who says, "delegation, which may be accounted a species of novation, is the changing of one debtor for another, by which the obligation which lay on the first debtor is discharged; *e.g.*, if the debtor in a bond should substitute

* Pattie *v.* Thomson, 1843, 6 D. 350; Wilson, &c. *v.* Gardener, 1807, Hume, 247; Muir *v.* Dickson, 1860, 22 D. 1070; Williams *v.* Newlands, 1861, 23 D. 1355; Pollock *v.* Murray and Spence, Nov. 6, 1863, *ante*, vol. ii. 14; Pothier, Oblig. Eng. translation, vol. i. 392.

a third person, who becomes obliged in his place to the creditor, and who in the Roman law is called *expromissor*, this requires not only the consent of the *expromissor* who is to undertake the debt, but of the creditor." Now, in any ordinary case of delegation one would rather expect the proposal to substitute a new debtor would come from the original obligant; but in place of that we start here with the circumstance that there was not only no such proposal on the part of the debtor, but he was actually ignorant of the delegation, which he now alleges was effected by the pursuers' acceptance of M'Lennan as their debtor. Now, it may be that delegation might take place even without the knowledge of the original debtor, provided another person represents him in undertaking the obligation as *expromissor*, and the creditor acquiesces in that arrangement. But was that the case here? Did M'Lennan, the factor, intend to put himself in the place of his constituent, Mr. Ainslie, and to discharge him of the debt? I can find no evidence of that. On the contrary, I think the very form of the promissory-note granted by M'Lennan to the pursuers negatives that suggestion, because it is quite plain that what he did was in his factorial character, and for behoof of his employer. The words used are, "for value received in account of Mr. Ainslie of Muirton"; but that is plainly not discharging the debt to the effect of liberating Mr. Ainslie. It is laid down by all the authorities that delegation is not to be presumed, and I think the doctrine even goes further, and that there is a strong presumption against it. Erskine (iii. 4, 22) says, that "neither novation or delegation is to be presumed; for a creditor who has once acquired a right ought not to lose it by implication, and consequently the new obligation is *in dubio* to be accounted merely corroborative of the old." Now, Erskine is there referring to the case of a new obligation; but the case before us is *a fortiori* of that, because there was here an undertaking by the factor to provide the means of payment in a way which plainly implied that the debt was still to be kept up for a period. It appears to me that what took place was substantially this: The factor said, "I have not in my possession at present [310] funds of Mr. Ainslie's sufficient to meet your claim, but I will give you the means of raising the money at once, by granting a promissory-note on Mr. Ainslie's behalf, which I will retire when it falls due." In these circumstances I am of opinion that there was no delegation. But then it is contended that the pursuers' letter of 6th July 1869 supports the plea of delegation. No doubt that letter does not accurately represent the fact, and a creditor ought not so to conduct himself as to induce the belief that he has accepted one person as his debtor in place of another. But then the evidence of that must be very distinct. I do not think the parties could drift unconsciously into delegation; but their intention must be clear and plain, or the law cannot give effect to it; and the single circumstance of the erroneous statement contained in this letter of 6th July appears to me to be so entirely outweighed by the other evidence in the case that I am unable to regard it as of any importance.

It was argued, however, that the letter in question operated as a bar to the action. But it could only do so if it contained a statement false and fraudulent, or followed by injurious consequences to the defender. It is not pretended that the inaccurate statement to the effect that the pursuers had received from M'Lennan £60 in cash was either false or fraudulent. It was plainly an erroneous statement innocently made, and the pursuers, therefore, cannot be held bound by it, unless the defender can show that he has suffered injury in consequence. But that has not been done, and in the absence of any statement or proof that he would have acted differently from the way in which he did, had he known of the existence of the promissory-notes granted by M'Lennan, I am for adhering to the Lord Ordinary's interlocutor.

LORD DEAS.—I am of the same opinion on both points. The only thing I wish to guard myself against being assumed to hold is, that actual intention on the part of the creditor to accept a new debtor is essential to delegation. I am not prepared to affirm that. I am not prepared to say that there could be no delegation in a case where the creditor had so acted as to lead the original debtor *bona fide* to believe that the creditor had accepted a new debtor in his place. The letter of the pursuers, in which they give credit for the factor's promissory-note as a cash payment, is part of the evidence in the case, but it is not sufficient to introduce such a qualification of the rule as I have pointed to. Mr. Ainslie did not know that that promissory-note had been granted, and therefore it is difficult for him to say that he was led to believe that there was delegation.

As regards the second question, I think there is a great deal in the answer made by the Solicitor-General to the argument for the defender, that the question must be dealt with very much as if the bill had not existed. Mr. Ainslie did not know of the existence of the bill till after his factor's bankruptcy, and therefore there is great force in the observation that the defender's second plea would need to have been rested on separate grounds from that transaction.

Supposing Mr. Ainslie to have believed that part of the debt had been paid by a bill, I see no evidence from which to conclude that he would have done otherwise than he did. It does not appear that he would have repudiated what his factor had done. It was a bill for an undoubted and lawful debt of his, and it does not follow that, because he did not authorise his factor to grant bills for him, he would not have sanctioned the transaction. Still less does it follow that the creditor was much to blame for accepting the factor's bill. The relation between Mr. Ainslie and M'Lennan, of landlord and land-steward, is a most material circumstance. It is quite a different case from that of co-cautioners, or of cautioner and principal, where the one has no control over the other, and is not responsible to the other. Mr. Ainslie does not say that he has lost anything by M'Lennan, nor does it appear that M'Lennan is not in a position at this moment to pay all that he owed.

It is very difficult to suppose that a party accepting a bill from a land-steward for the landlord's debt intends to substitute him as debtor for the landlord. As the result of the whole evidence in the case, I think there is no foundation for the defender's pleas.

[311] LORD ARDMILLAN.—I think this is one of the clearest cases I ever saw. Mr. Ainslie is proprietor of premises, on which the pursuers execute repairs for him. He was undoubtedly indebted to the pursuers. His factor is instructed by him to make a payment to them to account, and he pays them partly in cash, and gives his promissory-note for the balance, and afterwards a bill. The factor having failed to retire the bill, and the pursuers being called on to take it up, they bring this action against Mr. Ainslie for the balance of their account, under deduction of the payments made in cash. The action is not brought on the bill, but against the original and undoubted debtor, the party on whose property the labour was expended. In answer to that demand delegation is pleaded. I entirely agree in the general exposition given by your Lordship on that point. Delegation is not a form of contract, but of discharge, not the adding of a new debtor, but the substitution of one debtor for another, implying the consensual release of the first debtor. After what Lord Deas has said, I would hesitate to say that a case cannot be conceived where there can be delegation, without the consent of the creditor. But if such a case is possible, it must be of the rarest occurrence, and in exceptional circumstances, very different from those of this case. It cannot be here held, as matter of reasonable inference from the evidence, that the pursuers, having Mr. Ainslie as their unquestionable debtor, preferred to substitute M'Lennan. That supposition seems quite contrary to the plain truth and justice of the case, and the intention of the parties. But the fact that the pursuers had no option is conclusive. Where a demand is made on the debtor's agent, and no option is given to the creditor of cash payment, it is clear law that the debt is not discharged. That is clearly stated by Thomson on Bills, pp. 197 and 198, and still more pithily by Byles, p. 381 (10th ed.), who cites the case of Marsh *v.* Pedder, 1815, 4 Campbell, 257, which seems precisely in point. I hold, therefore, that the creditor in this case having been sent by the debtor to his factor for payment, and having, from the agent, got the offer of a bill, without the option of cash, he never discharged the obligation of Mr. Ainslie, which still subsists.

If that be so, the next question is the effect of the letter of the pursuers to Mr. Ainslie, in which they credit him with the amount of M'Lennan's promissory-note as a payment of "cash." Taking it with the other evidence, I do not think that letter instructs consent to change the debtor. The bill was not cash in law till paid, but it was expected to be paid, and might well be described as cash; and I think your Lordship correctly described the pursuers' mistake in calling it cash, as an inaccurate but innocent representation of what they believed to be the state of the fact. I am also of opinion that not only is delegation not to be presumed, but that the presumption is against it. It cannot be drifted into without mutual consent.

On the question of personal bar I have nothing to add. There is nothing to bar the pursuers' claim if there was no delegation, unless Mr. Ainslie can show that he

suffered injury by their erroneous statement. But though he has adduced himself as a witness, he does not say that he has lost one shilling by M'Lennan, or call him as a witness.

On the whole, I have not the least doubt that the Lord Ordinary has rightly decided the case.

LORD KINLOCH.—I have arrived at the same conclusion with your Lordships. I regard the case, in the first place, apart from the letter of 6th July, and from that point of view I think there was very clearly no delegation.

What are the circumstances? We find the defender, a landed proprietor, desiring his factor to pay certain sums to account of the pursuers' claim, and he informs the pursuers that he has done so. The pursuers having applied to the factor, are told that he has not at the time funds belonging to his constituent sufficient to pay them in cash, but that if they will take a promissory-note by the factor himself he will have funds in his hands sufficient to retire it by the time when it falls due. Accordingly they take the note. I think it quite impossible to infer from these facts that the creditor discharged the original debtor, and took the factor as a substitute for the debt. In taking the factor's acceptance, [312] I think the pursuers either took it on the footing that it was virtually their debtor's acceptance, or that they took it as a temporary accommodation, leaving their debtor in the same position as before. In either case the debt remains equally untransferred.

With regard to the letter of 6th July, I confess that I at first entertained some difficulty, which I have now got over. The letter does not prove that delegation was intended; on the contrary, it implies that the debt was played out and out, and delegation is not payment, but substitution of a different debtor in the obligation. No doubt the letter involves an erroneous statement on the part of the pursuers, that they had received cash from the factor, when they had only received a bill; but I am satisfied that before their claim can be prejudiced in consequence of that statement upon their part it must be shown not only that the statement was intentionally untrue, but also that it was followed by injury to the defender. Now, in the first place, I do not think the letter amounts to wilful misrepresentation, and, in the second place, I agree in thinking that there is a total want of any proof of Mr. Ainslie's having sustained any injury in consequence of anything which the letter contains. If Mr. Ainslie had been told that the promissory-note had been granted by his factor, in consequence of his not having the necessary amount of cash in hand at the time, I see no reason to doubt that he would have believed the factor's statement as much as the pursuers did, and regarded the granting of the note as a convenient temporary arrangement; and I perceive nothing to lead to the supposition that he would have acted otherwise than he did in the way of protecting himself from loss.

THE COURT adhered, with additional expenses.

MACKENZIE & BLACK, W.S.—WILLIAM KENNEDY, W.S.—Agents.

No. 62. X. MACPHERSON, 312. 11 Jan. 1872. 2d Div.—Sheriff of Aberdeenshire, I.

AUGUSTUS LAVAGGI, Pursuer and Respondent.—*Sol.-Gen. Clark—Balfour.*
PIRIE AND SONS, Defenders and Appellants.—*Shand—M'Laren.*

Sale—Price.—Held that when a person agrees to sell goods to another at a price to be fixed by the latter the contract of sale is complete.

Principal and Agent—Compensation—Sale.—Opinions, that when goods are sold by an agent as such, although the name of the principal is not disclosed, the buyer is not entitled, in answer to a claim for the price, to plead compensation in respect of a debt due to him by the agent.

This action was raised in the Sheriff-court of Aberdeenshire by Augustus Lavaggi, merchant, London, against Pirie and Sons, paper-manufacturers, Aberdeen, concluding for payment of "the sum of £50, 7s., being the value of ten bales cotton

rags, the property of the pursuer, and sent by his agent, Joseph Wood, commission agent in Aberdeen, as goods of the pursuer, his principal, to the defenders, on or about the 1st day of October 1870, with a view to a sale thereof to the defenders, and which rags the defenders say were converted by them into paper, although no sale thereof to them was or has been completed: Or otherwise, and whether a sale should or should not be held to have been effected, the defenders ought to be decerned to make payment to the pursuer, as disclosed principal, or to the said mandatory on his behalf, of the said sum of £50, 7s., or of such other sum, more or less, as may be found to be the fair market price of the said rags upon the said 1st day of October 1870: Or otherwise, and in any event, the said defenders ought to be decerned to make payment to the pursuer, or his said mandatory, of the said sum of £50, 7s. as the amount of loss and damage sustained by the pursuer in the premises."

The pursuer pleaded;—1. The ten bales of rags in question having been the property of the pursuer, and having never been sold to the defenders, but only sent to them for their examination, and for an offer being made for them with a view to a sale, his right of property continued intact, and he was entitled to have them returned at any time previous [313] to the completion of a sale. 2. No sale having taken place, and the defenders having refused to return the said rags, they are liable in payment of the value of the same, or of such price as he might have been able to obtain for them. 3. Where, as here, a party deals with a broker who discloses a principal, or where it is known to that party that such broker was not the proprietor of goods or subjects which have come into that party's possession, he has no right to compensate or credit the goods or value or price thereof against a debt due to him by the broker individually.

The defenders pleaded;—1. The defenders having dealt with and relied on Mr. Wood as a principal, are entitled to set off the price of the goods against the debt due by Wood to them—Bell's Commentaries (5th ed.), vol. ii. p. 125. 2. The delivery of the goods to the defenders, with the letter from Wood, under the custom of trade between the parties, constituted a sale.

A proof was led, from which it appeared that Wood (who was sequestrated in October 1870) had become insane, and could not be examined.

Mr. Gordon Pirie, one of the defenders' firm, deponed,—"I met Mr. Wood. When he said he had some rags to sell I said we would buy them, but must fix the price ourselves, as I knew nothing of the quality. He agreed to send them on those terms—that is, for our firm to fix price after examination. I thought that conversation concluded the bargain. He knew that I would not fix an unreasonable price, and I would not have held him to his bargain had he objected to the price. This conversation took place a day or two before receiving the letter, No. 20. I considered the goods *bona fide* ours, and it would have been matter of favour had we given them back on Mr. Wood's objecting to our price. We got the goods on or about 1st October. Mr. Wood is credited in our books with their value on 1st October. We had very extensive dealings with Mr. Wood, sometimes to the amount of £2000 or £3000 a-year for rags, and in every case he sent invoices in his own name. We knew he got his goods elsewhere, and sometimes knew from whom, but we always dealt with him alone. In the case of the rags we did not knew from whom he got them."

The letter of 1st October 1870 referred to was as follows:—"Aberdeen, 1st October 1870.—Dear Sir,—The ten bales rags have been sent by the same party who sent the former lot. He specifies them as cotton rags, No. 2, as follows:— . . . I shall feel obliged if you will have them sorted, and say what price you can give for them.—Yours faithfully, Jos. Wood. G. Pirie, Esq., Stoneywood Works."

The Sheriff-substitute (Dove Wilson) pronounced this interlocutor:—"Aberdeen, 25th July 1871.—Having considered the record and proof, Finds (1) that the pursuer consigned to the bankrupt, Joseph Wood, the ten bales of rags libelled, for the purpose of sale; (2) that Joseph Wood sold and delivered said rags to the defenders; (3) that in so doing the said Joseph Wood did not disclose that he was acting as agent; (4) that the said Joseph Wood had for some time previously a course of extensive dealings with the defenders, in all of which he transacted with them as a principal; (5) that on the bankruptcy of Wood he was indebted to the defenders in a sum considerably exceeding the value of the rags in dispute; (6) that it was not disclosed to the defenders that Wood was agent for the pursuer till after Wood's bankruptcy: Finds in point of law that all defences pleadable against Wood, as at the date of the disclosure of

the agency, are pleadable against the pursuer; and that therefore the defenders are entitled to set off the value of said rags against the debt due to them by Wood's bankprut estate: Therefore assoilzies the de-[314]-fenders from the conclusions of the action: Finds them entitled to expenses," &c.

The Sheriff (Smith) on appeal recalled this judgment, and pronounced the following interlocutor:—" Finds that the pursuer having, for the purposes of sale, consigned to the bankrupt, Joseph Wood, the ten bales of rags libelled, the same were, on or about the 1st of October 1870, sent by the said Joseph Wood to the defenders, with a request that they would sort them, and state what price they could give for them: Finds that, although the said Joseph Wood did not disclose who his principal was, the defenders knew that in said transaction he was acting as an agent: Finds, farther, that when this action was raised the price of said rags had not been fixed: Therefore finds in law that the said rags were still the property of the pursuer, and the defenders being no longer able to give delivery, are liable to him in the value thereof; remits the case back to the Sheriff-substitute that the value may be fixed; and decerns." *

---

* " NOTE.—The question in the present case is, whether the defenders are at liberty to keep the goods of the pursuer in payment of a debt due to them, not by him, but by an insolvent named Joseph Wood, who carried on business as a broker and commission merchant, and to whom the goods in question had been consigned for the purposes of sale.

" When an agent or factor sells the goods of his employer as his own, the purchaser, being ignorant of the fact that he is only an agent, is entitled, in an action by the principal for the price, to set off a debt due to himself from the agent or factor. The reason is, that a vendor who allows another to deal with his goods as if they were his own cannot deprive the vendee of the equities which he has against the apparent vendor, by resuming his character of principal and reducing the seller to the position of a mere agent. But if the seller was known to possess a purely representative character, no such set-off can be pleaded against the principal, even although the buyer did not know who the principal was. This point was so ruled in the case of Semenza v. Brinlay, 34 L. J. C. p. 161, where it was said by the Judges that, in order to make a plea of set-off a valid defence within the rule stated, it must be shown that the contract was made by a person whom the plaintiff entrusted with the possession and ownership of the goods; that he sold them as his own, in his own name as principal, with the authority of the plaintiff; and that the defendant then believed him to be the principal in the transaction.

" Thus the first point for decision in this case is, whether the defenders dealt with Wood as principal in the transaction, and had reason to believe that the rags in question were his property. The Sheriff is inclined to think that this can hardly be maintained in the face of the letter of 1st October 1870, which opens with the statement that the rags had 'been sent by the same party who sent the former lot, and who specifies them as cotton rags, No. 2.' The plain meaning of this is, that this unnamed person had sent the rags to Wood for disposal on commission, not that Wood had acquired or purchased them from the same collector. The language used is just what an agent would have employed under the circumstances, and the defenders, as men of business, must have known quite well Wood's position in the matter. If that be so, the pursuer, as principal in the transaction, is still in time to come forward and claim the price of his property.

" The second point is, whether the transaction, at the date of the declaration of Wood's insolvency, was so complete as to vest the pursuer's property in the defenders' person. In the letter of 1st October, already referred to, Wood writes, 'I shall feel obliged if you shall have them sorted, and say what price you can give for them.' It is explained by the rag-merchants who were examined that this is the common way of doing business. 'When a party with whom we are not familiar brings us mixed rags, we sort them first, and report to him the yield of them—that is, the various classes of rags contained in the lot. After classing them, we say what we are willing to give. If the seller [315] agrees, the bargain is closed.' But if, says another, 'the seller is not content with our price, he can take them away; there is no sale till the price is agreed to.' The defender, Mr. Gordon Pirie, does not contradict this evidence. He says he bought the rags on the footing that the price was to be left to himself, after he had examined them to see what they were worth. This, however, is not the

[315] The defenders appealed.*

LORD JUSTICE-CLERK.—The first question is, whether the defenders dealt with Wood as a principal; and the second, whether there was a concluded contract of sale. I am of opinion, on the first of these points, that the defenders did deal with Wood as a principal. The law on which the Sheriff relies is sound enough in cases which admit of its application; but we have here a long course of dealing, to a very large amount in point of value, between the defenders and Wood as principal, and accounts settled from quarter to quarter on that principle. In these accounts all the transactions are entered as the individual transactions of Wood, and the balances are calculated and carried on without any reference to any one else. From the nature of the business, the defenders knew that Wood had correspondents elsewhere; but they had no reason to know, and they were in no degree bound to inquire, on what terms they dealt with him. In these circumstances I have no doubt that the same principle of compensation which is given effect to throughout the whole of their mutual accounts must apply in the present case.

On the second question I can have no doubt that there was a completed contract, under which the defenders agreed to take the goods, and Wood agreed to take such price as the defenders should fix after having tested their quality. The rags were accordingly, by the direction of Wood, delivered to the Piries, and retained and used by them. I have no doubt the defenders were bound to fix the price or value of these rags; nor is it in any degree material, even if the price had not been fixed prior to Wood's insolvency. There was a valid obligation to accept such price as they should fix. In my opinion the sale was complete; but even if there should be technical difficulty about that, there was certainly a concluded transaction, from which neither could resile.

I am of opinion that the judgment of the Sheriff is wrong, and that we should return to that of the Sheriff-substitute.

[316] LORD COWAN.—I concur in thinking that the case raises no question of law, and that its solution depends on the application of undisputed law to the facts of the case. The Sheriff has found that "the pursuer having, for the purposes of sale, consigned to the bankrupt, Joseph Wood, the ten bales of rags libelled," the same were sent by him to the defenders, "with a request that they would sort them, and state what price they could give for them"; and farther, "that, though the said Joseph Wood did not disclose who his principal was, the defenders knew that in said transaction he was acting as an agent." I agree with your Lordship in holding that these findings are not well founded on the facts. I cannot hold it to have been proved that Pirie and Sons knew that he acted as agent in this particular transaction.

---

fair meaning of the letter of 1st October, nor was it Wood's own understanding, so far as that can be gathered from his letter to the pursuer of 29th October. It is there assumed that the sale was to be considered unclosed until the value of the rags had been reported on by the defenders. Accordingly, it is not surprising that the defender candidly admits that he would not have held Wood to his bargain had he objected to the price when he came to state what he was willing to pay. Now, that is just what has happened. Nothing more was said on the subject till after Wood's insolvency, and when the price was mentioned it was objected to by the pursuer as much too little. So standing the facts, it cannot be held that there was here any completed sale. It is necessarily implied in the very nature of sale that the parties should be at one in respect to the price (1 Bell's Coms., p. 87). If the price is left to the buyer himself, or is to depend on his own measurement, the sale will be held to be complete; but if the concurrence of the seller is necessary, either for the purpose of fixing the price, or for ascertaining the measurement when the price depends upon the quantity, the performance of these things is a condition precedent to the transfer of the property. For these reasons the Sheriff is of opinion that there was here no concluded contract, and that the property still remains in the original owner."

* *Defenders' Authorities.*—Hinchiner, Hunter, and Co. *v.* Stewart and Ninian, M. 14,206; 2 Bell's Com. (5th ed.) 125.

Pursuer's Authorities.—Alison *v.* Fairholm and Malcolm, M. 15,132; Fleming *v.* Findlay and Co., June 29, 1832, 10 S. 739; George *v.* Clagett, June 30, 1797, 7 Durnford and East's Repts. 359; Wilson *v.* Marquess of Breadalbane, June 14, 1859, 21 D. 957.

Wood had a long series of transactions, extending over years, with the Piries, as principal, and no attempt has been made to show that on this occasion he acted in a different character or capacity from what he did in the other transactions. This, in my view, is all-important in a question of knowledge. I would have required much clearer ground to rebut it than is to be found in the proof.

LORD BENHOLME.—I have come to the same conclusion. The English case of Semenza (34 L. J. C. p. 161), quoted by the Sheriff, affirms the doctrine that if the purchaser knows that the seller acted as agent, though he did not know for whom he was agent, he cannot have the benefit of compensation. But it will not be enough to say if he knew or might have known, for the alternative can only be introduced if there is a duty to know. There was no duty in the purchaser to inquire. If there was a duty, if was the duty of the agent to disclose that he was acting for another.

If the transaction was made between Pirie and Son and Wood as principal the benefit of compensation must be conceded, whether there was a concluded sale or not. I am, however, of opinion that there was a concluded sale. The way in which the parties had dealt for years shows that there was confidence between them. The seller had full confidence in the integrity of the purchasers, and it is quite likely that he should leave it to them to say what price they would give. This is perhaps not a common way of effecting a sale, but it is quite a competent way. We have the letter, which is not inconsistent with the parole evidence. We cannot, therefore, avoid looking at it, although by itself it would not establish a sale. After looking at it with the utmost scrutiny, I can find nothing inconsistent with the evidence, which establishes that there was a completed contract of sale.

LORD NEAVES concurred.

This interlocutor was pronounced :—" Having heard counsel on the appeal, Find that in the transaction libelled the appellants dealt with Joseph Wood as a principal, and not as an agent : Find that the rags in question were delivered to the appellants on or about the 1st of October, in terms of a contract between them and Joseph Wood, which was concluded prior to the insolvency of the latter : Therefore sustain the appeal : Recall the judgment complained of, and assoilzie the defenders from the conclusions of the action : Find the appellants (defenders) entitled to the expenses in both Courts, and remit," &c.

HENRY & SHIRESS, S.S.C.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 63. X. MACPHERSON, 317. 11 Jan. 1872. 1st Div.—Lord Mackenzie, B.

THE TRUSTEES OF THE LATE RICHARD BANNATINE, Pursuers.—*Millar—Crichton.*

WILLIAM ALLASON CUNNINGHAME, Defender.—*Sol.-Gen. Clark—Marshall.*

Process—Reclaiming Note—Competency—Judicature Act (6 *Geo. IV. cap.* 120), *sec.* 17—*Court of Session Act*, 1868 (31 *&* 32 *Vict. cap.* 100), *secs.* 52 *and* 53—*Held* (1) That although the 17th section of the Judicature Act enacts that a Lord Ordinary in pronouncing judgment on the merits of a cause " shall also determine the matter of expenses," it is competent for the Lord Ordinary to embody his judgment in two interlocutors, 1st, an interlocutor on the merits, reserving the question of expenses, and, 2d, an interlocutor disposing of the question of expenses ; (2) That under the 52d section of the Court of Session Act, 1868, an interlocutor of the Lord Ordinary disposing of the whole subject-matter of the cause, but reserving the question of expenses, may be competently submitted to the review of the Inner-House, after the lapse of twenty-one days from its date, by a reclaiming note against a subsequent interlocutor disposing of the question of expenses.

In this case the Lord Ordinary, by an interlocutor dated 15th July 1871, disposed of the whole merits of the case, and appointed the cause to be put to the roll for the disposal of the question of expenses. On 2d November 1871, his Lordship, having heard counsel, found the pursuers entitled to expenses subject to modification, allowed an account to be given in, and remitted to the Auditor to tax and report.

On 10th November 1871 the defender boxed a reclaiming note, by which he sought to bring under review of the Inner-House not only the last-mentioned interlocutor but also the judgment on the merits.

The pursuers objected to the competency of the reclaiming note, and argued;—After a final judgment exhausting the merits of the case the Lord Ordinary cannot competently award expenses by a subsequent interlocutor,* and the previous judgment on the merits not having been reclaimed against within the statutory period cannot now be competently reviewed by the Court. Moreover, the pursuers are willing to pass from the finding of expenses in their favour.

Argued for the defender;—The rule recognised in the case of Wilson's Trustees applies only to the case of a final judgment in which no mention whatsoever is made of expenses, as it is then presumed to have been the intention of the Court to award costs to neither party. But here the question of costs was reserved in accordance with a very usual practice in the Outer-House, and it would be contrary to the policy of the Court of Session Act of 1868 to have two reclaiming notes. Under that Act the defender could not competently have reclaimed against the interlocutor on the merits until the subsequent interlocutor was pronounced, because, with the exception of reclaiming notes against interlocutors pronounced during the preparation of the case, the statute provides for only one reclaiming note when the whole cause has been disposed of, which is not done until costs have been either awarded or refused.

LORD PRESIDENT.—It is not disputed that the Lord Ordinary's interlocutor of 15th July 1871 was a judgment "on the merits of the cause," in the words of the 17th section of the Judicature Act, or an interlocutor disposing of "the whole subject-matter of the cause," to use the words of the 53d section of the Court of Session Act of 1868. But this interlocutor does not dispose of the question of expenses, but merely appoints the case to be put to the roll for that [318] purpose, and by a subsequent interlocutor of 2d November 1871 his Lordship found the pursuers entitled to expenses subject to modification. Now, this mode of dealing with the question of expenses is not strictly consistent with the 17th section of the Judicature Act, because that section provides that the Lord Ordinary in pronouncing judgment on the merits "shall also determine the matter of expenses," from which I think the meaning of the Legislature was that the Lord Ordinary, in his judgment disposing of the merits, should also deal finally with the question of expenses. I do not mean that this implies that he should finally decern for expenses, but that in his judgment on the merits he should give or refuse them in whole or in part. But then the 17th section of the Judicature Act has been made the subject of construction in several decided cases. It has been held that if the Lord Ordinary, in disposing of the merits of the cause, makes no mention of expenses, that is tantamount to an express finding that neither party is entitled to expenses; and it has also been held that if the Lord Ordinary reserves the question of expenses until he can hear parties upon it, that is quite consistent with the provisions of the 17th section of the Judicature Act, although it is doing in two interlocutors what the statute apparently intended should be done in one. Now, that is what was done here, because, although the interlocutor of 15th July 1871 does not expressly reserve the question of expenses, it appoints the case to be put to the roll for the purpose of hearing counsel upon that question, which is practically the same thing. The question, therefore, is whether that interlocutor so entirely disposes of the whole subject-matter of the cause within the meaning of the 53d section of the Court of Session Act of 1868 as to render the present reclaiming note too late. Now, one object of the Act was, no doubt, to diminish the number of reclaiming notes, and if an interlocutor like that of 15th July 1871 must be reclaimed against within a certain number of days, or become final, the consequence would be that we should always have two reclaiming notes in a case of this kind, where the Lord Ordinary disposes of the question of expenses by a separate interlocutor. That unquestionably would to some extent defeat the object of the statute; but of course everything depends upon the meaning of the 53d section, which provides that "It shall be held that the whole cause has been decided in the Outer-House when an interlocutor has been pronounced by the Lord Ordinary which either by itself or taken along with a previous interlocutor disposes of the whole

* Wilson's Trustees *v.* Wilson's Factor, 1869, *ante*, vol. vii. 457; Hamilton *v.* Bennet, 1832, 10 S. 426.

subject-matter of the cause or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause." Now, so far, I do not think that any of the provisions of this section of the statute affect the question of expenses, but the present question depends rather on the words immediately following, which appear to me to have had specially in view the 17th section of the Judicature Act,—"But it shall not prevent a cause from being held as so decided," *i.e.*, it shall not prevent it from being held that the whole cause has been decided, "that expenses, if found due, have not been taxed, modified, or decerned for." Now, I think that in using these words the framer of the Act had only two alternatives in view, first, the case where expenses have been found due, and second, the case where expenses have been refused, and these are just the two cases contemplated by the 17th section of the Judicature Act, which directs the Lord Ordinary, in giving judgment on the merits of the cause, to determine the matter of expenses by "either giving or refusing the same in whole or in part." Well then, under the 53d section of the statute of 1868 the judgment so pronounced shall be final, although where expenses have been found due the account may not have been taxed; but where they have been found not to be due, nothing more is to be done, the whole cause being exhausted in every possible sense, so that, the alternative being, as I have stated, the Legislature leaves the case where no expenses have been awarded to work itself out, and in the other alternative provides that it shall not prevent the whole cause from being held to be decided, that expenses if found due have not been taxed, modified, or decerned for.

But then the case occurs where expenses have neither been given nor refused, neither found due nor found not to be due, but where the Lord Ordinary pauses and desires to hear parties before disposing of the matter. I am of opinion that [319] until he does dispose of the question of expenses he has not done all that was contemplated by either Act, and as the statute of 1868 contemplates only one interlocutor to be reclaimed against without leave, the result, I think, is that in this case the Lord Ordinary's first interlocutor of 15th July 1871 was incomplete, although it might be completed according to practice by the subsequent interlocutor of 2d November. But then the 52d section of the recent Act comes into operation, which provides that "every reclaiming note, whether presented before or after the whole cause has been decided in the Outer-House, shall have the effect of submitting to the review of the Inner-House the whole of the prior interlocutors of the Lord Ordinary of whatever date," and in terms of that section I think that the reclaiming note against the interlocutor of 2d November brings under review all the previous interlocutors, including that of 15th July, and I do not think that the circumstance that these two interlocutors have to be combined to form a complete judgment exhausting the cause prevents the operation of the 52d section of the Act of 1868, because the words of that section are very comprehensive. I am of opinion, therefore, that the objection to the competency of this reclaiming note is ill founded.

The other Judges concurred.

Objections repelled, with expenses.

W. K. THWAITES, S.S.C.—A. & A. CAMPBELL, W.S.—Agents.

No. 64. X. MACPHERSON, 319. 12 Jan. 1872. 1st Div.—Lord Mackenzie, B.

THE TRUSTEES OF THE LATE RICHARD BANNATINE, Pursuers.—*Millar—Crichton.*

WILLIAM ALLASON CUNNINGHAME, Defender.—*Sol.-Gen. Clark—Marshall.*

Succession—Heir and Executor—Apportionment Act (4 & 5 *Will. IV. cap.* 22).—*Held* that the Apportionment Act does not apply to the succession of a fee-simple proprietor, but only to those cases where the deceased was entitled to the periodical rents, &c. of property in which he enjoyed merely a limited or terminable interest.

Agent and Principal—Negotiorum gestor—Accounting—Culpa.—The proprietrix of a landed estate, which her husband, under their marriage-contract, was to liferent

after her death, conveyed the fee to a relative, whom she appointed her executor. At her death, the executor being absent in a distant colony, and having delayed to execute a power of attorney to wind up the affairs of the deceased, the husband, from the necessity of the case, acted as *negotiorum gestor*, and without authority paid his wife's debts, legacies, &c., and uplifted and intromitted with the rents and proceeds of the property. In an action of accounting against him at the instance of the executor's representatives, *held* that he was liable as *negotiorum gestor* for gross omissions only, and was not bound to have used exact diligence.

This was the sequel of the preceding case, and of the case reported *ante*, vol. vii. 993.

By antenuptial contract of marriage in 1834 between Mr. W. A. Cunninghame and Miss Elizabeth Allason, she conveyed to him her estate of Logan, in the county of Ayr, in case he should survive her, in liferent allenarly, and to the children of the marriage in fee. In virtue of this conveyance Mr. Cunninghame was infeft in the liferent of the estate.

By a disposition and settlement executed in 1837 Mrs. Cunninghame conveyed her whole property, heritable and moveable, then belonging, or which might happen to belong to her at her death, and in particular the estate of Logan, to and in favour of herself and the heirs whatsoever of her body; whom failing, to her cousin, Mr. Richard Bannatine, and the heirs whatsoever of his body; whom failing, to her husband; and failing him, to certain other disponees, and her own nearest heirs and assignees whomsoever. This conveyance was made under burden of a number of annuities and legacies, with a declaration "that any memorandum signed [320] by me, however informal, giving additional legacies or annuities, or otherwise expressive of my will, shall be equally binding on my said disponees as if forming part of these presents, any law or practice to the contrary notwithstanding."

By a holograph will executed in 1835, Mrs. Cunninghame bequeathed, *inter alia*, a legacy of £100 and an annuity of £10 to her maid, Janet Merry, afterwards Finlay; and by the disposition and settlement of 1837 she bequeathed to the same person a legacy of £100 and an annuity of £15. She also, during her last illness, gave Mrs. Finlay a letter in these terms:—"Mrs. Finlay, I wish you and your sister to be paid one hundred after my death. E. ALLASON CUNNINGHAME." Before her death, Mrs. Cunninghame alluded to this letter to her husband, and her agent, Mr. Arthur Campbell, expressing a doubt whether it was so intelligible or explicit as to be understood, but saying that it was of no consequence, as the import of it was to secure to Mrs. Finlay and her sister £100 each, in testimony of their faithful services. A memorandum relative to this statement was made at the time by Mr. Campbell, and was signed by him and Mr. Cunninghame. The testatrix also stated to her husband and Mr. Campbell that she had omitted to leave anything to her servant Alexander Moir, and desired that he might get £100, and of this also a memorandum was made at the time by Mr. Campbell and Mr. Cunninghame. Mr. Cunninghame paid Mrs. Finlay £300 with interest, and he also paid the nuncupative legacy of £100 to Alexander Moir.

Mrs. Cunninghame died in March 1851 without issue, and Mr. Bannatine, whom she appointed to be her sole executor, succeeded her, in terms of her settlement of 1837, as fiar of the estate of Logan, of which her husband enjoyed the liferent, under the provisions of their marriage-contract before mentioned.

At Mrs. Cunninghame's death Mr. Bannatine was in New Zealand, and in May following Mr. Campbell sent out to him copies of the settlement and will, with an abstract of the settlement, in which he had entered the three legacies of £100 in favour of Mrs. Finlay as being all due. He also entered therein the nuncupative legacy of £100 directed by Mrs. Cunninghame to be paid to Alexander Moir, as set forth in the memorandum signed by Mr. Campbell and her husband, Mr. Campbell stating, "You will observe you are her executor; but, as you will see from the abstract, you will not derive much benefit, as the legacies will exhaust the whole of the personal property." Mr. Campbell requested him to execute a power of attorney to enable some person to act for him as executor during his absence; but Mr. Bannatine delayed doing so, hoping to be able to return home at an early date. Eventually, however, finding that he could not do so, he executed, on 28th May 1853, a power of attorney in favour of Mr. Cunninghame, in whom he expressed his confidence, and authorised him "to adjust, settle, clear, and discharge all such accounts as were due by the

deceased, to whatever person or persons, at the time of her death, and all legacies or other bequests made by the deceased by the aforesaid disposition and settlement, and holograph will, codicil, and memorandum."

Mr. Bannatine returned from abroad in 1854, and died in October 1867. During the whole period between these dates he made no objection to any of Mr. Cunninghame's intromissions; but after his death his trustees raised the present action of accounting against Mr. Cunninghame, both as factor and commissioner for Mr. Bannatine, and also for his intromissions individually with the rents, &c., of the estate of Logan, due and current at Mrs. Cunninghame's death. After an interim report by Mr. Alexander Weir Robertson, the accountant to whom the cause was remitted, the Lord Ordinary, on 18th November 1870, pronounced this interlocutor:—[321] "Finds that the late Mrs. Allason Cunninghame having died on 20th March 1851, the late Richard Bannatine, as her executor, became entitled —1st, to the agricultural rents of the estate of Logan for the crop and year 1850, and to all the antecedent rents; 2d, to the proportion corresponding to the period of Mrs. Allason Cunninghame's survivance, from 11th November 1850 to 20th March 1851 inclusive, of the first moiety of the agricultural rents for crop and year 1851 inclusive, which were legally due at Whitsunday 1851, although by convention payable only at the term of Martinmas following; 3d, to the mineral rents or royalties payable at Martinmas 1850; and 4th, to the proportion of the mineral rents or royalties for the half-year ending at Whitsunday 1851, and then payable, corresponding to the period of Mrs. Allason Cunninghame's survivance, from 11th November 1850 to 20th March 1851 inclusive, all just allowances and deductions in respect of charges on such rents and royalties being made: Reserves all questions of expenses, and of new remits the cause to Mr. Alexander Weir Robertson, C.A., to proceed with the remit made to him by the interlocutor of 2d February 1870."*

In obedience to the remit contained in this interlocutor the accountant issued a report showing a balance against the defender amounting to £2304, 7s. 10d., including progressive interest to the date of the action.

In this report the accountant debited the defender with £338, 1s. 11d., being two of the three sums of £100 each paid by him, with interest thereon, as legacies to Mrs. Janet Merry or Finlay, and the sum of £100, with interest, paid to Alexander Moir, in accordance with Mrs. Cunninghame's directions to that effect—the accountant being of opinion that the three several bequests of £100 to Mrs. Finlay were not cumulative, but substitutional, and that the nuncupative bequest to Alexander Moir was invalid.

The accountant also debited the defender, in terms of the Lord Ordinary's interlocutor of 18th November 1870, with a proportion of the rents of the estate of Logan,

---

* NOTE.—After narrating the facts—"Mrs. Allason Cunninghame died on 20th March 1851. The rents of the estate of Logan now in dispute are—1st, the agricultural rents of the estate due for crop and year 1850, conventionally payable at Martinmas 1850 and Whitsunday 1851, and all antecedent agricultural rents; 2d, the half-year's rents or lordships of the minerals and others due under the lease No. 64 of process for the half-year ending at Martinmas 1850; and 3d, the rents of the estate, including the rents or royalties of the minerals for the half year current at the time of Mrs. Allason Cunninghame's death, and ending at Whitsunday 1851.

"The Lord Ordinary is of opinion that Mrs. Allason Cunninghame having survived the legal term of Martinmas 1850, there vested in her by such survivance, and descended to her executor, the whole rents of the estate for that year, including the mineral rents and all antecedent rents, although some of these rents, by convention, may not have become payable until after her death.

"As regards the rents of the estate, including the mineral rents for the half-year current at Mrs. Allason Cunninghame's death, the Lord Ordinary is of opinion that Mr. Bannatine, as her executor, is entitled to a share of these rents corresponding to the period of her survivance after the term of Martinmas 1850. He considers that the provisions of the Apportionment Act, 4 & 5 Will. IV. cap. 22, regulate this matter. The terms of the marriage-contract, by which the liferent of the estate of Logan is conferred upon the defender, are also in favour of this view.—See Erskine, 2, 9, 64, and 67; Campbell, 9 D. 1426; Blaikie *v.* Farquharson, *ib.* 1456; Weir's Executors *v.* Durham, 8 Macph. 725."

both agricultural and mineral, for the half-year current at Mrs. Cunninghame's death in March 1851, corresponding to the period of her survivance after the term of Martinmas 1850. Under this head the accountant debited the defender with all sums received as rents which were entered in the rental-book of the estate, but refused to [322] give him credit for sums appearing in the same book as the amount of accounts due to tenants, and entered as payments to account of their rents after Mrs. Cunninghame's death, holding that sufficient vouchers had not been produced, either to instruct the amounts, or to show that these accounts had been incurred prior to Mrs. Cunninghame's death. The accountant also debited the defender with certain arrears of rents, which were noted in the rental-book as having been abandoned by him, being of opinion that the defender, having undertaken without authority the responsibility of acting for a person who was absent, was bound to have exercised greater diligence in the recovery of these rents than if he had acted on his own account.

The defender lodged objections to the accountant's report upon all these points, as well as upon others which it is unnecessary to specify.

The Lord Ordinary, by interlocutor dated 15th July 1871, "Sustains the 12th objection stated by the defender to the accountant's report, in so far as regards the sum of £338, 1s. 11d., placed by the accountant to the defender's debit in respect of legacies, with interest, paid to Mrs. Janet Merry or Finlay and Alexander Moir: Repels the whole remaining objections stated by the defender to the accountant's report: Finds that the balance due by the defender to the pursuers, in respect of his intromissions libelled on, amounted, as at 8th January 1869, including interest, to the sum of £1966, 5s. 11d.: Decerns against the defender for the said sum of £1966, 5s. 11d., with interest on the sum of £886, 9s. 3d., being the capital, from 8th January 1869, at the rate of 5 per cent. per annum until payment; and appoints the cause to be put to the roll for the disposal of the question of expenses."*

---

* "NOTE.—The Lord Ordinary concurs in the results stated by the accountant with regard to the whole items objected to by the defender, with the single exception of the sum of £338, 1s. 11d., being the amount of two legacies of £100 each paid by the defender to Mrs. Janet Merry or Finlay, and a legacy of £100 paid by the defender to Alexander Moir, and of the interest thereon, for which the accountant has not given credit to the defender in the accounting.

"The question whether the three legacies of £100 left by Mrs. Allason Cunninghame, the defender's wife, to Mrs. Janet Merry or Finlay, her maid, are cumulative or substitutional, is attended with difficulty, particularly as regards the hundred pounds which Mrs. Allason Cunninghame, in her holograph letter, delivered to Mrs. Finlay during her last illness, stated to be her wish that Mrs. Finlay should receive after her death. Mr. Arthur Campbell, the agent of Mrs. Allason Cunninghame, took the view that they were cumulative, and, in the abstract of her settlements prepared by him a few days after her death he entered the whole three legacies as due. He also entered therein the nuncupative legacy of £100, directed by Mrs. Allason Cunninghame to be paid to Alexander Moir, her overseer and collector of rents, as set forth in the memorandum signed by the defender and Mr. Arthur Campbell by her desire on 20th March 1851, the day of her death. This abstract showed also very distinctly the result of the whole legacies, and that they amounted in all to £1000. On 29th May 1851 Mr. Campbell wrote to the late Mr. Richard Bannatine, the heir and executor of Mrs. Allason Cunninghame, who was then a staff-surgeon in New Zealand, enclosing him copies of the disposition and settlement and will of Mrs. Allason Cunninghame, with the 'abstract of her settlement, showing the effect thereof,' and stating, 'you will observe you are her executor; but, as you will see from the abstract, you will not derive much benefit, as the legacies will exhaust the whole of the personal property.' Mr. Campbell also informed Mr. Bannatine that it was necessary for him to send home a power of attorney to enable some person to act for him, 'by recovering the funds and paying the debts and legacies,' and suggesting that he should appoint the defender as his attorney 'to wind up the personal estate.' A power of attorney was enclosed in the letter for Mr. Ban-[323]-natine's signature. Mr. Bannatine having delayed sending home a power of attorney in consequence of bad health, and in the hope that he would obtain leave to return home, Mr. Campbell again wrote him on 23d November 1852 that the legacies left by Mrs. Allason Cunninghame were bearing 5 per cent. interest against him, and that the legatees

[323] On 2d November 1871 the Lord Ordinary found the pursuers entitled to expenses, subject to modification.

The defender reclaimed, and, after an objection to the competency of the reclaiming note had been disposed of (*ante*, p. 317), counsel were heard on the merits.

Argued for the defender;—(1) No part of the rents due at Whitsunday 1851, the term immediately succeeding Mrs. Cunninghame's death, fell into her executry. The Apportionment Act has no application to the present case. It applies only to the succession of persons having a limited interest in an estate, heirs of entail, life-renters, &c., whose inchoate right to the rents would, but for the Act, be prematurely defeated by death between the terms when the rents are payable, but the statute has never been extended to the case of estates held in fee-simple.* (2) At Whitsunday 1851 the defender was acting, from the necessity of the case, as *negotiorum gestor* for Mr. Bannatine, who did not grant the power of attorney in his favour till May 1853. He was, therefore, liable for gross omissions only,† and was not bound to do exact diligence for recovery of arrears of rent, or to produce authority for striking them off. It was enough if he accounted for actual receipts, and the rental-book which is [324] founded on to instruct the charge against him must be taken with its qualifications. No doubt the accounts due to tenants for which the defender claimed deduction were not fully vouched, owing to the fact that Mrs. Cunninghame's factor, who kept her accounts and the rental-book in question, left the country shortly after her death, and his books and papers were found by the defender in a very confused and backward state. The difficulty of procuring vouchers would, therefore, be almost insuperable; and after the time which has elapsed the defender ought not, in the circumstances, to be required to do so.

Argued for the pursuers;—(1) By the marriage-contract between the defender and Mrs. Cunninghame he had a liferent of her estate after her death, but he was

---

were becoming urgent for payment of their legacies. Mr. Bannatine then signed and sent home the power of attorney in favour of the defender. In this power of attorney, which proceeds upon the narrative of the foresaid disposition and settlement, holograph will, codicil, and memorandum, and that it was necessary that he should appoint some person to manage the executry estate, and of his confidence in the defender, he appointed the defender to be his factor and commissioner, and granted him full power, warrant and commission, for him and in his name 'to adjust, settle, clear, and discharge all such accounts as were due by the deceased to whatever person or persons at the time of her death, and all legacies or other bequests made by the deceased by the foresaid disposition and settlement, and holograph will, codicil, and memorandum.'

"The defender acted upon this power of attorney, and paid the legacies now objected to by the pursuers in 1853. Mr. Bannatine returned to this country in 1854, and he died on 26th October 1867. During all that time he never objected to the payment of the legacies which had been made by the defender as his factor and commissioner.

"In these circumstances, the Lord Ordinary is of opinion that the defender was authorised by Mr. Bannatine, as Mrs. Allason Cunninghame's executor, to pay the legacies which are now objected to, and that the pursuers, who are Mr. Bannatine's trustees, are not entitled to refuse credit to the defender for these payments, on the ground that, according to a strict construction of the various testamentary writings left by Mrs. Allason Cunninghame, only one legacy of £100 was payable to Mrs. Janet Merry or Finlay, and that the nuncupative legacy of £100 to Alexander Moir, mentioned in the memorandum of 20th March 1851, was ineffectual. The Lord Ordinary has only further to observe that, as regards the legacy to Moir, it would have been, he thinks, contrary to all right and proper feeling if Mr. Bannatine, who had been left by Mrs. Allason Cunninghame, his cousin, a large succession, had refused, on the ground that it was ineffectual in law, to implement her dying wish, stated to her husband and to her agent, that her servant, 'Sandy Moir,' should receive a legacy of £100."

* Brown *v.* Amyot, 1844, 3 Hare, Ch. 173; *In re* Clulow's Estate, 1857, 3 K. & J. Ch. 689; Baillie *v.* Lockhart, 1855, 2 Macq. 258; Lord Advocate *v.* Stevenson, 1866, *ante*, vol. iv. 322.

† Ersk. iii. 3, 53; Bell's Princ. sec. 540.

not entitled to any part of the rents of the estate between that date and the preceding term of Martinmas, which fell to Mr. Bannatine as Mrs. Cunninghame's executor. The accounting, therefore, properly proceeded upon the same footing as if the Apportionment Act applied to the case, and it was immaterial to consider whether the Act was applicable *in terminis* or not, as the result was the same in any event. (2) The defender having taken upon himself the responsibility of acting without authority for Mr. Bannatine during his absence abroad, he was bound to have exercised greater diligence in the recovery of the arrears of rent than if he had acted for his own behoof. There was no reason to suppose that the arrears were irrecoverable, as the same tenants were proved to have continued in the farms long after 1851, paying rent to the defender as liferenter, and he had not abandoned any rents due to himself. In the absence of any vouchers or evidence to instruct payment of the accounts alleged by the defender to have been incurred to tenants, or to show by whom they were incurred, the accountant had rightly refused to give him credit for the amount.

At advising,—

LORD PRESIDENT.—There are two interlocutors submitted to review, the one dated 18th November 1870, and the other 15th July 1871. By the first of these the Lord Ordinary "finds that the late Mrs. Allason Cunninghame having died on 20th March 1851, the late Richard Bannatine, as her executor, became entitled—1st, to the agricultural rents of the estate of Logan for the crop and year 1850, and to all the antecedent rents; 2d, to the proportion corresponding to the period of Mrs. Allason Cunninghame's survivance, from 11th November 1850 to 20th March 1851 inclusive, of the first moiety of the agricultural rents for crop and year 1851 inclusive, which were legally due at Whitsunday 1851, although by convention payable only at the term of Martinmas following; 3d, to the mineral rents or royalties payable at Martinmas 1850; and, 4th, to the proportion of the mineral rents or royalties for the half-year ending at Whitsunday 1851, and then payable, corresponding to the period of Mrs. Allason Cunninghame's survivance, from 11th November 1850 to 20th March 1851 inclusive, all just allowances and deductions in respect of charges on such rents and royalties being made."

Several things are fixed by this interlocutor. In the first place, the Lord Ordinary holds, and I think justly, that in such a question as here arises, mineral rents, in whatever shape, and at whatever terms payable, are to be dealt with exactly on the same principles as agricultural rents. We had occasion to consider that question in the case of Weir's Executors *v.* Durham,* and I think the Lord Ordinary's judgment is in accordance with that decision, and sound.

Dealing then with the whole rents, the next question is, whether the executor is not entitled to the whole rents for the crop and year 1850. On that point, Mr. Marshall gave us an argument somewhat difficult to understand, the ground [325] being that it was a hardship for the husband of the liferenter to get nothing till Martinmas 1851. But that is an ordinary hardship, not peculiar to the case of a liferent. In the case of a widow the law has interposed a remedy, on the special consideration that she is not to be left to starve in the meantime until the arrival of the term for payment of her annuity. But that consideration does not extend to other cases, and certainly not to a person in the position of Mr. Cunninghame.

The next question is, whether the executor is not entitled to a proportion of the first half of the rents of crop and year 1851 which is legally due at Whitsunday 1851, corresponding to the period of Mrs. Cunninghame's survivance within that term; or, in other words, whether the Apportionment Act of 1837 applies? I confess I think this question, though it has never been expressly decided here, must be held to be well settled. This is a case arising on the death of a fee-simple proprietor. Mrs. Cunninghame was fiar, and the question relates to the right of her executor to a proportion of the rents. Now, is the succession of a fee-simple proprietor within the scope of the Act? This question was decided in three English cases in the negative, and though it has never been directly decided here, it would be difficult to say that it was not indirectly decided in the case of Baillie *v.* Lockhart. That case was appealed from this Court to the House of Lords, and the ground of appeal was that, as the deceased was heir of entail, his executor could not have the benefit of the statute, because an heir of entail is not a fiar but a liferenter. The answer was, that the

* *Ante*, vol. viii. p. 725.

question might simply be put, whether the deceased had a *jus disponendi*? If he had not, then his interest in the estate terminated with his death; if he had, it did not. On that conclusive test the judgment of the House of Lords proceeded, which was, that the executor of the heir of entail was entitled to the benefit of the statute, because he had only a life interest, and could not dispose of it. That seems to assume, as a necessary foundation of the judgment, that the full and absolute fiar of an estate, or fee-simple proprietor, and the executor of such, is not included within the provisions of the statute; and the result will be in this case to restrict the claim of the executor to the rents legally due at Martinmas 1850.

The only other question raised regards the principle on which Mr. Cunninghame is to account for the rents with which he intromitted in the absence of the executor in New Zealand. Now, here it is necessary to attend to the precise position of Mr. Cunninghame. His agent wrote to Dr. Bannatine to give notice to him of his interest in the estate of his deceased cousin, and unfortunately it happened that Dr. Bannatine was at that time severely ill, and for a considerable time he returned no answer, and it was not in fact till after the lapse of some years that instructions were sent by him to Scotland, followed by his own arrival. Meantime Mr. Cunninghame took upon himself to collect the rents and manage the executry estate, and in doing so he necessarily uplifted the rents due to the executry estate as well as those due to himself. In so doing he acted purely as a *negotiorum gestor*; he had no authority, and he could not have any. But it was not a case of officious or unnecessary intrusion. On the contrary, he seems to have been led to act from friendship for Dr. Bannatine and the necessity of the case, there being no other person having authority to act for him. The question therefore is, first, what is the responsibility of a *negotiorum gestor* under such circumstances, acting gratuitously, not officiously or intrusively? The doctrine on this subject is remarkably well stated by Erskine, iii. 3, 53,—"By some tests of the Roman law the *negotiorum gestor* ought to use the most exact diligence. . . . By others he is liable only in the middle kind of diligence. . . . But, in truth, the kind of diligence ever rises or falls according to the views of the gestor in undertaking the management, and the nature of the *gestio*. Where the gestor, from friendship and the necessity of the case, takes upon him the direction of an affair which requires immediate execution, he is accountable only for gross omissions." Now, that last sentence appears to me very accurately to describe the position of Mr. Cunninghame. He assumed the office of gestor from friendship and the necessity of the case, and he can only be accountable for gross omissions. Keeping that in view, what is it proposed to charge against him, so far as he complained of the accountant's report? The accountant disallowed [326] certain deductions from rent made by a manager on Mrs. Cunninghame's estate, and continued after her death by Mr. Cunninghame. These are for work done by tenants, furnishing of dung, &c., and amounting altogether to £109, 7s. 10d. Now, none of these items appear to be of later date than the summer of 1851, and thus it is left partly doubtful for what precise period they were incurred. It may be a nice question, on whom does the onus lie in such a case; for whose benefit were those things done, Mrs. Cunninghame's or Mr. Cunninghame's? But looking to the circumstances, I think the *negotiorum gestor* is not to account as on a rental; he should be charged only with what he actually received, and is liable only for gross omissions, which must be proved. Now, the only proof of his receipts is the book kept by Moir the grieve, which shows the receipt of certain amounts of rent at different periods, and to that extent Mr. Cunninghame must be charged. But these counter accounts do not prove that that portion of rent was received, but that it was not received. There is therefore no evidence on which to charge Mr. Cunninghame with receiving those rents, or to prove that his failure to receive them was ascribable to gross negligence.

Then there are two, and only two instances of arrears of tenants wiped off after Mrs. Cunninghame's death, both of small amount, and the means of inquiring whether that was judicious administration at the time are now lost, and I think the presumption is all in favour of Mr. Cunninghame as *negotiorum gestor*. I am therefore of opinion that the accountant is wrong in refusing credit to Mr. Cunninghame for these accounts, amounting to £189, 7s. 10d., and also for the arrears amounting to £65, 14s. 2d., and to that extent I am prepared to alter the Lord Ordinary's interlocutor.

The other Judges concurred.

The following interlocutor was pronounced:—"Adhere to the interlocutor of

18th November 1870 in so far as it finds Mrs. Cunninghame's executor entitled to the agricultural and mineral rents of the estate of Logan for the year 1850, and preceding years: *Quoad ultra* recall the said interlocutor: Adhere to the interlocutor of 15th July 1871, in so far as it sustains the 12th objection for the defender, as regards the sum of £338, 1s. 11d., placed by the accountant to the defender's debit in respect of legacies, with interest, paid to Mrs. Janet Finlay and Alexander Moir: *Quoad ultra* recall the said last-mentioned interlocutor; sustain the 10th objection for the defender, and find that the statute 4 & 5 Will. IV. cap. 22, is not applicable to the deceased Richard Bannatine as the executor of a fee-simple proprietrix: Sustain also the 2d, 6th, 8th, and 9th objections for the defender, also the second part of the 3d objection, and the second part of the 5th objection: Remit to the accountant to give effect to this interlocutor and report to the Court *quam primum*, reserving in the meantime the question of expenses."

In obedience to this remit the accountant issued a supplementary report, in which the balance due by the defender as at 8th January 1869, when the action was raised, was shown to be £187, 13s. 3d., with interest on £74, 3s. 11d. of principal from that date until paid; and it appeared that a sum exceeding by about £20 the balance thus brought out by the accountant had been tendered by the defender with his defences.

LORD PRESIDENT.—There has been a great deal of litigation in this case, with a very small result, and one cannot help inquiring whose fault it has been. This is the only pertinent inquiry remaining. Now, looking to the whole history of the cause, I cannot help thinking that the proceedings of the pursuers have been nimious in the extreme. This is an accounting which should have been, and which might have been, conducted on an amicable footing, and it has been the pursuers' fault that it has not. Mr. [327] Cunninghame rendered an account before this action was raised, in which he included a sum which he was not entitled to charge. It was a sum which he had paid away without any legal obligation or right to do so, but which he paid in perfect *bona fides*, and from his knowledge of the testator's own real intention. On the first opportunity, he says at once, I do not mean to insist in this charge, and had rather give it up than dispute about it. That tender he undoubtedly made in his defences to this action, and if that tender had been accepted by the pursuers the result would have been to leave them in 1869 with a sum in their hands £18 or £20 greater than that which they have now actually got, excluding interest. But instead of accepting that tender the pursuers have gone on since, opening up every contentious point, and of course driving the defender to contest each point. Under these circumstances I do not think that the question of expenses should depend at all upon the preponderance of success in these different disputes. The question of expenses should rather depend upon whether the suit was a justifiable one or not in its origin, and whether it ought to have been brought. I think that the pursuers ought to have accepted the offer made in the defences, and that their proceedings since then have been nimious and vexatious. The conclusion to which these considerations lead me is, that the defender should be found entitled to the whole expenses of the cause.

The other Judges concurred.

THE COURT decerned in terms of the accountant's supplementary report, and found the defender entitled to the whole expenses in the cause.

WILLIAM KELSO THWAITES, S.S.C.—A. & A. CAMPBELL, W.S.—Agents.

No. 65. X. MACPHERSON, 327. 12 Jan. 1872. 2d Div.—Sheriff of Dumbartonshire, I.

JOHN EDWARD GEILS, Complainer and Respondent.—*Watson.*
WILLIAM THOMPSON AND OTHERS, Respondents and Appellants.—*Sol.-Gen. Clark—Lang.*

Right of Way—Obstruction—Remedy—Via facti removal.—The proprietor of a stream which supplied a public well diverted its course so as to deprive the well of the supply of water. A few months after some members of the public went upon the proprietor's lands and removed the obstruction. *Held* that they were not entitled to do so, and that the proprietor was entitled to interdict.

This was an appeal in a petition presented in the Sheriff-court of Dumbartonshire by Mr. Geils of Dumbuck against William Thompson and others, inhabitants of Dumbarton, to interdict them from trespassing on the lands of Dumbuck.

From time immemorial the public had been in the habit of drawing water from a stream which ran through the lands of Dumbuck; and in 1866 certain of the inhabitants of Dumbarton erected a well, called Strowan's Well, a short distance up the stream from the highway. Mr. Geils did not interfere at the time, but some time after he resolved to carry the water to the highway. The pipes he laid down for the purpose were cut, and in the spring of 1869 he cut off the supply to the well at a point considerably above the well. On 2d July 1869 certain of the inhabitants of Dumbarton went to the point at which the supply was cut off, and removed the obstruction.

Mr. Geils presented to the Sheriff a petition for interdict.

The respondents averred that the footpath to the well and the well had been public from time immemorial.

The complainer lodged a minute denying that the respondents and the public had any legal right of way, but admitting that the public had used the well and the footpath leading to it for seven years; and he stated that he did not insist for interdict, in so far as the well and footpath were con-[328]-cerned, but that he insisted in the petition *quoad ultra*, and reserved his right to vindicate his legal rights in a competent Court, where the question was not limited to that of possession.

After a proof the Sheriff-substitute (Steele) pronounced this interlocutor:—"Finds it established by said proof that two of the defenders, namely, M'Hard and Hunter, dug or assisted in digging the hole complained of, but that the other defenders did not interfere in that operation: Finds that the hole was dug with the view of restoring to the well the flow of water which had shortly before been diverted from it *brevi manu* by the pursuer; and finds farther, that in the position in which the parties stood in regard to each other, the said defenders, M'Hard and Hunter, were justified in doing what they did: Therefore sustains the defence, and assoilzies the defenders from the conclusions of the action: Finds the pursuer liable in expenses," &c.

On appeal the Sheriff (Hunter) recalled the interlocutor of the Sheriff-substitute, and found "that it is proved that the defenders, John Hunter and Samuel M'Cart or M'Hard, did illegally and unwarrantably trespass on the lands of the pursuer, and did serious injury thereto, by entering thereon and digging a trench or hole therein; and, in respect of the said findings, interdicts, prohibits, and discharges the said defenders from trespassing upon the said lands: Finds them liable to the pursuer in expenses, subject to modification," &c.

The respondents appealed to the Court of Session.

LORD JUSTICE-CLERK.—I have no difficulty in concurring with the Sheriff, reading his judgment in the light of the minute which has been lodged by the complainer; and I am only desirous of stating the points which we do not decide by our present judgment.

This stream, which ran through Mr. Geils' land, may, perhaps, at one time have been subject to certain rights of commonty, which have since ceased to exist. From time immemorial, however, the public have been in the habit of taking water from

the stream, and about 1866 certain of the inhabitants of Dumbarton erected a sort of well on Mr. Geils' ground. Mr. Geils at that time did not interfere to prevent them, but some time afterwards he resolved to carry the water to the highway at a point more convenient, as he says, for the public. The pipes which he laid down for that purpose were destroyed, and he then cut off the supply to the basin at a point considerably within his own boundary. Whether he was entitled to do so is not before us in this case. I give no opinion whatever upon that point.

But the respondents, whether Mr. Geils had a right to cut off the supply or not, had no right to do what they did. They went up the stream beyond the spot to which they had been in the custom of going, and so trespassed on Mr. Geils' land; and having done so, they *via facti* removed the obstruction which he had created. That was an illegal mode of asserting their rights. The complainer has lodged a minute stating that he does not insist in his interdict as far as relates to the use of the well or the footpath, while he does not admit the right of the respondents to use them. I am not quite sure that the Sheriff intended to limit the interdict in terms of the minute, but the complainer's counsel interposes no difficulty to our doing so.

The Sheriff has found that two of the respondents did the injury complained of, and he has directed the interdict against them. He has assoilzied the others; and on both these points I think his judgment sound.

He has farther found the respondents who have been assoilzied entitled to expenses, subject to modification. I think we should keep the question of modification in our own hands.

There are some points on both sides which are reasonable, and some which are unreasonable. I cannot but think that the parties might arrive at an amicable settlement.

[329] LORD COWAN, LORD BENHOLME, and LORD NEAVES concurred.

This interlocutor was pronounced:—"Find it proved that the defenders, John Hunter and Samuel M'Cart or M'Hard, did illegally and unwarrantably trespass on the lands of the pursuer, and did serious injury thereto by entering and digging a trench or hole therein: Therefore dismiss the appeal, and affirm the judgment of the Sheriff, provided that the interdict thereby granted shall not extend to the use of the footpath and well, in terms of the minute No. 15 of process: Find the respondent entitled to expenses," &c.

A. S. DOUGLAS, W.S.—D. CRAWFORD & J. Y. GUTHRIE, S.S.C.—Agents.

No. 66. X. MACPHERSON, 329. 17 Jan. 1872. 1st Div.—Lord Jerviswoode, B.

THOMAS CORBETT, Pursuer.—*Watson—M'Lean.*
JOHN ROBERTSON, Defender.—*Sol.-Gen. Clark—Asher.*

Personal or Real—Burdens—Property—Condition.—A minute of sale of a piece of ground set forth as a condition of the sale that the purchaser should forthwith proceed to erect thereon dwelling-houses of a particular description, and that he should be restricted from erecting any other buildings on the ground, or making any other use thereof, or disposing of the same for any other purpose during the period of ten years from and after the term of entry. *Held*, in a question as to the terms of the formal disposition to be granted by the seller, that the foregoing condition of the agreement did not import a real burden, but only a personal obligation on the part of the purchaser and his heirs, and that the seller was not entitled to insert a clause in the deed resolutive of the purchaser's right in the event of the obligation not being fulfilled.

Question, whether the personal condition could be enforced against a singular successor.

Question (*per* Lord Deas), whether, if the stipulation as to buildings had not been limited to ten years, the seller might not have been entitled to have a clause inserted to make it effectual as a real burden.

By minute of agreement executed in August 1869 between Mr. John Robertson of Blairbeth near Glasgow, and Thomas Corbett, merchant in London, the first party

agreed to sell, and the second party to purchase, a portion of the lands of Cessnock belonging to Mr. Robertson, "on the terms and conditions following, *videlicet*:— 1. The price shall be 7s. 6d. per square yard; and the quantity of ground shall be ascertained by the parties, or by the measurement of some skilled surveyor. 2. The term of entry shall be Martinmas 1869, when said price shall be payable, with interest at the rate of 5 per cent. per annum thereafter until payment. 3. The second party shall also, from and after the term of Martinmas 1869, free and relieve the first party of a proportion of the feu-duty, stipend, cess, and other burdens specified in the titles, if any, of his lands of Cessnock, corresponding to the extent of the said piece of ground. 4. The second party shall forthwith proceed to erect on the said piece of ground dwelling-houses of a suitable description for working people, and of a good and substantial style of workmanship; and the fronts thereof towards said intended street shall be built of at least good hammer-dressed or squared rubble, in courses; and the second party shall be restricted from erecting any other buildings than those above provided for on said ground, or making any other use thereof, or disposing of the same for any other purpose, during the period of ten years from and after said term of entry. . . . 7. The second party shall be entitled to require the whole or any part of the price of the ground, or any portions thereof, to be converted into a feu-duty or feu-duties, at the rate of 5 per cent. per annum, and to have the same allocated on the several lots into which the said ground may be divided by him, in sums corresponding to [330] the extent of said several lots." The 8th, 9th, 10th, and 11th articles contained stipulation as to feu-duties. "12. The expense of the deeds to be granted or executed by the parties in implement of this minute shall be borne by them in conformity with the rules of the Faculty of Procurators in Glasgow."

At or about the date of this agreement Mr. Robertson sold the remaining portions of his lands of Cessnock to the trustees of the Clyde Navigation, to whom he granted a conveyance in November 1869 which contained no reference to his agreement with Corbett.

In or about the month of February 1870 Corbett entered into an agreement with the Trustees of the Clyde Navigation for the sale to them of the ground which he had purchased from Robertson, subject to any obligations, restrictions, and others contained in the before-mentioned agreement.

Thereafter Corbett called upon Robertson to execute a disposition of the ground in his favour, and the parties having differed as to the terms of that deed, he consigned the price, and, with concurrence of the Clyde Trustees, raised this action, concluding that Robertson should be ordained "to execute and deliver a formal and valid disposition of the foresaid subjects in favour of the pursuer, the said Thomas Corbett, and his heirs and assignees, containing a clause of entry at Martinmas 1869, a clause of tenendas, to be held *a me vel de me*, a clause of resignation of the said subjects for new infeftment and investiture, a clause of assignation of the writs, and delivery thereof, or obligation for delivery thereof, according to inventory, a clause assigning the rents, a clause binding the defender to free and relieve the pursuer, and his heirs and assignees, of all feu-duties, casualties, and public burdens, all in terms of the 'Titles to Land Consolidation (Scotland) Act, 1868,' a clause of warrandice by the defender at all hands and against all mortals, and all other usual and necessary clauses, and also to put the pursuer in possession of the said subjects and others, with the whole writs and evidents thereof."

The defenders averred that the pursuer by his agreement to sell the ground to the Clyde Navigation Trustees had "ceased to have any interest in the ground, and put it out of his power ever to implement or carry out the terms of his contract with the defender; and the Clyde Trustees have no intention, and have no powers under their statutes to enable or entitle them, to erect the houses stipulated for in the agreement, and they made the purchase for the purpose of forming a dock or harbour in communication with the river Clyde, or other works for the purposes of their trust." (Stat. 7) "The Clyde Trustees by their agreement bear to have purchased the ground subject to the obligations, restrictions, and others contained in the defender's agreement with the pursuer, 'in so far as the' defender 'has not discharged or agreed to discharge the said obligations, restrictions, and others,' and these remain undischarged. The reference made to these restrictions in the agreement was merely a colourable pretext to enable the pursuer to state that he had sold the ground subject

to the conditions agreed to with the defender; and neither he nor the Clyde Trustees ever had, or have now, the slightest intention to observe these conditions; and, accordingly, the conclusions of the present action are for a conveyance of the ground without any restriction, and without any reference whatever to the conditions of the contract." (Stat. 8) "The price to be paid by the trustees was to be referred to arbitration. They were to pay the expenses incurred by the pursuer with relation to his purchase, and also to relieve him of a sum of £70 as compensation to the architect whom he employed to manage the erection of the 'model houses.' The defender believes and avers that the price fixed by the arbiters to whom the pursuer and the Clyde Trustees referred that matter is 15s. [331] per square yard, being double the price for which the defender agreed to sell it to the pursuer for the special and restricted use specified in the agreement." (Stat. 9) "The pursuer's agreement with the Clyde Trustees specially provided that it should not be competent for or allowable to either party, either verbally or in writing, to make any allusion in the proceedings in the arbitration to the fact that the first party had purchased the ground with no view to personal gain, but with the intention of erecting a number of cottages on the English plan, as a model to the workmen of Glasgow, nor to the obligation come under by the pursuer to build nothing but workmen's houses upon the ground; and it was also provided that no question should be raised before the arbiters as to the possibility of the pursuer's getting as suitable or more suitable ground for his houses in other situations. These stipulations were inserted with the view of concealing from the arbiters or valuators the restricted nature of the pursuer's right to the ground, and of enhancing the profit or personal gain which he contemplated realising from the sale, in violation of his contract with the defender; and they show that he had abandoned all intention of implementing the contract, and that the ground was required by the Clyde Trustees for no purpose within its terms." (Stat. 10) "The pursuer, by thus agreeing to sell the ground in question, has made another use thereof, and has disposed of it for other purposes than those defined in his contract with the defender, and has violated or broken the same in one of its essential conditions, and has incapacitated himself from ever fulfilling that condition. The defender's interest in the ground is its value for other purposes than that stipulated, which is greatly in excess of the price fixed and settled with reference to the use or purpose bargained for; and as the pursuer has now incapacitated himself from applying the ground to that purpose, the defender claims the right to sell, dispose of, or use it in such manner as he thinks fit."

The pursuer pleaded;—A valid and binding contract of sale of the subjects set forth in the conclusions of the action having been entered into and concluded, the defender is bound, on receiving the stipulated price, and such interest as may be due thereon, to grant in favour of the pursuer, the said Thomas Corbett, a valid and formal disposition of the subjects, in terms of their contract.

The defender pleaded;—(1) The pursuer having violated the said agreement as condescended on, and incapacitated himself from implementing his part thereof, has thereby forfeited his right to enforce implement thereof against the defender. (2) In the event of the pursuer being found entitled, notwithstanding his violation of the said agreement, to a conveyance of the said ground from the defender, the latter is entitled to have inserted in the disposition to be granted by him such clauses as may be necessary for giving effect to the whole stipulations in the said agreement.

The Lord Ordinary, before answer, allowed the parties a proof of their averments, and appointed the defender to lead in the proof; but the pursuer reclaimed, and the Court on the 8th July 1871 recalled the Lord Ordinary's interlocutor, and, before answer, appointed the pursuer to lodge a draft of the disposition which he proposed that the defender should execute.

In obedience to this interlocutor the pursuer lodged in process a draft-disposition, which, after a conveyance of the subjects in common form, contained the following clause:—"And declaring, as it is hereby provided and declared, in terms of the said minute of agreement, that the said Thomas Corbett shall forthwith proceed to erect on the said piece of ground dwelling-houses of a suitable description for working people, and of a good and substantial style of workmanship, and that the fronts thereof towards said intended street shall be built of at least good ham-[332]-mer-dressed or squared rubble in courses; and that the said Thomas Corbett shall be restricted from erecting any other buildings than those above provided for on said

ground, or making any other use thereof, or disposing of the same for any other purpose, during the period of ten years from and after the term of entry after mentioned."

The defender proposed to insert the following clause :—"And further declaring, that in the event of the said Thomas Corbett or his foresaids in any way failing to implement or contravening any of the stipulations of the said minute of agreement, all deeds granted and acts done in contravention thereof shall in themselves be void and null; and immediately on the said failure to implement or contravention taking place, the said Thomas Corbett and his foresaids shall thereupon forthwith *ipso facto* irritate and forfeit their whole right or title to the subjects hereby disponed, and the same shall revert to me, or my heirs, assignees, or other successors, as my or their own absolute property, freed and disburdened of all right thereto on the part of the said Thomas Corbett or his foresaids; and it shall be lawful to me or my foresaids to make up our right and title to the said subjects by declarator or adjudication, or any other method competent by law."

Argued for the pursuer;—The defender having sold the other parts of his lands of Cessnock to the Clyde Trustees has now no interest in enforcing any of the conditions of his agreement with the pursuer, except in so far as regards payment of the stipulated price, and the pursuer is entitled to a disposition in the ordinary form. The conveyance by the defender to the Clyde Trustees prevented anything like the constitution of a servitude over the subjects acquired by the pursuer, there being no dominant tenement to which it could attach.

Argued for the defender;—The true meaning of the parties was, that the provisions contained in article 4 of the agreement should be made conditions of the right, binding on the pursuer and singular successors for a period of ten years, and the defender was entitled to insert a clause in the conveyance which should make these conditions effectual against singular successors.

At advising,—

LORD PRESIDENT.—My Lords, this is an action to enforce implement of an agreement for sale of a piece of land of which the defender was the seller and the pursuer the purchaser. The agreement is dated 25th and 27th of August 1869, and the summons concludes that the defender, on receiving payment of the stipulated price, should be decerned "to execute and deliver a formal and valid disposition of the foresaid subjects in favour of the pursuer, the said Thomas Corbett, and his heirs and assignees, containing a clause of entry at Martinmas 1869, a clause of tenendas, to be held *a me vel de me*, a clause of resignation of the said subjects for new infeftment and investiture, a clause of assignation of the writs, and delivery thereof, or obligation for delivery thereof, according to inventory, a clause assigning the rents, a clause binding the defender to free and relieve the pursuer and his heirs and assignees of all feu-duties, casualties, and public burdens, all in terms of the Titles to Land Consolidation Act, 1868, a clause of warrandice by the defender at all hands and against all mortals, and all other usual and necessary clauses, and also to put the pursuer in possession of the said subjects and others, with the whole writs and evidents thereof." The defence pleaded is, 1st, that the pursuer having violated the agreement and incapacitated himself from implementing his part of the contract, has forfeited his right to enforce it against the defender; and 2d, that in the event of the pursuer being found entitled to a conveyance of the ground in question, the defender is entitled to have inserted in the disposition such clauses as may be necessary for giving effect to the whole stipulations in the agreement. When the cause came before the Lord Ordinary [333] on a closed record, his Lordship, by an interlocutor dated 22d of June last, before answer, allowed the parties a proof of their respective averments, the defender to lead in the proof; the meaning of which, as we understand it, was, that the defender was to have an opportunity of establishing his averments of breach of contract; but as we were all of opinion that there was no relevancy in these averments, and that the only question to be determined was the form of the conveyance to be executed by the defender, we recalled the Lord Ordinary's interlocutor, and before answer appointed the pursuer to lodge in process a draft of the disposition in the terms in which he maintained that the defender was bound to grant it. The draft of the proposed disposition has now been lodged, but it is objected to by the defender, who suggests the insertion of a clause, the object of which is to constitute any contravention by the pursuer, or his heirs and assignees, of the stipulations in the agreement an irritancy, inferring *ipso facto* a forfeiture of his or their whole right

and title to the subjects, which in that case ought, it is said, to revert to the defender or his successors. The question is, whether the defender is entitled to have that clause inserted in the disposition. I do not mean a clause in the exact terms proposed by the defender, but whether he is entitled to have any clause to that effect inserted in the deed. To determine this question it is necessary to attend to the terms of the original minute of agreement, by which the defender, of the first part, agrees to sell to the pursuer, of the second part, a portion of the lands of Cessnock, there described, "on the terms and conditions following, viz., (1) The price shall be 7s. 6d. per square yard; and the quantity of ground shall be ascertained by the parties, or by the measurement of some skilled surveyor." Now, there is no difficulty either as to the price or the extent of the ground, for in the 2d article of the condescendence the actual measurement is stated not to exceed 4818 3-9th square yards, and that the price, in terms of the agreement, is £1806, 17s. 6d., and this is admitted by the defender in his answer. The next condition is: "(2) The term of entry shall be Martinmas 1869, when the said price shall be payable, with interest at the rate of 5 per cent. per annum thereafter until payment." Now, the price was not paid at Martinmas 1869, the defender not being then willing to grant a conveyance of the subjects, and standing upon his averment of breach of contract; but it is admitted in his answer to the 5th article of the condescendence that the pursuer, on 17th November 1870, consigned the amount of the price, with interest at 5 per cent. to that date, and the deposit-receipt granted by the bank has been lodged in process. The 3d article of the agreement is in these terms: "(3) The second party shall also, from and after the term of Martinmas 1869, free and relieve the first party of a proportion of the feu-duty, stipend, cess, and other burdens specified in the titles, if any, of his lands of Cessnock, corresponding to the extent of the said piece of ground." Now, without going further, it seems to me that we have here a perfectly good missive of sale, founding an obligation on the seller to grant a disposition with all the usual clauses, and an obligation to infeft *a me vel de me*. But then the fourth head of the agreement is this: "(4) The second party shall forthwith proceed to erect on the said piece of ground dwelling-houses of a suitable description for working people, and of a good and substantial style of workmanship; and the fronts thereof towards said intended street" (*i.e.* a proposed street which is described as the boundary of the property on the east) "shall be built of at least good hammer-dressed or squared rubble in courses; and the second party shall be restricted from erecting any other buildings than those above provided for on said ground, or making any other use thereof, or disposing of the same for any other purpose during the period of ten years from and after said term of entry." The pursuer contends that this is a mere personal obligation, while the defenders, on the other hand, maintain that it must be implied that it was intended to form a real burden on the subjects, binding against singular successors. Now, it must be observed that at the same time that the defender agreed to sell this piece of ground to the pursuer, he sold the whole of the remainder of his lands of Cessnock to the Clyde Navigation Trustees; and having parted with the whole of these lands contemporaneously with the sale to the pursuer, any idea of the constitution of servitude being intended by this 4th head of the agreement is out of the question, as there is no dominant tene-[334]-ment. I therefore put out of view the 5th and 6th articles, which are occupied with details relative to the erection of the houses contemplated by the 4th head of the agreement, and that brings us to the 7th, which, in connection with the 8th, 9th and 10th, contains stipulations in the event of the purchaser exercising an option, which is reserved to him, of requiring the whole or any part of the price to be converted into a feu-duty or feu-duties, to be allocated upon the several lots into which the ground might be divided by him. It is not necessary, however, to consider these articles in detail, because the pursuer has not availed himself of this mode of settling the transaction, but has preferred the other alternative of taking a disposition and paying the price in a lump sum. Now, in these circumstances, and the agreement being as I have stated, the defender's demand to have the stipulation in regard to the erection of workmen's houses constituted a real burden over the property, or rather, I should say, inserted in the titles as a condition resolutive of the pursuer's right, is in my opinion altogether unjustified by the contract. The defender's contention is that the pursuer's obligation shall be fortified by irritant and resolutive clauses, but I have heard no explanation, and do not understand how these are to be carried into effect after the pursuer's entry

with the superior. Is it to be said that, after the purchaser's entry, the seller could thrust him out, and substitute himself in his room? I think that consideration is of itself sufficient to show the absurdity of this proposal, and serves to satisfy me that the pursuer's obligation is merely personal, and one which cannot be made effectual against singular successors.

If the defender has any other objections to the draft disposition we will of course listen to them, but, in the meanwhile, I am of opinion that this objection is unfounded.

LORD DEAS.—When parties differ as to the terms of the formal deed to follow upon missives of sale the usual course is to remit to a man of business to adjust the terms of the deed and to report. I think that course ought to be followed here. The draft disposition proposed and lodged by the pursuer is undoubtedly objectionable in some respects, and the defender cannot be bound to accept of it as it stands. On the other hand, the mere addition to the deed as it now stands of the clause of irritancy suggested by the defender would not be appropriate to the purpose in view. The question to be at present considered is not, I think, the insertion of the proposed irritant clause, but whether in remitting to a man of business to adjust the terms of the deed generally he ought to be instructed that the conditions as to buildings are to enter the disposition in the form of personal obligations, or of real burdens, or (what may have the same effect), as conditions of the right. That that could be done, if parties were agreed, I have no doubt. The case of the Tailors of Aberdeen *v.* Coutts * is conclusive on that point. When there is an agreement of sale, and a formal disposition is to follow, the disposition must be so adjusted as to carry out the object of the agreement, and if to do that requires the constitution of a real burden, then a real burden must be constituted. But the question here is whether that is the nature of the stipulation in this case. If the buildings had been of a permanent nature I am not prepared to say that a clause constituting a real burden should not have gone in for the purpose of making the burden effectual. But the difficulty on the threshold is, that there is nothing of a permanent nature provided for as to buildings—nothing that is to exist beyond ten years. Now, I do not see how an obligation as to buildings which is to exist only for ten years can be constituted into a real burden, and, without some special stipulation for it, I cannot presume that the parties intended anything so anomalous. I therefore agree with your Lordship to this extent, that there is nothing in the agreement to show that the seller is entitled to have this condition made a real burden.

But I am equally clear in the opinion that the obligations must go into the disposition in appropriate terms, and not, as the pursuer contends, in the very words of the missives,—for instance, I do not think that because only two persons are spoken of in the missives, the seller and the buyer, the rights and obligations in [335] the disposition are to be limited to the seller and the buyer personally. It seldom or never happens in missives of sale that anything is said about heirs and successors. A. sells, and B. buys, and that is all. But when the disposition comes to be executed, then you must add to the names of the buyer and seller "their heirs and successors" as well. But in this draft, which has been carelessly framed, or carelessly revised, it is the individuals only who are mentioned throughout. Supposing the deed to have been framed in the usual business way, I am not prepared to give an opinion that the obligation cannot be enforced against singular successors. When we speak of a personal obligation, as distinct from a real burden, we do not mean to distinguish the individual from his heirs and successors. Whether, notwithstanding the terms of the deed, singular successors may or may not free themselves from the obligation on some ground of law is another question, which is not before us. But that the deed must bear to bind heirs and successors I have no doubt. But on the ground I have already stated, of the limited period during which the condition as to the buildings is to exist, I think that the defender is not entitled to have that condition made a real burden.

LORD ARDMILLAN.—My opinion on what I think is the only legal question here depends on the position of these parties in point of fact. Mr. Robertson, proprietor of the lands of Cessnock, agrees with Mr. Corbett on a sale of a part of these lands. In the meantime, he sells all the remainder of the lands, and therefore anything of the nature of a servitude is excluded, because the seller has no land that can be a dominant tenement. The right he gives must therefore be limited entirely to the

* 13 S. 226, 2 S. and M'L. 609, and 1 Rob. 296.

one subject sold, and, in regard to that subject I think the obligation is entirely personal. I admit that the seller is bound to give a deed fairly carrying out the stipulations in the agreement, and these being personal obligations, ought to be inserted in the conveyance. But the seller proposes further, that these obligations be made real burdens, and that these be set forth clearly in the disposition, and accompanied by an irritant clause, declaring forfeiture of the right of the purchaser in the event of a contravention; and the obligation so to be enforced is a temporary one, limited to a period of ten years. On the law of this point I understand both your Lordships to be of the same opinion, that the obligation is one which the seller is not entitled to have inserted as a real burden in the conveyance. I concur in that opinion. That disposes of the only question in the case.

It appears to me that there are great difficulties in the way of making an obligation of this kind effectual as a real burden, where there never was constituted any feudal relation between the parties, and the relation is that only of buyer and seller. But I do not so much rest my opinion on that ground, as on the nature of the obligation; I look rather to what was intended by the agreement.

As to the insertion of the words "heirs and successors," the purchaser is bound personally, and his heirs and representatives necessarily are also. If the effect of adding these words were to make binding on singular successors what is not in the titles, that would be doing *per ambages* what we refuse to do directly, and I should be against allowing their insertion.

LORD KINLOCH.—The substantial question to be decided by us is, whether, in the disposition by the defender to the pursuer, by which is to be carried out the agreement of sale by the former to the latter, there is to be inserted not merely the personal obligation undertaken by the pursuer (the purchaser) to build workmen's houses on the ground, and to keep it unemployed for any other purpose for ten years, but a further clause declaring that, if this obligation is not fulfilled, any deeds to the contrary should be null and void, and the right to the subjects should be irritated, and revert to the disponer.

I am clearly of opinion that the seller has no right to have this clause inserted in the disposition. In adjusting a disposition to follow on a minute of sale the exact terms of the agreement are to be embodied, together with all the usual clauses proper to a disposition. Very clearly an irritant and resolutive clause like what is proposed is not a usual clause, but requires a special contract for its insertion. On the face of the minute of agreement there is nothing but a per-[336]-sonal obligation on the disponee to build the houses, and to keep the ground unoccupied for ten years in any other way. To insert a clause irritating the right if the obligation is not fulfilled, is to insert something not contained in the agreement, and *prima facie* going far beyond its scope. It would therefore be making the disposition not the same thing with, but something different from, the agreement, and doing for the parties what they have not done for themselves. This the Court cannot do.

It is said that to insert this clause is the only sure method of rendering the obligation effectual against singular successors. I will not pronounce on this question. I am not called on to do so. Supposing that this was the case, it would be no good ground for inserting the clause, but emphatically the reverse. It would be simply giving to the disponer something beyond what he stipulated for. We are not authorised to insert in dispositions clauses executorial, or the best clauses we can conceive for making the obligations effectual. If the parties did not contract for such clauses we are not warranted to insert them. For this reason I cannot sanction the insertion of the proposed clause. But I desire distinctly to be understood as not thereby pronouncing on any question of right, connected either with the omission or the insertion of the clause. I do not say that the obligation is ineffectual without the clause, either against one party or another; neither do I say what extent of right the clause would give if inserted. I say no more than that I do not think the clause ought to be inserted in the disposition as a matter of right on which the disponer can insist, leaving to the disposition all its legal effects without this express insertion.

I may add, in regard to the suggestion of Lord Deas that to the name of the disponee there should be added the words "his heirs and successors," this has not yet been proposed by the defender, but should he do so the proposal will meet with my consideration, and I may say my favourable consideration.

THE COURT pronounced this interlocutor:—"The Lords having resumed con-

sideration of the cause, with the draft disposition, No. 31 of process, and clause proposed by the defender to be inserted therein, No. 33 of process, find that the defender is not entitled to insist on the insertion of the said clause; and continue the cause, that parties may adjust finally the terms of the said draft disposition; reserving in the meantime all questions of expenses."

MACONOCHIE & HARE, W.S.—J. & R. MACANDREW, W.S.—Agents.

No. 67. X. MACPHERSON, 336. 17 Jan. 1872. 1st Div.—Lord Mackenzie, B.

MRS. MARY AINSLIE AND ROBERT AINSLIE, Complainers.—*Sol.-Gen. Clark—Lee.*

REV. JOHN GRANT TAINSH, Respondent.—*Millar—Marshall.*

Parish—Schoolmaster—Minister's right to vote at meetings of Heritors.—The Act 1696, c. 26, enacted, "that there be a school settled and established and a schoolmaster appointed in every parish not already provided, by advice of the heritors and minister of the parish, and for that effect that the heritors in every parish meet and provide a commodious house for a school."

Held (*diss.* Lord Deas), that this did not entitle the minister to vote at a meeting of heritors for the purpose of considering the state or condition of the existing schoolhouse, or any question as to repairing or renewing it.

Opinions, that the minister has a voice with regard to any proposal to alter the site of the school.

Mrs. Mary Ainslie, wife of Robert Ainslie, Esquire of Elvingstone, was proprietrix of the estate of Newmains of Moreham, in the parish of Moreham, and as such one of the heritors of the said parish qualified to attend and vote at meetings of heritors in relation to the parish school and schoolmaster's house under the Acts 1696, c. 26, and 43 Geo. III. c. 54. The Earl of Wemyss was the only other qualified heritor in the parish.

Mr. and Mrs. Ainslie brought this note of suspension and interdict [337] against the Rev. Mr. Tainsh, minister of the parish, praying that he should be interdicted "from attending and voting at a meeting of the qualified landed heritors of the parish of Moreham, to be held in the schoolhouse of said parish on Thursday, the 21st day of July 1870, in so far as the said meeting is to be held for the purpose (as set forth in the circular calling the said meeting), of proceeding with the erection of a new schoolhouse for said parish, arranging as to tradesmen, imposing an assessment for the purpose; and from attending and voting at any meeting of the qualified heritors of said parish which may hereafter be called or held, in so far as the same may be called or held for the purpose of considering the state or condition of the existing schoolhouse of said parish; or any motion, proposal, or resolution relating to the alteration of the site of said schoolhouse, or the repair, alteration, or renovation of said schoolhouse."

The complainers pleaded;—(1) The complainers are entitled to suspension and interdict as craved, in respect that a schoolhouse has already been provided for the parish of Moreham by the heritors, in terms of the Act 1696, cap. 26, and that the minister of the parish has no right or title to advise or interfere with the heritors of the parish in regard to the said schoolhouse.

The respondent pleaded;—(1) Under the statute 1696, cap. 26, and subsequent statutes relating to the schools, the minister of the parish has a voice, as well in matters affecting the establishment or maintenance of the school, and requisite buildings, including the state or condition and site thereof, and the erection, alteration, and removal of the same, as in the appointment of the schoolmaster. (2) Under the said statutes, and according to immemorial usage, the minister is entitled to exercise his voice in the establishment and maintenance of the school, and in the appointment of the schoolmaster, by attending and voting at meetings of heritors on the subject, at least when summoned to such meetings.

The Act 1696, chapter 26, enacts, *inter alia*,—"That there be a school settled

and established, and a schoolmaster appointed in every parish not already provided, by advice of the heritors and minister of the parish; and for that effect that the heritors in every parish meet and provide a commodious house for a school, and settle and modify a salary to a schoolmaster, which shall not be under one hundred merks, nor above two hundred merks, to be paid yearly at two terms, Whitsunday and Martinmas, by equal portions, and that they stent and lay on the said salary conform to every heritor's valued rent within the parish, allowing each heritor relief from his tenants of the half of his proportion for settling and maintaining of a school, and payment of the schoolmaster's salary." The Act 43 Geo. III. chapter 54, section 8, enacts,—"That in every parish where a commodious house for a school has not already been provided pursuant to 1696, chapter 26, and where there has not been already provided a dwelling-house for the residence of the schoolmaster, with a portion of ground for a garden to the extent hereafter-mentioned, the heritors shall provide a commodious house for a school, and a house for the residence of a schoolmaster (such house consisting of not more than two apartments, including the kitchen), together with a portion of ground for a garden to such dwelling-house, from fields used for the ordinary purposes of agriculture or pasturage, as near and convenient to the schoolmaster's dwelling-house as reasonably may be; that such garden shall contain at least one-fourth part of a Scots acre, and shall be enclosed with such fence as is generally used for such purposes in the district of country where it is situated; and that the expense of providing such schoolhouse, dwelling-house, and garden, and supporting the same, shall be defrayed in the manner prescribed for providing a [338] house for a school by the foresaid Act 1696; providing that where the heritors shall determine that such garden cannot be allotted to the schoolmaster without great loss and inconvenience, it shall be optional to them, with the authority of the Quarter Sessions of the county or stewartry, to assign to the schoolmaster in lieu of such garden an addition to his salary at the rate of eight bolls of oatmeal per acre, to be computed according to the average ascertained in manner before directed." Section 9 enacts that "If the heritors shall neglect or refuse to provide the accommodations of house, schoolhouse, and garden, or additional salary in lieu thereof, to schoolmasters, according to the provisions of this Act, or if the schoolmaster shall not be satisfied with the accommodations offered him, it shall be competent for him to bring the same, by representation or petition before the Quarter Sessions for the shire or stewarty to which the parish kirk belongs, or within which the parish kirk is situated, and that in all such cases the judgment of the Quarter Sessions shall be final." Section 22 enacts "That it shall not be lawful for any heritor who is not a proprietor of lands within the parish, to the extent of at least one hundred pounds Scots of valued rent, appearing in the land tax books of the county, to attend or vote at any meeting held pursuant to this Act, but that every heritor so qualified may vote by proxy, or by letter under his hand."

The Lord Ordinary on the Bills passed the note. A record having been made up and closed, the Lord Ordinary pronounced an interlocutor (25th July 1871) suspending, interdicting, and discharging in terms of the note, and finding the respondent liable in expenses.*

---

* "NOTE.—The question whether the respondent, as minister of the parish of Moreham, is entitled to vote at meetings of the qualified heritors of that parish with reference to the state or condition of the present parish schoolhouse, the repair, alteration, or renovation of that school, or the erection of a new schoolhouse in the place of the present schoolhouse, depends upon the provisions of the statute 43 Geo. III. chap. 54. By that statute those heritors only who are proprietors of lands in the parish to the extent of at least £100 Scots of valued rent are entitled to attend or vote at any meeting held pursuant to that Act. There are various enactments in the statute for making better provision for parochial schoolmasters in Scotland. Some of these provisions are directed to be carried into effect by the qualified heritors alone, and others by the qualified heritors and the minister of the parish. The statute, which is free from ambiguity on this matter, makes a clear distinction between those acts which are to be done by the qualified heritors alone, and those which are to be done by the qualified heritors and the minister.

"The acts which are to be done by the qualified heritors and the minister of the parish are (secs. 2, 4, 6), the fixing and determining the amount of the schoolmaster's

[339] The respondent reclaimed, and argued;—That under the Act of 1696 the minister had the right of voting in regard to the appointment of a schoolmaster, and the establishment of schools.* This right was not taken away by the Act of 1803, and must be held as entitling the minister to vote in any question regarding the establishment or maintenance of the school and requisite buildings, including the state or condition and site thereof, and their erection, alteration, or removal, as well as in regard to the appointment of a schoolmaster.† The statute of 1803, in sec. 7, providing that "in every parish where there is only one heritor qualified as hereinafter prescribed such heritor shall have two votes at every meeting directed to be held pursuant to this Act," necessarily implied that the minister should have a voice in such questions.‡

---

salary within certain specified limits; (sec. 11), the division of the salary among two or more teachers in the case of parishes which consist of districts detached from each other by the sea or otherwise, or where they are of great extent or population; (secs. 14, 16, 17), the election of a person to fill the office of schoolmaster when it is vacant, and (sec. 18) the fixing of the school-fees from time to time. The heritors, minister, or elders are also by the said statute empowered (sec. 21) to present a complaint to the Presbytery charging the schoolmaster with neglect of duty, or immoral conduct, or cruel and improper treatment of the scholars—a provision which has been altered by the Act 24 & 25 Vict. chap. 107, sec. 14. But no power is conferred by the statute 43 Geo. III. c. 54, upon the minister of the parish to act or vote with reference to providing a commodious schoolhouse, or a dwelling-house for the residence of the schoolmaster. These matters are regulated by the 8th section of the statute.—(His Lordship quoted the 8th and 9th sections of the statute.)

"The 8th section of the statute commits to the qualified heritors alone the duty of providing a commodious schoolhouse, and a dwelling-house and garden for the parish schoolmaster, and its terms are so clear and distinct in themselves, [339] as, in the opinion of the Lord Ordinary, to preclude the respondent, as minister of the parish of Moreham, from voting at meetings of the qualified heritors, called for the purpose of considering the state or condition of the present parish schoolhouse, the repair, alteration, or renovation thereof, or the erection of a new schoolhouse in its place.

"The respondent maintained that as by the Act 1696, c. 26, it was ordained 'that there be a school settled and established and a schoolmaster appointed in every parish not already provided, by advice of the heritors and minister of the parish,' he was entitled to vote at meetings of the heritors with reference to the schoolhouse. But a school has been settled and established and a schoolmaster appointed in the parish of Moreham, and the Act 1696, c. 26, does not therefore apply. Further, it is provided by the Act 43 Geo. III. chap. 54, sec. 23, 'that all former Acts and statutes with regard to parish schools or schoolmasters are hereby ratified and confirmed, in so far as they are not altered by the express provisions of this Act.' The argument of the respondent appears to the Lord Ordinary to be inconsistent with the express provisions of this last-mentioned Act.

"The respondent also maintained that, according to universal practice since the passing of the statute 43 Geo. III. chap. 54, the minister of the parish is entitled to vote at meetings of the heritors with reference to the schoolhouse. Even if such universal practice had existed since the passing of that statute, it could not, the Lord Ordinary thinks, confer any such right upon the minister of the parish, because the statute alone can regulate the matter, and under the statute the respondent has no such right. The whole matter is statutory, and must be regulated by the provisions of the statute.

"The Lord Ordinary has only further to observe that the subsequent statues, 1 & 2 Vict. chap. 87, and 24 & 25 Vict. chap. 107, are also quite distinct as to the acts to be done by the heritors alone, and those to be done by the heritors and minister, and that there is no provision in either of these statutes which supports the respondent's claim."

* Philp v. Heritors of Cruden, 1724, Mor. 13,122; Earl of Strathmore v. Minister of Kirriemuir, 1762, Mor. 13,128.

† Anderson v. Heritors of Bourtie, Nov. 26, 1808, F. C.

‡ Act of Assembly of 1642; Act 1646, c. 45.

and established, and a schoolmaster appointed in every parish not already provided, by advice of the heritors and minister of the parish; and for that effect that the heritors in every parish meet and provide a commodious house for a school, and settle and modify a salary to a schoolmaster, which shall not be under one hundred merks, nor above two hundred merks, to be paid yearly at two terms, Whitsunday and Martinmas, by equal portions, and that they stent and lay on the said salary conform to every heritor's valued rent within the parish, allowing each heritor relief from his tenants of the half of his proportion for settling and maintaining of a school, and payment of the schoolmaster's salary." The Act 43 Geo. III. chapter 54, section 8, enacts,—"That in every parish where a commodious house for a school has not already been provided pursuant to 1696, chapter 26, and where there has not been already provided a dwelling-house for the residence of the schoolmaster, with a portion of ground for a garden to the extent hereafter-mentioned, the heritors shall provide a commodious house for a school, and a house for the residence of a schoolmaster (such house consisting of not more than two apartments, including the kitchen), together with a portion of ground for a garden to such dwelling-house, from fields used for the ordinary purposes of agriculture or pasturage, as near and convenient to the schoolmaster's dwelling-house as reasonably may be; that such garden shall contain at least one-fourth part of a Scots acre, and shall be enclosed with such fence as is generally used for such purposes in the district of country where it is situated; and that the expense of providing such schoolhouse, dwelling-house, and garden, and supporting the same, shall be defrayed in the manner prescribed for providing a [338] house for a school by the foresaid Act 1696; providing that where the heritors shall determine that such garden cannot be allotted to the schoolmaster without great loss and inconvenience, it shall be optional to them, with the authority of the Quarter Sessions of the county or stewartry, to assign to the schoolmaster in lieu of such garden an addition to his salary at the rate of eight bolls of oatmeal per acre, to be computed according to the average ascertained in manner before directed." Section 9 enacts that "If the heritors shall neglect or refuse to provide the accommodations of house, schoolhouse, and garden, or additional salary in lieu thereof, to schoolmasters, according to the provisions of this Act, or if the schoolmaster shall not be satisfied with the accommodations offered him, it shall be competent for him to bring the same, by representation or petition before the Quarter Sessions for the shire or stewarty to which the parish kirk belongs, or within which the parish kirk is situated, and that in all such cases the judgment of the Quarter Sessions shall be final." Section 22 enacts "That it shall not be lawful for any heritor who is not a proprietor of lands within the parish, to the extent of at least one hundred pounds Scots of valued rent, appearing in the land tax books of the county, to attend or vote at any meeting held pursuant to this Act, but that every heritor so qualified may vote by proxy, or by letter under his hand."

The Lord Ordinary on the Bills passed the note. A record having been made up and closed, the Lord Ordinary pronounced an interlocutor (25th July 1871) suspending, interdicting, and discharging in terms of the note, and finding the respondent liable in expenses.*

---

* "NOTE.—The question whether the respondent, as minister of the parish of Moreham, is entitled to vote at meetings of the qualified heritors of that parish with reference to the state or condition of the present parish schoolhouse, the repair, alteration, or renovation of that school, or the erection of a new schoolhouse in the place of the present schoolhouse, depends upon the provisions of the statute 43 Geo. III. chap. 54. By that statute those heritors only who are proprietors of lands in the parish to the extent of at least £100 Scots of valued rent are entitled to attend or vote at any meeting held pursuant to that Act. There are various enactments in the statute for making better provision for parochial schoolmasters in Scotland. Some of these provisions are directed to be carried into effect by the qualified heritors alone, and others by the qualified heritors and the minister of the parish. The statute, which is free from ambiguity on this matter, makes a clear distinction between those acts which are to be done by the qualified heritors alone, and those which are to be done by the qualified heritors and the minister.

"The acts which are to be done by the qualified heritors and the minister of the parish are (secs. 2, 4, 6), the fixing and determining the amount of the schoolmaster's

enjoy. In regard to the appointment of the teacher, the school fees, the salary of the teacher, and other matters, there are special clauses in the Act of 1803 and the Act of 1861 conferring the power on, and committing the duty of disposing of the matter to the "heritors and minister." To these clauses effect must of course be given. But in the matter of providing a "commodious schoolhouse," &c., the power and duty is by the 8th section of the Act of 1803 given to the "heritors of every parish." The minister is not included, and is not mentioned. It provides "that in every parish where a commodious house for a school has not already been provided, pursuant to 1696, chapter 26, and where there has not been already provided a dwelling-house for the residence of the schoolmaster, with a portion of ground [341] for a garden to the extent hereafter mentioned, the heritors shall provide a commodious house for a school, and a house for the residence of the schoolmaster (such house consisting of not more than two apartments, including the kitchen), together with a portion of ground for a garden to such dwelling-house, from fields used for the ordinary purposes of agriculture or pasturage, as near and convenient to the schoolmaster's dwelling-house as reasonably may be: That such garden shall contain at least one-fourth part of a Scots acre, and shall be enclosed with such fence as is generally used for such purposes in the district of country where it is situated; and that the expense of providing such schoolhouse, dwelling-house, and garden, and supporting the same, shall be defrayed in the manner prescribed for providing a house for a school by the foresaid Act 1696: Providing that where the heritors shall determine that such garden cannot be allotted to the schoolmaster without great loss and inconvenience, it shall be optional to them, with the authority of the Quarter Sessions of the county or stewartry, to assign to the schoolmaster, in lieu of such garden, an addition to his salary at the rate of eight bolls of oatmeal per acre, to be computed according to the average ascertained in manner before directed." I cannot therefore perceive any sufficient grounds in the clauses of the subsequent Acts for sustaining the minister's claim as matter of right to attend and vote at the meetings referred to in the prayer of the petition in regard to repairing or erecting a school, apart from the question of selection of site. The question whether a new schoolhouse is required is for the heritors. The question where the new schoolhouse shall be put is a question for the heritors and the minister acting together.

The 7th section of the Act of 1803 has been very properly founded on by the counsel for the minister. It is not without importance. It provides that "in every parish where there is only one heritor qualified as hereinafter prescribed such heritor shall have two votes at every meeting directed to be held pursuant to this Act." It is plainly implied that in parishes where there is only one qualified heritor there must be some one, not an heritor, entitled to vote, for otherwise the giving two votes to the one heritor would be absurd and unmeaning. That the minister is that one person is also clear. But there are many meetings where the minister in such a parish, with only one heritor, would be entitled to vote. Take, for instance, the case of the appointment of a schoolmaster, where the right to appoint would be, according to the existing law, in the single heritor and the parish minister, and where, in the event of difference of opinion, the 7th section, conferring on the heritor two votes against the minister's one vote, would practically give the absolute right of nomination to the single heritor. That is the law, and is the effect of this 7th section. The exclusion of the minister from all meetings of heritors would be inconsistent with any rational meaning of the 7th section. But as the minister has by force of the statute a right to attend and vote at many meetings, the exclusion of him from others does not involve a *reductio ad absurdum*, and, consequently, the enactment in the 7th section does not control the construction or the effect of the Act of 1696, or of the 8th section of the Act of 1803. As I read these statutory provisions I am of opinion that, on the subjects set forth in the petition, except in regard to the selection of site, the heritors alone, and not the heritors and minister, are entrusted by the Legislature with the duty of meeting for consideration, and for the erection of a commodious schoolhouse, or repairing the existing schoolhouse. Therefore, under the exception of the consideration of the site which I have mentioned, I concur with the Lord Ordinary in continuing this interdict.

I observe that in the Bill-Chamber Lord Gifford was disposed to be of the same opinion.

LORD KINLOCH.—The question raised by this suspension regards the right of the respondent, the minister of the parish of Moreham, to attend and vote at certain meetings of heritors connected with the subject of the parish school.

It appears from the proceedings laid before us that in March 1870 a meeting of heritors, at which the minister was present, resolved on executing repairs on the schoolhouse agreeably to a specified plan, but, as the minutes bear, "resolved to delay calling for estimates till they had ascertained whether Mr. Ainslie would [342] be willing to grant a new site in exchange for site of present buildings and garden, including piece of land along roadside to the north of them, in which case they would prefer new buildings altogether." The communications with Mr. Ainslie not being satisfactory, and after certain intermediate proceedings, the following circular was issued on 20th June 1870 by the heritors' clerk:—"There will be a meeting of the qualified landed heritors and others of this parish held in the schoolhouse on Thursday, the 21st day of July next, at twelve o'clock noon, for the purpose of proceeding with the erection of a new schoolhouse, arranging as to tradesmen, imposing an assessment for the purpose, and such other business as may be brought before the meeting." The complainers, Mr. and Mrs. Ainslie, now seek an interdict against the respondent, the minister, from attending and voting at this meeting, "in so far as the said meeting is to be held for the purpose of proceeding with the erection of a new schoolhouse for said parish, arranging as to tradesmen, imposing an assessment for the purpose, and from attending and voting at any meeting of the qualified heritors of said parish which may hereafter be called or held for the purpose of considering the state or condition of the existing schoolhouse of said parish, or any motion, proposal, or resolution relating to the alteration of the site of said schoolhouse, or the repair, alteration, or renovation of said schoolhouse." The Lord Ordinary has granted interdict in these terms.

The question is mainly to be decided by the terms of the Acts of Parliament 1696, c. 26, and 43 Geo. III. c. 54. It is important at the same time to remember that the Act 1696 is not the first statutory provision on the subject of schools. So far back as 1494 a statute was passed ordaining barons and freeholders of substance to send their children to school, under a penalty for non-observance. After the Reformation various enactments were made on the subject of schools. In 1616 an Act of Privy Council was issued, afterwards ratified by the statute 1633, c. 5, providing "that in every parish of this kingdom where convenient means may be had for entertaining a school, a school shall be established, and a fit person appointed to teach the same, upon the expense of the parishioners, according to the quality and quantity of the parish." Episcopacy being by that time restored, the duty of seeing this done was devolved on "the bishops in their several visitations, with consent of the heritors and most part of the parishioners." And if the heritors failed to stent themselves for the expense, the bishops, "with consent of the most part of the parishioners," were authorised to lay on the necessary assessment. During the Usurpation, the Act 1646, c. 45 (afterwards rescinded), was passed, containing, with some slight variations, the same enactments with the after statute 1696. One of these variations is that the establishment of the school should be in the hands of the presbytery, again by that time the ruling judicatory. It is declared "that there be a school founded, and a schoolmaster appointed in every parish (not already provided), by advice of the presbytery. And to this purpose, that the heritors in every congregation meet among themselves, and provide a commodious house for a school, and modify a stipend to the schoolmaster, which shall not be under 100 merks, nor above 200 merks, to be paid yearly at two terms. And to this effect that they set down a stent upon every one's rent of stock and teind in the parish, proportionally to the worth thereof, for maintenance of the school and payment of the schoolmaster's stipend, which stipend is declared to be due to the schoolmaster by and attour the casualties which formerly belonged to readers and clerks of kirk-sessions. And if the heritors shall not convene, or being convened shall not agree amongst themselves, then and in that case the presbytery shall nominate twelve honest men within the bounds of the presbytery, who shall have power to establish a school, modify a stipend for the schoolmaster, with the latitude before expressed, and set down a stent for payment thereof upon the heritors, which shall be as valid and effectual as if the same had been done by the heritors themselves." No special mention of the minister of the parish is made in this enactment.

There then comes the Act 1696, c. 26, of which the leading enactment is, "That there be a school settled and established, and a schoolmaster appointed in every parish not already provided, by advice of the heritors and the minister [343] of the parish." The Act thereafter proceeds, in almost the very words of the rescinded Act 1646,—"And for that effect, that the heritors in every parish shall meet and provide a commodious house for a school, and settle and modify a salary to a schoolmaster, which shall not be under 100 merks, nor above 200 merks, &c., and that they stent and lay on the said salary conform to every heritor's valued rent within the parish." Failing the heritors doing their duty in these respects, or, as the statute expresses it, "if the heritors or major part of them shall not convene, or, being convened, shall not agree among themselves," the Commissioners of Supply are empowered to act in their stead.

There is in this statute a marked difference in the words applicable to the settlement and establishment of the school, and those which regard the fixing of the salary and providing a schoolhouse. In the first case the thing is to be done "by advice of the heritors and minister of the parish." In the second case no mention is made of the minister; but the statute says, "the heritors in every parish shall meet." The prior Act 1646 has said, "the heritors shall meet amongst themselves"; and the words of the Act 1696 seem, according to their natural reading, to have exactly the same import. Under this Act, therefore, whilst the settlement and establishment of the school (whatever that may comprehend) is to be "by advice of the heritors and minister of the parish," the heritors seem to have exclusively conferred on them the provision of the schoolhouse, and the fixing and raising the salary.

The same difference of phraseology stands out in a very marked manner in the subsequent Act, 43 Geo. III. c. 54. In more than one point the minister is now admitted to a larger participation with the heritors by the express terms of the statute. In regard to the fixing of the salary, it is now expressly said—"The heritors possessed of the qualification required by this Act and the minister of every parish shall meet," and thereafter "such meeting shall fix and determine whether the schoolmaster's salary shall be 300 merks Scots per annum, or 400 merks per annum, or a sum between these two sums." So also as to other meetings connected with the fixing of the precise amount of the salary, and its division between two or more teachers in certain cases. The meetings for the election of the schoolmaster are in like manner described as composed "of the heritors, possessors of the qualification required by this Act, with the minister of the parish." The same is the phraseolgy employed in regard to the meeting for fixing the school fees. But in regard to the provision of a schoolhouse, what the statute says is, that "the heritors of every such parish shall provide a commodious house for a school, and also a house for the residence of the schoolmaster, &c. And the expense of providing such schoolhouse, dwelling-house, and garden, and supporting the same, shall be defrayed and paid in the same and like manner as is prescribed for providing a house for a school by the aforesaid Act of Parliament (1696); provided always, that where the heritors shall determine that such garden cannot be allotted to the schoolmaster without great inconvenience," they may make a certain allowance instead. It is further provided, that, "in case the heritors should neglect or refuse to provide the accommodations of house," &c., an appeal shall lie to the Quarter Sessions. There is nothing here expressly said as to the heritors meeting; but as action on their part must be always preceded by resolution, I conceive a meeting of the heritors, at which their determination shall be formed, to be necessarily implied.

I cannot consider the contrasted expressions of the two statutes without coming to the conclusion of the Lord Ordinary, that a difference was intended to be made between the provision of the schoolhouse and the other duties referred to in the Acts; and that, in the case of the schoolhouse, the heritors, on whom is thrown the burden of providing it, and by parity of reason maintaining and repairing it, have exclusively the right of deliberating and deciding on all points relative to this matter, their decision being of course always subject to the statutory appeal. I cannot read the 8th clause of the Act of 1803 as simply declaring the obligation of the heritors to provide the schoolhouse, apart altogether from any allusion to the deliberations precedent to such provision. I must hold it intended that those who provide are those who shall deliberate. I think the Act 1803, which is declared not to repeal the former statutes except [344] where expressly altered, when saying, "the heritors

of every such parish shall provide a commodious house for a school," means exactly the same thing with the Act 1696, when it says, " the heritors in every parish shall meet and provide a commodious house for a school." This Act, again, means, I think, the same thing with the rescinded Act, 1646, when it says, " the heritors in every congregation shall meet among themselves and provide a commodious house for a school." I consider this, which may be called the executive part of the statutory arrangement, as intended to be left entirely to the heritors, apart altogether from any direct action by the ecclesiastical authority, successively entrusted with it, whether presbytery, bishop, or parish minister. If the heritors go wrong, the statute provides the means of redress.

This leaves in full operation the provision in the Act 1696, " that there be a school settled and established, and a schoolmaster appointed in every parish not already provided, by advice of the heritors and minister of the parish "; and also all the relative enactments contained in both statutes providing for joint action in this matter by the heritors and minister. In these general phrases of the Act 1696 there is, as I conceive, a great deal more intended than a mere abstract resolution that a school shall be established in the particular parish. They comprehend, as I think, every arrangement connected with such establishment—such as the determination of the site of the schoolhouse, of the size of the building, and number of scholars to be accommodated, of the branches of learning to be taught in the school, and the like. On all these points I think the minister of the parish is joined with the heritors in the court of deliberation, and is entitled to a vote equal to that of a heritor. By parity of reason, I think he is a member of the deliberative body, wherever an alteration is proposed to be made in any of these particulars. But in regard to the provision of the building which is to fulfil the antecedent arrangements, or the repair of it when it needs repairs, and the assessment for the cost, I think the heritors are in the first instance left to themselves, and the minister forms no part of the deliberative meeting.

There was something said as to practice in this matter; but I do not think the practice of any relevancy. It is probable that no great strictness has prevailed in distinguishing between one kind of meeting and another. In most cases the heritors will be all the better of the information and intelligence of the minister; and any attempt to exclude him will be, generally speaking, as impolitic as uncourteous. I regret that the matter of legal right has been pushed to a decision; but as it has been so, I must decide it according to law.

The only remaining consideration is how to bring these general principles to bear on the conclusions of the present note of suspension and interdict. With regard to the interdict to be granted, none can now be applied to the meeting of the 21st July 1870, which is long past. I think the complainers entitled to an interdict against the respondent attending and voting at any meeting of heritors, " in so far as the same may be called or held for the purpose of considering the state or condition of the existing schoolhouse of the parish, or the repair, alteration, or renovation of said schoolhouse." I do not think them entitled to any further interdict. In particular, I do not think them entitled to an interdict against the minister voting on " any motion, proposal, or resolution relating to the alteration of the site of the schoolhouse "; because I think the site of the schoolhouse is one of the matters connected with the establishment of the school, in which the minister has an equal voice with the heritors.

LORD DEAS.—The meeting, the calling of which gave rise to this suspension and interdict, was intimated by a circular from the clerk to the heritors, which is dated 20th June 1870, and is in these terms:—" There will be a meeting of the qualified landed heritors and others of this parish held in the schoolhouse on Thursday, the 21st day of July next, at twelve o'clock noon, for the purpose of proceeding with the erection of a new schoolhouse, arranging as to tradesmen, imposing an assessment for the purpose, and such other business as may be brought before the meeting." Now, the object of this application for interdict is, as I understand it, to have the minister prohibited from attending and voting at that meeting with reference to anything concerning the proposed new schoolhouse.

[345] Your Lordships, I understand, do not propose to grant that interdict, but to allow the minister to attend and vote at meetings held for the discussion of certain matters relating to the schoolhouse, but not as to other matters relating to the schoolhouse. He is, as I understand the opinions of Lords Ardmillan and Kinloch, to be

allowed to attend and vote that there shall be a new schoolhouse, and that it shall be upon a certain site; but when this has once been resolved upon he is not to have any further voice in carrying the resolution into effect. He is to have no vote in regard to the details which may be required for rendering the schoolhouse sufficient for its purpose, or in regard to the alterations and repairs which may from time to time be necessary, or anything connected with alterations or renovations.

That seems to me to involve rather a nice splitting of straws. I can see no sufficient ground for holding that the minister is entitled to do some of the things mentioned, and at the same time to be altogether excluded from any vote in regard to the others. In my opinion the minister has as much to do with everything concerning the commodiousness and sufficiency of the schoolhouse as he has with any other business to be transacted at these meetings. It would certainly, I think, be very anomalous if the Legislature intended the minister to have a vote in regard to the more important matter, viz. the erection and site of the school, and at the same time to exclude him from having anything to do with the minor details.

According to the view expressed by your Lordships he is entitled to be present at all the meetings, and to a certain extent to take part in the proceedings, but when the particulars come to be adjusted the heritors are to be entitled to say, "Please your reverence, walk out, while we discuss those matters upon which you have no vote; when we come to discuss anything on which you have a vote we will call you in again." Now, I cannot think that anything of the kind was ever contemplated by the Legislature, and I am of opinion that the fair meaning of the various enactments upon the subject is that the minister is to be entitled to take part in everything relating to the schoolhouse. Lord Ardmillan has said that he reads the statutes as implying that whatever part the minister is entitled to take, when he is to take part in the proceedings at all, he is just to sit, act, and vote along with the heritors. That is the way admittedly in which his "advice" is to be taken, and I think that goes a long way towards the construction of the statutes. I read the Act 1696, cap. 26, as providing that in every parish there shall be a school settled and established and a schoolmaster appointed, by advice of the minister and heritors. The natural meaning of the words is, that the minister is to have a voice equally with any of the heritors in settling and establishing the school. Now, the word "school" is in Scotland sometimes applied to the schoolhouse and sometimes to the scholars. I have no doubt that in the statute it comprehends both, and that the settlement and establishment of the school includes not only the choice of a site for the house, but the nature and size of the building, and everything connected with it. The words of the statute, "and for that effect, that the heritors in every parish meet and provide a commodious house for a school," show that a commodious schoolhouse was contemplated as part of the settling and establishing of the school. A comfortable schoolhouse surely forms an important feature in settling and establishing a school, whether that word be applied to the building itself or to the scholars in it. But neither the securing a commodious schoolhouse nor the payment of the master's salary were, in my opinion, things to be done and arranged by the heritors without the "advice" of the minister, and I think that the subsequent enactments confirm this view, and shew that it was not the intention of the Legislature to exclude the minister from having a vote in regard to the expenditure of the pounds, shillings, and pence to be paid by the heritors. The 7th section of the Act 43 Geo. III. cap. 54, is quite general in its terms, and no construction of it has been suggested except that in a parish where there is only one heritor he is to be entitled to two votes and the minister to one. (His Lordship then read the 8th, 9th, 14th, 18th, and 21st sections of the Act.)

My Lords, I can find nothing in any of these provisions, nor in the later statutes of 1 & 2 Vict. cap. 87, and 24 & 25 Vict. cap. 107, which at all [346] conflicts with the views I have expressed, or which proves that the Legislature intended to exclude the minister from having a vote in regard to money matters. We must look to the whole scope of the enactments to see what was meant—and no doubt they are somewhat loosely worded—but the result, according to my opinion, is, that the settling and establishing of a school was intended to comprehend everything necessary for that purpose, and in particular the providing of a commodious schoolhouse, without any exclusion of the minister from voting in regard to the details in connection with that matter. I am persuaded the statutes have been so construed in practice, and I think the practice has been right.

LORD PRESIDENT.—I agree with Lord Ardmillan and Lord Kinloch, but I do not understand them in the same sense as Lord Deas does. I shall endeavour to explain what I understand their opinion to be. In the original erection of a school under the Act 1696 I think the minister and heritors together are to do everything falling properly under the description "settling and establishing" the school. For this purpose they must consider the circumstances of the parish, the population, its distribution over the area of the parish, the kind of instruction suitable for the population, and the number of scholars likely to attend. On these and other circumstances they are to form an opinion on the kind of school required, and to fix and determine what it is to be. That being done, it is the duty of the heritors alone under the Act to provide a building commodious and suitable for the school thus settled, and if they neglect to do so they fail to fulfil the provisions of the statute, and against that a remedy is provided. But that duty is laid on the heritors alone, and the minister has nothing to no directly in any consultation of the heritors or any meeting about it. It seems to me to follow still more clearly, that when repairs of the school building become necessary it will still be the duty of the heritors exclusively to execute them. I make no distinction between repairs and rebuilding so long as the question is whether they are necessary. Therefore, in any question regarding the repair of the building, I am of opinion that the minister has no voice. In any question regarding the rebuilding of a schoolhouse I am still of opinion that the minister has no voice, and I understand that Lord Ardmillan and Lord Kinloch are both of that opinion. But if a question arise respecting a proposal to change the site of the school I am of opinion that the minister has a voice, because I understand that under the Act 1696 that is part of the duty committed to the minister and heritors together in "settling and establishing" the school. The place where the school is to be fixed is one of the most important considerations in settling the school. That is the simple ground of my judgment.

The subsequent statutes do not affect the question. They settle matters about the schoolmaster's salary, and introduce an alteration as to the right of the minister to vote in regard to it. This only shows, by force of contrast, that it was not meant to introduce any novelty as to the minister's right to vote in any question regarding the providing of a schoolhouse,—that is left to the operation of the Act 1696.

The following interlocutor was pronounced:—"Recall the said interlocutor, also recall the interdict formerly granted: Sustain the reasons of suspension, and suspend the proceedings complained of, to the effect of granting interdict as aftermentioned; and interdict, prohibit, and discharge the respondent, as minister of the parish of Moreham, from attending and voting at any meeting of heritors called for the sole purpose of providing for the repair or rebuilding of the parish schoolhouse, or of carrying into execution any resolution to repair or rebuild the said schoolhouse by employing tradesmen, adopting plans, or laying on an assessment to provide for the expense, or by any other means; also from voting at any meeting on any question regarding the repairing or rebuilding [347] the said schoolhouse, or the carrying into execution as aforesaid of any resolution to repair or rebuild such schoolhouse: *Quoad ultra* repel the reasons of suspension, and refuse the interdict, and decern: Find the respondent entitled to the expenses incurred by him since the date of the Lord Ordinary's interlocutor reclaimed against: *Quoad ultra* find no expenses due to either party, and remit," &c.

W. KENNEDY, W.S.—MENZIES & COVENTRY, W.S.—Agents.

No. 68. X. MACPHERSON, 347. 18 Jan. 1872. 2d Div.—Sheriff of Fifeshire, R.

HENRY W. HOPE, Pursuer and Appellant.—*Marshall.*
JESSIE WEBSTER AND ANOTHER, Defenders and Respondents.
JAMES AITKEN, Defender.—*Sol.-Gen. Clark—Adam.*

Superior and Vassal—Feu-duty—Statute 16 *&* 17 *Vict. c.* 80.—A vassal was bound by his charter to pay as feu-duty "£2 Scots money, twelve capons, or 10s. Scots for each capon, and four dargs, or 6s. 8d. for each darg not performed, all in" the

superior's "option." For many years 2s. 6d. had been paid for each capon to the superior in lieu of delivery in kind. The vassal subsequently refused to continue this payment, and tendered 10s. Scots as conversion money. The superior having refused conversion money, and the vassal having made no payment for six years, the superior brought an action of declarator of irritancy against the vassal and his disponee who had not entered with the superior. *Held* (1) that the superior having refused the money-conversion, he had thereby sufficiently intimated his option of taking the capons; (2) that the vassal not having tendered the feu-duty for upwards of two years the feu-duty was in arrear, and the irritancy had been incurred; (3) that the dargs could not be demanded after the year in which they were exigible was past, nor the conversion in lieu thereof.

This was an appeal from the Sheriff-court of Fifeshire. The action was brought under the 32d section of the Act 16 & 17 Vict. c. 80,* at the instance of Henry Walter Hope of Craighall, as the superior of certain subjects situated in Ceres, against Jessie Webster and Robertina Watson or Barclay, as vassals in the subjects under the pursuer, and also against James Aitken, surgeon, Ceres, the present proprietor of the subjects. The summons concluded that the defenders, the said Jessie Webster and Robertina Watson or Barclay, and the said James Aitken, having run in arrear of the feu-duty payable out of the subjects for the years from Martinmas 1864 to Martinmas 1870, or at least for two years preceding the term of Martinmas 1870, the irritancy introduced by the Act of Parliament had been incurred, and, in terms of the said Act, that the defenders should be removed from their possession thereof.

In November 1845 George William Hope, the then superior of the subjects, granted a charter of confirmation in favour of the defenders, Jessie Webster and Robertina Watson or Barclay. The subjects were to be held of the superior "for the yearly payment of the feu-duty payable furth of the same, being two pounds Scots money, twelve capons, or ten shillings Scots for each capon, and four shear dargs, or six shillings and eight pennies Scots for each shear darg, all in our" (*i.e.* the superior's) "option, in name of feu-farm yearly."

[348] In 1846 Jessie Webster and Robertina Watson or Barclay disponed the subjects to Robert Hood, and in 1869 Robert Hood assigned this disposition to the defender James Aitken. James Aitken had not been entered with the superior.

In the summons the feu-duty in arrear was said to amount to £12, 8s. 9½d., being at the rate of £1, 15s. 6½d. per annum, which was made out in this way:—

"Two pound Scots	£0	3	4
"Twelve capons, not being delivered, the value as accustomed to be paid is 2s. 6d. each	1	10	0
"Four shear dargs, or 6s. 8d. Scots for each shear darg not performed	0	2	2⅔
	£1	15	6½"

The defence maintained by Dr. Aitken, the only defender who had entered appearance, was that the pursuer had not intimated whether he was to take payment of the feu-duty in kind or in money; that he, the defender, was ready to pay either in kind or money, but that, if the pursuer elected to take payment in money, he was not entitled to receive more than ten shillings Scots, or tenpence sterling for each capon. With regard to the shear dargs the defender maintained that those being personal services they were exigible only if called for within the year.

The pursuer averred;—"From time immemorial the vassals in the pursuer's barony have paid to the superiors thereof the conversion rate of 2s. 6d. sterling for

* Sec. 32 enacts, "Wherever in subjects not exceeding in yearly value the sum of £25 the vassal shall have run in arrear of his feu-duty for two years, it shall be competent for the superior to raise an action before the Sheriff in ordinary form, setting forth that the subject is of the value, and that the feu-duty has run in arrear as aforesaid, and concluding that the vassal should be removed from his possession, and that warrant to that effect should be granted," and that the warrant when granted should be executed at the first term of Whitsunday or Martinmas four months after its date, and that such warrant when executed should have the effect of a decree of irritancy *ob non solutum canonem*.

each capon not delivered, where no lesser conversion rate is fixed by the charters, in the option of the vassals. By the charters of the defender's feu the lesser conversion rate of 10s. Scots for each capon is not in the option of the vassals, it being optional only to the superiors to take that or the capons, and the vassals therein have from time immemorial, up to the year 1864 when payment was refused or was not made when requested, paid to the pursuer's predecessors in the superiority the long-established conversion-rate of 2s. 6d. sterling for each capon, instead of delivering the *ipsa corpora* of the capons. For many years the conversion-rate of 6s. 8d. Scots for each shear darg not performed was not demanded by the superior, but he has now declared his intention of taking the benefit of the option conferred upon him by the charters of the feu, of demanding payment of the conversion-rate stipulated by the charters, instead of the personal services."

To this the defender answered;—"Denied that the yearly feu-duty payable to the pursuer by the defender for the said subjects amounts to the sum of £1, 15s. 6½d. Admitted that it has been allowed to run into arrear for the years and terms from Martinmas 1864 to Martinmas 1870, but denied that any blame attaches to the defender with regard thereto. He waited upon the pursuer's factor or agent yearly from 1864 to 1869 on or about 25th June, when he visited Ceres to collect the feu-duties, and offered to deliver the capons or pay the conversion-money of 10s. Scots for each, as stipulated for in his charter, but he refused to accept either offer so made by the defender. Admitted that the feu-duty is made up according to the pursuer's views as here stated, but denied that he has any right, title, or authority to claim that sum from the defender. All he can claim from the defender yearly consists of 'two pounds Scots money, twelve capons, or ten shillings Scots for each capon, and four shear dargs, or six shillings and eight pennies Scots for each darg not performed, all in our option, in name of feu-farm yearly.' Entirely irrelevant that from time immemorial the vassals in the pursuer's barony have paid to the superior thereof the conversion-rate of 2s. 6d. for each capon. The de-[349]-fender's charter alone regulates the measure of his feudal obligations to the pursuer. *Quoad ultra* denied, and averred that agricultural services are lost if not exacted within the year."

The Sheriff-substitute (Beatson Bell) allowed a proof before answer. From the proof it appeared that the pursuer did not intimate to the defender, Dr. Aitken, his option to take delivery of capons in kind, but demanded 2s. 6d. in lieu thereof, and that the defender, on one occasion during the period embraced in the summons, tendered the conversion of 10s. Scots per capon, which was refused, but never tendered delivery of the capons.

The Sheriff-substitute thereupon pronounced the following findings in law:—"Finds in point of law that if the pursuer wished to exercise his option of taking delivery in kind he was bound to intimate the same to his vassal, and that this not having been done, it cannot be held that the feu has become forfeited by non-payment of the feu-duty: Therefore dismisses the action, and decerns, reserving to the pursuer all competent remedy for recovering the feu-duty which he may instruct to be unpaid: Finds the defender, Dr. Aitken, entitled to expenses, subject to modification," &c.

On appeal, the Sheriff (Crichton) adhered.*

---

* NOTE.—(After narrating the circumstances)—"The Sheriff entertains great doubt whether this action was competently directed against Dr. Aitken. The section of the Act upon which the action is laid gives power to the superior when the subjects do not exceed in value £25, and the vassal has run in arrear of his feu-duty for two years, to raise an action against the vassal for removal from the subjects, decree under which shall have the effect of a decree *ob non solutum canonem*. Now, the defender, Dr. Aitken, is not the vassal in the subjects in question, and stands in no feudal relation to the pursuer. He is not personally liable to the pursuer for payment of the feu-duty, except as an intromitter with the subjects. The persons liable are the last entered vassals, and they continue liable until another vassal be entered with the superior.

"But even assuming that this view were not well founded, the Sheriff is of opinion that this action would still fall to be dismissed.

"In all cases it is the duty of the superior to demand payment of his feu-duty. It is especially so when, as in the present case, the feu-duty is payable either in kind

[350] The pursuer appealed to the Court of Session. He argued;—A vassal was bound to offer feu-duties to his superior.* By immemorial practice the value of the capons had been fixed at 2s. 6d. each in lieu of delivery in kind.

The defender argued;—An option was given to the superior, and he was bound to declare his election. Custom could not change the conversion money payable in terms of the charter.†

At advising,—

LORD JUSTICE-CLERK.—It seems to be conceded that the option here was with the superior. I think it is also clearly proved that the superior had made and intimated his option, and that this had been acted on in the barony for more than half a century. He elected to receive in kind, but consented to take an equivalent from those who preferred to settle in that way. The defender here did prefer to do so, and did so up to a few years ago, when he seems to have supposed that he was paying too much, and refrained from paying anything. He is therefore in arrear; and the superior, availing himself of the 32d section of the statute, brings this summons of irritancy, in which he says that the conversion-money is in arrear, and concludes for the amount, explaining in the relative account that the sum was a conversion.

Many matters have been argued, but the only real question in dispute is whether the summons is relevant, in respect it does not set out that the capons themselves are in arrear, but only the conversion-money. It would certainly have been more technically accurate if the summons had stated specifically that the capons were in arrear. But in truth that is substantially stated both in the body of the summons and in the account annexed to it, which is part of it. It is clearly stated that the capons were not delivered. It is also stated that the accustomed conversion is in arrear. The question is whether that allegation is true, for if it is the statutory

---

or money according to the option of the superior. In his condescendence the pursuer says that he did not make any special demand for payment of the feu-duties from year to year. If he had made the demand the Sheriff is of opinion that he was bound to declare whether he was to take capons or money or shear dargs or money. If he intimated his option to take money then he was only entitled to the conversion-money for each capon, as stated in the reddendo of the charter, and not to the sum of 2s. 6d. for each capon, which, he sets forth in his summons, he is entitled to. The ground upon which this contention is rested is, that this is the sum which has been in use to be paid. The Sheriff is of opinion that any such use cannot affect the stipulations contained in the charter.

"There is no evidence that the pursuer ever intimated his option to the defender to take capons instead of money.

"With regard to the shear dargs the Sheriff is of opinion that these cannot now be demanded. Agricultural services and carriages are exigible only if called for within the year. There can be no demand for arrears of shear dargs.

"It is contended in the reclaiming petition that the action ought not to have been dismissed, but that decree should have been pronounced in terms of the conclusions, with a finding as to the amount of arrears due. This cannot be done until the pursuer has declared whether he is to take payment of his feu-duty in kind or in money. The amount of arrears due cannot otherwise be fixed. In his pleas in law the pursuer maintains that he is entitled to 2s. 6d. for each capon, or at least that the defender is bound to deliver the *ipsa corpora* of the capons or to pay their market value. The summons, on the other hand, is [350] framed on the assumption that the pursuer had elected to take money, because the amount of arrears due is brought out by each capon being converted at the value of 2s. 6d.

"The Sheriff is of opinion that the proper course is to dismiss the action. The 32d section of the Act provides that the warrant for removal granted in terms of the conclusions 'shall be executed at the first term of Whitsunday or Martinmas which shall first occur four months after the same is issued by the Sheriff,' but 'that it shall be competent to the vassal at any time before such warrant is executed to purge the irritancy by payment of the arrears pursued for.' This seems to make it clear that the arrears should be precisely ascertained before decree is pronounced granting warrant of removal."

* Elchies, *voce* Alternative, No. 1; Bell's Pr., sec. 695; Craig, iii. 3, 7, and iii. 6, 7.

† Duke of Hamilton, Dec. 15, 1835, 14 S. 162.

result must follow. It is true the capons have not been delivered and the conversion has not been paid, and therefore it would seem that the pursuer must prevail. It is another question whether the pursuer is bound still to accept the delivery of the capons. I think that may be doubtful. I am of opinion that we must give decree of irritancy, but I think we must reserve in our judgment any question which will properly arise if the defender proposes to purge the irritancy under the provision of the statute.

The shear dargs are not exigible nor any equivalent, the prestation not having been demanded within the year.

LORD BENHOLME.—I concur. It appears to me that the pleading here has really been an avoidance of the true dispute between the parties. From the evidence it is clear that the defender had taken up the position that he had the option of paying one shilling as conversion of the feu-duty. I think he offered nothing else than this, and that he said it was his right under his charter. That tender was expressly refused by the superior.

Matters went on for some years, but at last it has been brought to a point by [351] the superior raising this action. The defender has argued that because the superior has not expressly demanded the capons his claim is altogether bad and informal. But I think he sufficiently declared his option by refusing the tender of the shilling. The defender had no right to suppose anything else than that the pursuer elected to take the capons.

LORD NEAVES concurred. LORD COWAN absent.

The following interlocutor was pronounced:—"Find that by the feu-rights in process the feu-duty payable by the respondent and his authors was £2 Scots money, 12 capons, or 10s. Scots for each capon at the option of the superior, and 4 shear dargs, or 6s. 8d. Scots, also at the option of the superior: Find that the appellant and his authors, prior to the year 1864, sufficiently intimated to his vassals, including the respondent, his option to receive the capons annually: Find that prior to the year 1864 the appellant's predecessor in the superiority had been in use for many years to accept from the respondent the sum of 2s. 6d. for each capon in lieu of delivery in kind: Find that for the years libelled the said feu-duty has not been paid, and is in arrear as libelled as regards the said sum of £2 Scots and the said 12 capons or any conversion thereof; and find that neither delivery nor payment of the same was tendered to the appellant: Find that the said dargs not having been demanded within the years respectively libelled cannot now be exacted, nor any conversion thereof: Therefore sustain the appeal, recall the judgment appealed from, and remit to the Sheriff to decern in terms of the libel; but reserving to the respondent any remedy competent to him under the 32d section of the statute passed in the 16th and 17th years of the reign of her Majesty, c. 80; and any question which he may be advised to raise in any competent form as to the nature and amount of the said feu-duty, and to the appellant his answers as accords: Find the respondent liable in expenses in both Courts, and remit," &c.

HOPE & MACKAY, W.S.—D. CRAWFORD & J. Y. GUTHRIE, S.S.C.—Agents.

No. 69. X. MACPHERSON, 351. 19 Jan. 1872. 1st Div.—Lord Ormidale, B.

JOHN NICOL, Pursuer.—*Mair—Rhind.*
BRITTEN AND OWDEN, Defenders.—*Birnie.*

Court of Session Act, 1868 (31 & 32 *Vict. c.* 100), *sec.* 27.—The 27th section of the above Act declares that if a Lord Ordinary shall think probation necessary, but that it should not be taken before a jury, he may pronounce an interlocutor dispensing with issues, "and determining the manner in which proof is to be taken." *Held* that it was incompetent under this section to appoint the proof to be taken by commission in one of the class of causes enumerated by the Judicature Act, and excluded from proof by commission by 13 & 14 Vict. c. 36, sec. 49, as "actions for libel or for nuisance, or properly in substance actions of damages."

This was an action of damages for wrongous arrestment.

Both parties craved the Lord Ordinary to allow the proof to be taken by commission. His Lordship reported the case.

The parties founded on the 27th section of the Court of Session Act, 1868, subdivision (4).*

[352] LORD PRESIDENT.—This is an action of damages for wrongous use of diligence, and the summons contains no other conclusions. The parties have concurred in asking the Lord Ordinary to grant commission for taking the evidence in the case at Aberdeen. The question on which the Lord Ordinary has reported to us is, whether he has power to grant this motion, supposing he thought it expedient to do so.

This question depends upon the construction of several clauses of the different Acts of Parliament regulating the order of taking proof in this Court. The taking of proof by commission was extended or regulated by the 49th section of 13 & 14 Vict. c. 36. By the previous Judicature Act of 1825 certain causes were appropriated to jury trial, and under that statute it was not competent to try them in any other way. But section 49 of the Act of 1850 operated a change in that rule. It enacted that it should be competent to the Lord Ordinary, with the consent of both parties, or upon the motion of one party, with the leave of the Inner-House obtained upon the report of the Lord Ordinary, to appoint the evidence in any cause not falling under the causes enumerated in the Judicature Act to be taken by commission, "Provided always, that it shall be competent for the Court to allow proof on commission in any of such enumerated causes where the action is not an action for libel or for nuisance, or properly and in substance an action of damages." Now, under that section it was competent to the Lord Ordinary in the non-enumerated causes to allow a proof by commission in certain circumstances, with the leave of the Inner-House obtained on report. The only difference on the previous practice introduced by this section was the requiring the leave of the Inner-House, and the extension of the procedure to certain of the enumerated causes. But under that section the present case could not competently have been treated in the manner proposed. It comes under the head of those enumerated causes still excepted. And the question comes to be, whether by any subsequent statute a further change was made. The next Act dealing with matters of this kind is the Evidence Act of 1866. But it does not appear to me that this application gains any strength from its provisions. The object of that Act was to abolish proof on commission as much as possible. It did not, indeed, do so entirely and absolutely, but it discouraged it to the utmost. The first clause of this Act provides "that except as hereinafter enacted it shall not be competent in any cause depending before the Court of Session to grant commission to take proof, but when in such causes it is according to the existing practice competent to take proof by commission, and when in such causes proof shall be allowed," the evidence shall be led before the Lord Ordinary. And then it proceeds to describe how proofs are to be taken, which before its passing could have been taken on commission. Then the second section is a proviso on the first. It enacts that it shall be competent to take the depositions of havers on commission; "and also upon special cause shown, or with consent of both parties, to grant commission to take the evidence in any cause in which commission to take evidence may according to the existing law and practice be granted." Now, this exception to the rule of the first section is entirely confined to cases in which, according to the previously existing law and practice, it would be competent to take proof by commission. But there having been no alteration in this respect between 1850 and 1866, the cases falling under the exception remain as they were under the Act of the former year. The third section is of no importance to the present case. The fourth provides, that if both parties consent, it shall be competent to the Lord Ordinary to take proof in the manner provided by the first section in any cause depending before him, notwithstanding the provisions contained in the Judicature Act and in the 49th section of the Act of 1850. Here, undoubtedly, there is a relaxation of the rule about enumer-

* 31 & 32 Vict. c. 100, sec. 27, subdivision (4):—"If the Lord Ordinary shall think further probation should be allowed, but that such probation should not be taken before a jury, he may pronounce an interlocutor dispensing with the adjusting of issues, and determining the manner in which proof is to be taken or inquiry to be made."

ated causes; but it is only to the effect of substituting for jury trial the new method introduced by the statute of taking evidence before the Lord Ordinary himself, and gives no sanction to any extension of the practice of taking evidence on commission. Under this statute of 1866, therefore, there is no foundation for the application here made. The only other enactments which bear in any way upon the question are the Court of Session Act of 1868 and the subsequent Act of Sederunt of 1870. The 27th section of the Court of [353] Session Act regulates procedure before the Lord Ordinary immediately after closing the record. It provides that if the parties shall not agree to renounce farther probation the Lord Ordinary shall appoint the cause to be debated summarily, and after hearing parties he shall determine whether farther probation should be allowed; and if he shall consider that it is necessary he shall determine whether it is to be limited to proof by writ or oath, and if not, whether it is to be taken before a jury, or in whatever manner of way. Then follow the four sub-sections, which provide, first, for the case where farther probation is refused; second, where farther probation is to be limited to writ or oath; third, where it is to be by trial before a jury; and fourth, "If the Lord Ordinary shall think farther probation should not be taken before a jury he may pronounce an interlocutor dispensing with the adjusting of issues, and determining the manner in which proof is to be taken or inquiry to be made, and make such order as may be necessary for giving effect to such interlocutor." Now, it is contended that this fourth sub-section gives the Lord Ordinary plenary power to order proof to be taken in any manner he pleases. This would certainly give a very large and extraordinary effect to words of a very general character. I think that the construction proposed is an impossible one; and if it had been intended by the Legislature to do away in this clause with the distinction between the enumerated cases and those not enumerated, there certainly would have been a direct provision on the subject. It would not have been left to implication merely from a clause couched in such general terms as these. This view receives considerable support from the fact that there is in section 62 of this Act an express repeal of a part of the Evidence Act. But the inference is that the part unrepealed is to be allowed to stand. I cannot, therefore, avoid the conclusion that the provisions on the subject of taking evidence by commission are unaffected by the Act of 1868.

Now, the Act of Sederunt of 1870 is liable to the same observation. It is true that the powers of the Court under the Act of 1868 to regulate procedure under the Act are very large. They are more nearly powers of legislation than have ever before been accorded. But even supposing that the Court had full legislative powers, still this Act of Sederunt, framed by them in virtue thereof, is open to the same kind of construction as the Act of Parliament itself. Now, what does this Act of Sederunt effect? In its first part it substitutes for the 27th section of the Court of Session Act several provisions of its own, the fourth of which enacts that it shall be competent for parties having a cause standing in the Procedure Roll, in regard to which they have come to be agreed that it should be disposed of by a proof before the Lord Ordinary, or a trial by jury or otherwise, to enrol the cause, &c. Now, it is said that there is a great deal of force in these words "or otherwise," and without them the application would have no support from this Act of Sederunt. It is contended that these words sweep away all restrictions upon the taking of proof on commission. Now, this would be to assume in the Court a very violent exercise of the powers conferred upon it, not only in altering the provisions of the Act of 1868, but also those of the Acts of 1850 and 1866. I need not say that the Court in the Act of Sederunt referred to had no such intention.

Lord Deas, Lord Ardmillan, and Lord Kinloch concurred.

Motion refused.

William Officer, S.S.C.—W. & J. Burness, W.S.—Agents.

No. 70. X. MACPHERSON, 353. 19 Jan. 1872. 1st Div.—Lord Ormidale, B.

CHARLES N. COWPER (Miss H. L. Smith's Trustee), Pursuer.—
Sol.-Gen. Clark—Black.
HENRY CALLENDER, Defender.—*Hall.*

Process—Reclaiming Note—Competency—Court of Session Acts, 1850 *and* 1868 (13 *&* 14 *Vict. cap.* 36, *sec.* 11, *and* 31 *&* 32 *Vict. cap.* 100).—An interlocutor pronounced in a cause by the Lord Ordinary, approving of the Auditor's report upon the pursuer's account of expenses as taxed, modifying the [354] amount, and decerning therefor, was reclaimed against by the defender on the 21st day after its date. *Held* that the reclaiming note was incompetent, not having been presented within ten days from the date of the interlocutor, as required by the 11th section of the Court of Session Act of 1850.

Question as to what might have been the effect of the reclaiming note under the Court of Session Act of 1868, in bringing up for review the interlocutors in the cause prior to that which was reclaimed against had the note been presented in due time.

In this cause the Lord Ordinary pronounced the following interlocutor:—"18th November 1871.—Approves of the Auditor's report upon the pursuer's account of expenses, No. 318 of process, amounting, as taxed, to the sum of £135, 3s. sterling; and having heard the counsel for the parties on the modification of expenses, modifies the same to the sum of £110, 10s. sterling, for which decerns against the defender."

On the 9th of December 1871, being the 21st day after the date of this interlocutor, the defender presented a reclaiming note, which was objected to by the pursuer as incompetent, not having been lodged within the period of ten days, as required by the 11th section of the Court of Session Act of 1850 (13 & 14 Vict. cap. 36).

The defender argued;—The provisions of the 11th section of the statute of 1850 were superseded by the enactments contained in the 52d and following sections of the Court of Session Act of 1868 (31 & 32 Vict. cap. 100). The cases of Fisher *v.* Pearson, 1851, 13 D. 906, and Henderson *v.* Jaffray, 1852, 15 D. 11, were also cited.

LORD PRESIDENT.—My Lords, on the 18th of November last the Lord Ordinary pronounced an interlocutor approving of the Auditor's report upon the pursuer's account of expenses, amounting, as taxed, to £135, 3s., and by the same interlocutor his Lordship modified the amount to £110, 10s., for which he decerned against the defender. On the 9th of December, being the 21st day after the date of that interlocutor, the defender presented the reclaiming note now before us, to which the pursuer objects that it is incompetent, not having been presented within the period required by the 11th section of the statute 13 & 14 Vict. cap. 36, which enacts, "That it shall not be competent to reclaim against any interlocutor of the Lord Ordinary at any time after the expiration of ten days from the date of signing such interlocutor, with the exception only of reclaiming notes against interlocutors disposing in whole or in part of the merits of the cause, and against decrees in absence, which reclaiming notes shall continue to be competent in like manner as at the passing of this Act." Now, it has not been suggested that this enactment has been repealed, and the words used are negative and prohibitory, a form of expression which, when it occurs in a statute, must always be read as imperative, while the exception is confined literally to the case of reclaiming notes against interlocutors disposing in whole or in part of the merits of the cause, and reclaiming notes against decrees in absence. But the interlocutor now reclaimed against is certainly not embraced by either of these exceptions, and in my opinion it is therefore necessarily incompetent. I do not think that any relevant answer was stated to the objection, but it was contended that the enactment which I have read was modified by some of the provisions of the Act of 1868 as to reclaiming notes. Now, I cannot give effect to that contention. The Act of 1868 certainly did not in any case extend the period within which a party might competently reclaim, and although the 52d section provides that every reclaiming note, whether presented before or after the whole cause has been decided in the Outer-House, shall have the effect of submitting to review the whole of the prior interlocutors of whatever date, that obviously does not mean every reclaiming note whether com-

petent or incompetent, but only such reclaiming notes as are in themselves liable to no objection. What might have been the effect of this reclaiming note in bringing under review the previous interlocutors, had it been presented in due time, is a point upon which it is unnecessary to express any opinion. The objection which has [355] been taken seems to me to be unanswerable, and I am therefore for refusing the note as incompetent.

LORD DEAS and LORD ARDMILLAN concurred.

LORD KINLOCH.—I am clearly of opinion that this reclaiming note, not being presented within ten days of the judgment reclaimed against, is incompetent. It is so under the express terms of the Act 1850; and the Act 1868 does not in this respect alter the previous statute. Though the objection to competency was reserved till the discussion of the case on the merits, it must be sustained in the same way and to the same effect as if the note was at once thrown out when the case appeared in the Single Bills.

This being so, I think the question argued to us does not arise, whether, if the reclaiming note had been competent, it would have brought up for review all the prior interlocutors in the cause. For I entertain no doubt that such an effect can only be operated where the reclaiming note is in itself competent. I have a strong impression on that question. But I think it is better not to state it where the question is not properly before us.

The Court accordingly refused the reclaiming note as incompetent.

The defender's counsel then moved the Court to order the clerk to transmit the process to the Lord Ordinary with a view to the defender being reponed against an interlocutor allowed to become final by mistake.

This motion was refused, as the process was still before the Lord Ordinary.

DAVID CURROR, S.S.C.—HILL, REID, & DRUMMOND, W.S.—Agents.

No. 71. X. MACPHERSON, 355. 20 Jan. 1872. 1st Div.—Lord Mackenzie, R.

MRS. ANNIE LAWSON OR SURTEES, Pursuer.—*Sol.-Gen. Clark—Rhind.*
ROBERT WOTHERSPOON, Defender.—*Shand—Lancaster.*

Proof—Consistorial Cause—Judicial Examination.—The Court will order a judicial examination of one of the parties in a consistorial cause only where it is essential to the justice of the case, as where there is strong reason to believe that the party whose examination is asked for is concealing material facts, or where there is *penuria testium*.

Circumstances in which the Court refused to allow a judicial examination of the defender in an action of declarator of marriage.

Proof—Consistorial Cause—Relevancy.—Circumstances in which allegations as to the character of the pursuer of an action of declarator of marriage were allowed to be proved.

Opinions, that in a consistorial cause judicial examination may be allowed after proof has been led.

This was an action of declarator of marriage founded on promise *subsequente copula*. The pursuer alleged that in February 1865 she became acquainted with the defender, a merchant in Glasgow, who paid his addresses to her, and expressed his desire that she should become his wife; that he visited her, and took the greatest interest in her children by her previous marriage, one of whom he sent to school at his own expense. She averred;—(Cond. 3) "During the years 1865, 1866, and 1867, the defender, always professing the greatest love for the pursuer, frequently promised to make her his wife, and the pursuer, relying on his professions of attachment, agreed to accept of him as her husband." The pursuer further averred that in April 1867 the defender executed a codicil to his settlement in favour of her and her children; that on November 20, 1867, he subscribed and delivered to her a holograph writing in the following terms:—"I, Robert Wotherspoon, iron-merchant in Glasgow, do hereby

promise to marry Anne Surtees or Dewar, *nee* Lawson, and provide for [356] her according to my means until circumstances warrant such marriage, always providing that in the interim she continues to lead a virtuous and exemplary life; and in the event of my decease, such marriage not being consummated, I bequeath to her one-half of the residue of my estate, . . . Signed by me, Rob. Wotherspoon, upon the twentieth day of November, eighteen hundred and sixty-seven years, before these witnesses, George Scott and James Fulton. ROB. WOTHERSPOON. George Scott, *witness*; Jas. Fulton, *witness*."

The defender admitted that he had visited the pursuer, and had made a codicil in her favour, which he revoked; also that he had granted the holograph document referred to.

The defender averred;—(Stat. 1) "The defender became acquainted with the pursuer in February 1865. On one of the evenings of that month he met her in Cambridge Street, Glasgow, accosted her, went home with her, and had connection with her. This acquaintance was continued for a considerable period thereafter, and the defender had frequently connection with the pursuer at various houses she occupied in Glasgow and at Dunoon." . . . (Stat. 2) "The pursuer represented herself to the defender as of good family, and the widow of an officer in the East India Company's service of the name of Surtees. She took the name of Dewar, which she explained by saying that it was the name of a man to whom she had been engaged subsequent to the death of her husband." (Stat. 3) "Towards the end of 1867, and prior to the 20th November of that year, the defender entertained doubts of the representations which the pursuer had made to him. The defender had then reason to believe, and now avers, that she had carnal connection with other men; she was frequently drunk, and was in consequence taken to the police-office; and altogether her conduct was the reverse of virtuous or exemplary. Subsequent to that date she continued the same vicious course of life. The defender's visits to her consequently became rare, but he continued to send her payments of money until January 1870, when, in consequence of the position she took up, he discontinued these payments altogether." (Stat. 4) "The only relation in which the pursuer ever stood to the defender was that of a woman whom he visited from time to time for the purpose of carnal connection, in consideration of money given to her. At no period in their acquaintanceship did any connection take place between them on any other footing than this, or with any different understanding on either side." (Stat. 5) "Since the present action was threatened the defender has learned, and now avers, that during the whole period of his acquaintance with the pursuer she was, or at least believed herself to be, the wife of another man, *i.e.*, Mr. Francis Dewar, an auctioneer and appraiser in Edinburgh. On the 4th June 1863 she brought an action of declarator of marriage against the said Mr. Dewar, concluding, *inter alia*, that 'the Lords of our Council and Session ought and should find facts, circumstances, and qualifications proved relevant to infer marriage between the pursuer and the defender, and find them married persons accordingly.' In the record in that action she set forth in great detail the facts on which she rested that conclusion; and, in particular, in the 26th article of her condescendence, she avers, 'The pursuer is the defender's wife. On the faith of his solemn and repeated promises of marriage she allowed him to have carnal connection with her as before-mentioned. He repeatedly acknowledged her to be his wife, and, *de presenti*, took her as such,'" &c. (Stat. 7) "The defender has recently learned, and now avers, that all the representations made to him by the pursuer with regard to her family and character were untrue. She is and has for many years been a prostitute; has been kept by various men; and has herself kept brothels in Edin-[357]-burgh, in St. James's Square, and other localities which the defender cannot at present specify."

The defender pleaded;—(2) The terms of the document of 20th November 1867 do not import a promise of such a character as to be competently made the ground for an action of declarator of marriage. (3) In any view, the promise alleged to be given in the said document being conditional, and the said condition not having been purified by the pursuer, it cannot be competently founded on by her in the present action. (4) No *copula* having taken place on the faith of any promise of marriage made by the defender, or with the view of constituting marriage, the defender ought to be assoilzied.

At adjustment the pursuer added to her record a statement that the action at

her instance against Dewar was "not well founded in fact, and was practically abandoned by the pursuer in 1864. The defender, from shortly after the time when he first made the acquaintance of the pursuer, was fully aware of the said action and procedure therein, and of the relationship upon which the pursuer had stood to the said F. Dewar. Since the pursuer's acquaintance with him ceased the said F. Dewar has married, and the marriage between him and his wife still subsists."

On 21st November 1871 the Lord Ordinary, before answer, allowed the parties "a proof of their respective averments in so far as regards the conclusions for declarator of marriage and adherence, and to the pursuer a conjunct probation," &c.

The pursuer thereafter moved that the defender should be ordained to appear for judicial examination.

The Lord Ordinary, on 23d December 1871, pronounced this interlocutor:—"The Lord Ordinary having heard the counsel for the parties, and considered the closed record, allows the defender to be judicially examined, first in regard to the carnal connection of the defender with the pursuer set forth in the record; and second, in regard to the defender's knowledge, during the period between the month of January 1865 and the 5th of July 1871, of and concerning the action at the pursuer's instance against Francis Dewar, and the procedure therein, and appoints the said judicial examination to take place before the Lord Ordinary on Thursday, the 11th day of January, at half-past ten o'clock." *

[358] The defender reclaimed, and argued;—A judicial examination is an exceedingly delicate proceeding, and has been allowed in the recent practice of the Court in consistorial cases, only where there is strong reason to suspect concealment of material facts by the party sought to be examined. In the present case no sufficient reason is alleged to justify a departure from the general rule.†

The pursuer also brought up the interlocutor of November 21, allowing proof, and argued that in a declarator of marriage averments as to character were irrelevant

---

* "NOTE.—The Lord Ordinary considers that the judicial examination of the defender should be allowed on the two points set forth in the preceding interlocutor.

"1. In regard to the first of these, the pursuer desired to limit the examination of the defender to the carnal connection alleged by her to have taken place after 20th November 1867, the date of the alleged promise of marriage, and set forth in the fifth article of her condescendence. But the Lord Ordinary considers that, if the defender is to be examined at all with reference to this matter, his examination should be allowed to include the acts of connection alleged by him to have taken place during a period of nearly three years prior to the date of the alleged promise. Any other course would, it is thought, be unjust to the defender, and might lead to an erroneous view of the relations which subsisted between the parties, and which may have an important bearing upon the case. The ground stated in support of the pursuer's motion was the occult nature of the acts, and that she only kept one servant in the house where the defender visited her, after granting her the alleged promise of marriage, during part of the time, so that there is a *penuria testium* in regard to these subsequent acts of connection. Although the defender in his defences admits long continued intimacy with the pursuer, and connection prior to the date of the promise, he denies the pursuer's statements in regard to the subsequent connection, and the averments in his statement of facts with reference thereto are evasive.

"2. The statement of the defender with reference to the declarator of mar-[358]-riage at the pursuer's instance against Francis Dewar may have a very important bearing upon the question at issue,—these averments being, that during the whole period libelled the pursuer was insisting in that action of declarator. The pursuer avers that this action was not well founded in fact, and was practically abandoned by her in the year 1864, before her acquaintance with the defender began. She also avers that the defender was fully aware, both before and after the date of the promise, of the said action and of the procedure therein, and also of the relationship upon which the pursuer had stood to Dewar. Such knowledge, if it existed, must have a very material bearing upon the defence, in so far as founded upon the subsistence of that action, and the judicial examination of the defender with reference to such knowledge appears to the Lord Ordinary to be proper."

† Sceales *v.* Sceales, March 13, 1866, *ante*, vol. iv. 575; Lindsay *v.* Chapman, Feb. 23, 1826, 4 S. 490; Steuart *v.* Steuart, June 3, 1870, *ante*, vol. viii. 821.

and ought not to be admitted to probation. With regard to the question of judicial examination the defender's averments as to his ignorance of the pursuer's relations with Dewar raised upon the face of them a case of great suspicion, and that as well as other matters upon record were occult, and could not be proved otherwise than by his examination. The Court had allowed judicial examination and relaxed the rules as to exclusion of evidence in similar cases.*

At advising,—

LORD PRESIDENT.—The pursuer reclaims for the purpose of submitting to review an interlocutor of 21st November 1871, by which the Lord Ordinary, "before answer, allows the parties a proof of their respective averments, in so far as regards the conclusions for declarator of marriage and adherence." Under this interlocutor every relevant averment made by either party, and nothing but what is relevant, goes to proof. I think that in the circumstances it was the proper interlocutor to pronounce. It would be rather unsafe to fix beforehand that particular averments are not to be allowed to go to proof; for, although it may not now be quite apparent how particular averments bear on the question of marriage, they may, in the course of leading the proof, turn out to be relevant. But I confess that, looking to the conditional character of the promise founded on by the pursuer, the averments to which she objects as irrelevant in a declarator of marriage, those, namely, regarding her life and conversation, appear to me to be perfectly relevant. It is unnecessary to say anything more regarding the interlocutor of 21st November.

The question raised by the defender's reclaiming note against the interlocutor of 23d December 1871 is of more general importance. There is no doubt that at one time, and especially in the Commissary Court, it was a very common and indeed almost universal practice to appoint a judicial examination of the parties *in initio litis*, before any evidence was led. But there is just as little doubt that since the time that consistorial jurisdiction was conferred on this Court the practice has been the very opposite—that is to say, not to refuse a judicial ex-[359]-amination in all cases, but to make the granting of it exceptional. The modern practice is stated with, I think, perfect accuracy by Lord Medwyn and by Lord Moncreiff in the anonymous case reported under date 23d December 1843, 6 D. p. 342. Lord Medwyn there says—"It is a well-known form to allow a judicial examination of the parties, both or either of them, on facts which are within their knowledge, where there is undue concealment or suspicion, or where there is necessarily a *penuria testium*." And Lord Moncreiff says—"I have no doubt of the competency of this course. It has often been done; but I think that it has been too often done. Judicial examination is a very delicate matter; and had the answer returned by the pursuer been more distinct in its nature I might have hesitated before permitting it. But I think that in the circumstances of this case it ought to be allowed. I would be far from laying down in general terms that it is to be granted in every case in which it is asked; but this is a very extraordinary and peculiar case. Looking at the minute she has given in, and contrasting it with the letter of 3d September 1839, it is impossible not to see that there is something very extraordinary in the case, involving great suspicion and concealment."

Now, taking that as a fair exposition of the grounds upon which judicial examinations have been permitted in modern times, the question arises whether there is in this case anything of the nature of a grave suspicion or undue concealment on the part of the defender, or whether there is necessarily a *penuria testium*. Taking the latter of these points first, I have only to say that I see no allegation, no circumstances, no aspect of the case, which suggests a *penuria testium* at all, far less a necessary *penuria testium*. No doubt, acts of carnal intercourse are in popular language described accurately enough as occult facts; but they are, as the experience of this Court only too abundantly shows, susceptible of proof, either by witnesses or by facts and circumstances necessarily inferring carnal connection. To say that in all such cases there must necessarily be a *penuria testium* is to assert what is contrary to our actual experience.

---

* A. B. *v.* C. D., Dec. 23, 1843, 6 D. 342; Mackenzie *v.* Stewart, Feb. 5, 1848, 10 D. 611; Kennedy *v.* MacDowall, Feb. 12, 1800, Ferguson's Consistorial Law, 163; 2 Bell's Illus. 243; Craigie *v.* Hogan, Jan. 19, 1837, 15 S. 379; Stewart *v.* Lindsay, March 6, 1817, and July 8, 1818, Hume, 380; 2 Fraser's P. and D. Relat. 700; 16 & 17 Vict. c. 20, sec. 6.

The next question then is, whether anything has been stated on record regarding the position of the parties that can lead us to think that there is grave suspicion or wilful concealment on the part of the defender. I confess that I can see nothing of the kind. I rather think we might have had a fuller disclosure of the facts of the case, if the record had been completed in the old-fashioned method, after a revisal of the pleadings; for the pursuer would then have had an opportunity of answering the averments of the defender. And I cannot help thinking that the present practice of closing the record without a revisal is not expedient in cases like the present. The fault, if there be any, is attributable to the existing system of closing records, and I see no circumstance suggestive of grave suspicion or undue concealment on the part of the defender. He has made an important allegation that there was a previous declarator of marriage at the instance of the pursuer against another man. The rejoinder made by the pursuer on adjustment is, that the defender knew of the existence of that action at the time when he was paying his addresses to the pursuer and promising her marriage. If such knowledge is proved, it may deprive the defender's allegation of the effect which it would otherwise have. But there is nothing that I can see in the pursuer's allegation of the defender's knowledge of the previous action that can possibly create any suspicion against the defender, or suggest a *penuria testium*. It cannot be more difficult to prove the defender's knowledge of the pursuer's previous legal proceedings than to prove knowledge of any other particular fact. Such knowledge is in practice constantly established by the testimony of witnesses or by writing; and it has been incidentally mentioned to us that there are in this case letters between the parties which must necessarily mention those proceedings if they were known to the defender. Therefore, upon neither of the grounds stated by the Lord Ordinary, can the judicial examination of the defender be permitted by the practice of this Court. I am therefore for recalling the interlocutor, and allowing the proof to go on.

I think it right to say, that although a passage has been quoted from a writer on consistorial law, to the effect that a judicial examination cannot be allowed after a proof has been led, I do not subscribe to that doctrine, and it is quite [360] possible that at a future stage of this case a judicial examination may be allowed. Indeed, I think there are cases in which facts disclosed in the course of a proof for the first time justify a judicial examination. I should, therefore, be sorry to say anything affecting the competency of such a proceeding after as well as before proof has been led. In either case, however, it will be allowed only in the circumstances stated by Lord Medwyn and Lord Moncreiff in those opinions to which I have already referred.

LORD DEAS.—With reference to the question last argued, whether the Lord Ordinary should have limited the proof allowed to the parties, I am entirely of the opinion expressed by your Lordship. The proof allowed before answer will not prejudice the parties as to what averments are relevant. Besides, there are in this case circumstances of a very peculiar kind; for example, the qualifications contained in the promise of marriage founded on by the pursuer are very peculiar, and such as I do not remember to have seen in any document of the kind. There is thus raised an important question, in disposing of which it is desirable to have before us the precise facts of the case. On that point, therefore, I have no hesitation in concurring with your Lordship.

As regards the judicial examination of the defender, I agree with your Lordship that although a judicial examination is perfectly competent it is to be allowed only in exceptional cases, and not as a matter of course. The question then is, whether there are in the present case sufficient grounds for this exceptional proceeding. The grounds stated for asking the judicial examination are two—*first*, the defender's knowledge of the pursuer's action of declarator of marriage against Dewar; and *secondly*, the pursuer's allegations of carnal intercourse between the parties. As regards the defender's knowledge of the dependence of the action against Dewar, I do not see any reason to assume that there was anything occult about it, so as to prevent its being proved in the ordinary way. After proof has been led it may, no doubt, possibly turn out that a judicial examination would have been useful. Whether or not such an examination would be competent after a proof has been led is a very important question, regarding which I should not like to express any decided opinion at present, seeing that we have not had the advantage of a full argument or a statement of the authorities bearing upon it. But assuming, as the most favour-

able case for the pursuer's present contention, that a judicial examination will be incompetent after a proof, there must still be, to say the least of it, strong *prima facie* ground for supposing that the facts will turn out to be of that occult kind requiring to be expiscated by a judicial examination. Now, I can see no *prima facie* ground for supposing that the defender's knowledge of the previous action against Dewar cannot be proved in the ordinary way. The *prima facie* probability is all the other way; for according to the statements of the parties that action was raised in 1863, and remained in Court, though it may not have been proceeded with, till July 1871; and the period during which the defender had an opportunity of knowing about it thus extends from the commencement of his acquaintance with the pursuer in February 1865 till July 1871.

With reference to the intercourse between the parties, I do not see that there is any *prima facie* ground for supposing it to be of such an occult nature as to necessitate a judicial examination. There are cases of that kind, where, for example, a single act of intercourse is alleged in circumstances rendering it improbable that it should be known to any one but the parties themselves. But here the allegation is that there was habitual intercourse for a series of years. The pursuer avers that the defender visited her in her own house from February 1865 down to very near the date of this action. She does not say, indeed, whether he had or had not intercourse with her prior to the date of the written promise of marriage on which she founds, but she certainly does say that he had intercourse with her from that date till very near the date of raising the present action. The intercourse, moreover, is alleged to have taken place in her own house, so that there was the most ample opportunity for witnesses seeing the defender entering or going out of it, and facts and circumstances must have occurred from which intercourse may be inferred, if it really took place.

[361] Another reason for refusing to the pursuer this unusual method of expiscating the facts is, that she does not state in her condescendence whether the intercourse began in February 1865 or in November 1867. She thus conceals whether she had intercourse with the defender prior to his promise of marriage. No doubt the defender also conceals a fact within his own knowledge, namely, whether he had intercourse after the date of his promise, so that, as regards concealment of facts, the parties are on an equal footing. But the pursuer is the party making this application for a judicial examination, and it appears to me that she is not entitled to it while she conceals the date when the intercourse began. She states in the third article of her condescendence that during the years 1865, 1866, and 1867, the defender, always professing the greatest love for her, frequently promised to make her his wife, while she agreed to accept him as her husband. A party making such a statement, but concealing whether intercourse took place prior to the promise of marriage in 1867, is not entitled to say that the occultness of the facts render necessary the unusual remedy of a judicial examination.

Apart altogether from these peculiarities of the case, I am not satisfied that mere *prima facie* grounds for supposing that the facts are occult, or that there is a *penuria testium*, are in themselves conclusive that a judicial examination should be allowed. I have a strong impression that it is not sufficient to make out either of these abstract points, unless it can also be shown that such an examination is necessary for the ends of justice. Now, I am unable to see that there is any *prima facie* ground for supposing that such is the case in the present instance.

LORD ARDMILLAN.—Two points have been raised under this reclaiming note. As to the point which was last argued I have no doubt whatever. The defender avers that the pursuer is a prostitute, that she is of the worst possible character, that she was kept by various men, and that she had connection with him in consideration of money given her. These are the statements that the pursuer now proposes to exclude from proof. To do what she asks would be simply to shut out evidence on matters the ascertainment of which is absolutely necessary to the ends of justice. I can imagine no clearer case against limiting the proof.

The other point is attended with more difficulty. I do not think that a judicial examination is incompetent now, or that it is necessarily incompetent after a proof, but it requires some special circumstance or ground to support it. In short, as Lord Deas has put it, it must appear to the Court that a judicial examination is essential to the ends of justice. Now, no such case has been made out in the present instance. The pursuer's counsel attempted in vain, and at last gave up the attempt, to show

that there was any special or unusual suspicion or occultness in the matters to be investigated, and he ended by laying down the untenable proposition that every pursuer in a case of this kind is entitled to a judicial examination. As no specialties have been instructed I have no hesitation in refusing to allow a judicial examination at present, reserving the pursuer's right to demand it after a proof has been led. I shall only add that I entirely concur in the view and in the language of Lord Deas on the subject. The question is not one of competency, but whether the proceeding does or does not appear to be essential to the ends of justice.

LORD KINLOCH.—I have arrived at the same conclusion with all your Lordships.

The only question of importance is that regarding the proposed judicial examination of the defender. Rightly or wrongly, our law does not allow the parties in a declarator of marriage to be examined as witnesses. The proposal now made is to examine one of the parties without putting him into the witness-box; for that is what is really implied in what is called a judicial examination. There is no doubt as to the competency of such a proceeding; but I think it is equally clear that it will be allowed only in very peculiar and exceptional circumstances, for it is a departure from the general rule of our law as it exists at present. I think that the anonymous case in 6 D. p. 342, shows the circumstances under which a judicial examination is competent. I am well acquainted with [362] that case, as I happen to have been counsel in it. There was overwhelming evidence to show that it was a trumped up action by a woman of abandoned character for the purpose of frightening the defender into paying money. The Court ordered her to be judicially examined, and with good effect, for that order put a stop to the proceedings. Now, I do not say that that is the only case in which a judicial examination is to be allowed. There is, perhaps, no better rule than that just laid down by Lord Deas, that it must be absolutely necessary for the ends of justice. It has been pleaded that it is necessary in this case on account of the occultness of the facts. But in truth there is no greater occultness here than what must generally occur in cases of carnal intercourse; indeed there is less, for it is alleged that this gentleman visited the pursuer repeatedly in her own house, of which she was not the sole occupant, and that he there treated her as his wife. In all this there is no occultness, so that we canot allow a judicial examination in this case, unless we hold that it is to be permitted in every case in which carnal intercourse is involved. I am not prepared any more than your Lordships to lay down such a rule, yet I think we should virtually do so were we to grant the present application to have the defender judicially examined.

This interlocutor was pronounced:—"Having heard counsel on the reclaiming note for the defender against Lord Mackenzie's interlocutor of 23d December 1871, and as also submitting to review at the instance of the pursuer the previous interlocutor of Lord Mackenzie of 21st November 1871, adhere to the interlocutor of 21st November 1871: Recall the interlocutor of 23d December 1871: Refuse the pursuer's motion for the judicial examination of the defender; and remit to the Lord Ordinary to proceed with the cause as shall be just: Find the defender entitled to expenses since the date of the Lord Ordinary's interlocutor of 23d December 1871 reclaimed against; and remit to the Auditor to tax the account of said expenses, and to report to the Lord Ordinary, with power to his Lordship to decern for said expenses."

J. & R. D. ROSS, W.S.—D. CRAWFORD & J. Y. GUTHRIE, S.S.C.—Agents.

No. 72. X. MACPHERSON, 362. 20 Jan. 1872. 2d Div.—Lord Jerviswoode, B.

WILLIAMS AND JAMES, Pursuers.—*Sol.-Gen. Clark—M'Laren.*
DONALD MACLAINE'S TRUSTEES, Defenders.—*Watson—Moncreiff.*
ANTHONY VINCENT MACLAINE, Defender.—*Crawford.*

Property—Title—Trust for Payment of Debt—Superior and Vassal.—A., a crown vassal infeft in the *dominium plenum* of a barony, in 1776 disponed it heritably and irredeemably, under burden of certain family provisions, to trustees for payment of £10,000 of his debts, with precept *a me vel de me*, with the conditions that

the trustees should only enter with the Crown to the extent of the lands sold by them, and that on the trust-purposes being fulfilled the conveyance and infeftment of the trustees should become extinct, or otherwise that the trustees should be bound to execute the deeds necessary to reinvest the truster.

The trustees in 1776 were infeft base, but never sold or possessed any part of the subjects.

B., who succeeded to the estate as institute under a defective deed of entail executed by A. in 1776, in 1801 sold "the superiority of S.," part of the estate, to create a freehold franchise.

In 1819 M., who had acquired the purchaser's right to the superiority of S., with an assignation to an unexhausted precept in a crown-charter, was infeft as crown vassal in the "lands of S."

In 1832 the trustees, under the deed of 1776, reconveyed the estates, including the *dominium utile* of S., to C., the heir of entail then in possession, who took infeftment.

[363] C.'s estates were sequestrated after his death, and the trustee, after the debts had been paid, granted a general conveyance of the barony to D., the succeeding heir of entail.

D. took up by special service to C. the whole lands held of the Crown, excepting S.

In 1859 M. (the holder of the superiority) conveyed the lands of S. to D., who conveyed his whole estates to his testamentary trustees.

In an action brought by a creditor of a succeeding heir of entail to adjudge the *dominium utile* of S. as still in *hæreditate jacente* of C., the pursuer maintained that the *dominium directum* and the *dominium utile* of S. had been effectually separated by the infeftment of the trustees of 1776, and subsequent conveyance of the *dominium directum* by the heir of entail to M., and that the *dominium utile* remained in the *hæreditas jacens* of C., to whom it had been reconveyed by the trustees of 1776. *Held* (*diss.* Lord Benholme) that the right to the *dominium utile* of S. had been vested in D., and was carried by his settlement to his trustees.

The Lord Justice-Clerk holding (1) that the trust-deed of 1776 and infeftment thereon had become extinct without having any feudal effect upon the radical title of the granter and the heirs of entail, and that the reconveyance by the trustees of the *dominium utile* of S. in 1832 was inoperative; and (2) that the *dominium directum* and *dominium utile* of S. had never been separated, and that M., by his infeftment on the crown-charter, acquired a feudal title to the *dominium plenum*, which was carried by his conveyance to D., and by D. to his trustees.

Lord Cowan holding (1) that a radical right to the *dominium utile* of the lands of S. had all along belonged to the successive heirs taking the entailed estate; (2) that the extinction of the trust of 1776 by the fulfilment of its purposes, not less than the reconveyance by the trustees in 1832, conferred on C. a complete title to the *dominium utile* in respect of his radical right to the entailed estates and lands; (3) that D. effectually took, *ex hæreditate* of C., the very right that was in him at the time of his death, either directly or through the trustee on his sequestrated estate, and whether that right be regarded as personal or feudal; and (4) that such right was carried to the trustees by D.'s trust-settlement.

Lord Neaves holding that the trust-deed of 1776 was a valid mode of splitting the superiority and property, and that the reconveyance of the *dominium utile* to C. was valid; (2) that C.'s right to the *dominium utile* passed to the trustee on his sequestrated estate, who conveyed his right to the heir D., who thereby acquired a *jus crediti* to demand a conveyance of the *dominium utile* from the holder of the superiority, and that he had conveyed this *jus crediti* by his settlement.

Lord Benholme *dissenting*, on the ground that the trust-deed and infeftment of the trustees of 1776 effected a separation of the *dominium utile* from the superiority, and that the sale of the superiority in 1819 conferred only the *dominium directum* on the purchaser, the *dominium utile* remaining in the trustees of 1776 until it was reconveyed by them in 1832 to C., the heir then in possession, in whose *hæreditas jacens* it remained, and therefore that D., the granter of the settlement, had no power to convey the *dominium utile*.

Messrs. Williams and James, solicitors, London, raised this action against Murdoch Gillian Maclaine for payment of a debt of £158, and for adjudication of the lands of Scallastle, which they alleged to belong to the said defender as heir-apparent of

his grandfather, Murdoch Maclaine, or of his father, Donald Maclaine, of Lochbuy. The action was also directed against A. V. Maclaine and others, the three next heirs of entail; and also against the trustees under the settlement of the said Donald Maclaine, the debtor's father. The action was defended by the trustees of Donald Maclaine, and by A. V. Maclaine.

The pursuers alleged (1) that the lands of Scallastle remained in the *hæreditas jacens* of the debtor's grandfather, Murdoch Maclaine, Donald Maclaine not having completed a title to them; and (2) that assuming that the title which Donald Maclaine held to the barony of Moy included [364] the lands of Scallastle, that he did not include them in the conveyance to his testamentary trustees, and that they descended to his eldest son, the debtor.

The defenders maintained that Donald Maclaine had a completed title to the lands, and had conveyed them to his trustees.

The state of the titles was as follows:—

In 1776 Archibald Maclaine was infeft under the Crown in the whole barony of Moy, which comprehended Scallastle.

On 3d April 1776 Archibald Maclaine executed a trust-disposition of the whole lands and barony of Moy in favour of B. W. Macleod, afterwards Lord Bannatyne, and Allan Macdougall, W.S., for the payment of the debts of the truster and his father, amounting to about £10,000, with power of sale to that extent. This disposition * contained procuratory and precept, and the trustees were infeft base, conform to instrument of sasine recorded 31st May 1776.

On 31st May of the same year, 1776, Archibald Maclaine made an entail of the same lands in favour of the heirs-male of his body, whom failing, John Maclaine, and failing him and his issue, Murdoch Maclaine and others, which was recorded in the Register of Tailzies on 18th January 1785.

Archibald, the entailer, died without issue in 1784, and was succeeded by Murdoch Maclaine (1), who, after a general service as heir of tailzie and provision to the entailer, obtained on 4th July 1785 a crown-charter of resignation, proceeding on the procuratory of resignation in the entail upon which he was infeft, conform to instrument of sasine recorded 10th December 1785.

The entail reserved a power to sell for payment of the entailer's debts, and as those debts were found to amount to about £30,000,—that is to say, were three times greater than the limit to which the trustees under the deed of 1776 were confined, Murdoch (1), the heir in possession, who was himself a creditor for about a third of the debt, raised an action of sale of the estate in 1787, to which the trustees were called as parties, and in which they concurred.

Under this action of sale portions of the estate were exposed for sale in lots by warrant of the Court of Session on 25th June 1801. The first lot—containing the *plenum dominium* of six farms composing the estate of Ardmeanich, together with the "superiority of the lands of Scallastle and Garmony, which, in addition to the superiority of the lands contained in this lot, extend to upwards of four pound Scots of valued rent, affording a freehold qualification"—was purchased by Murdoch (1) himself. During the progress of the action of sale, from 1787 to 1801, the task of extricating the estate from the burden of debt was undertaken by Murdoch (1), the pursuer of the action. But the trustees, although their functions were so far superseded, concurred in the proceedings in the action, and signed the articles of roup. The debts were paid to the creditors by the heir under the authority of the Court. Murdoch (1) died in 1804, and was succeeded by his son.

From 1801 the trustees had no intromissions of any kind with the estate.

Murdoch (2) possessed the bulk of the estate on apparency till 1814. In 1808 his father's testamentary trustees obtained a decree of adjudication in implement of the subjects sold to Murdoch (1) in 1801, including the superiority of the lands of Scallastle, on which decree they expede a crown-charter, dated 5th July 1808, and were infeft thereon,—the charter containing a grant of the lands of Ardmeanich, &c., "una cum dominio directo terrarum de Scallastle." Murdoch (2) [365] made up his title to his father as heir of tailzie by special service, dated 22d January 1814, precept from Chancery following thereon, dated 4th May 1814, and instrument of sasine dated 13th May, and recorded 23d June 1814. From the title to the barony which

* The terms of this deed will be referred to particularly afterwards.

he then made up are omitted, in the enumeration of the subjects, the lands the *plenum dominium* of which had been sold, and also the lands of Scallastle, the superiority of which was included in the lot purchased by his father.

In August 1817 the testamentary trustees of Murdoch (1) conveyed to Murdoch (2) Ardmeanich, being part of the lot purchased by his father as aforesaid, and on the precept in this disposition he was infeft.

In May 1819 the testamentary trustees of Murdoch (1) conveyed to Murdoch (2) the superiority of Scallastle (and also of the lands of Camyss and Shiconnell, the remainder of the lot purchased by his father, and which had been given off in feu by his father's trustees in 1812).

On 21st April 1819 Murdoch (2) executed a procuratory of resignation of Ardmeanich in his own favour, and on 2d June 1819 expede a crown-charter of resignation and confirmation of Ardmeanich, and of Scallastle, Camyss, and Shiconnell, proceeding, as to Ardmeanich, on the procuratory executed by himself, which was validated by confirmation of his infeftment on the conveyance of 1817 by his father's trustees, and proceeding, as to Scallastle, Camyss, and Shiconnell, on the procuratory in the disposition of 1819, granted by them in his favour. In this title, after enumerating the lands of Ardmeanich, Camyss, and Shiconnell, the charter proceeds—"una cum terris de Scallastle, quæ sunt partes et portiones Baroniæ de Moy jacen. infra insulam de Mull."

By disposition dated 2d September 1819, containing assignation to the precept of sasine in the charter of resignation, Murdoch (2), "in consideration of the sum of £420 sterling instantly advanced and paid to me by Duncan M'Neill, Esq., advocate, the agreed on price of the superiority of the subjects after specified," &c., conveyed the lands of Scallastle to Duncan M'Neill, Esq., advocate, afterwards Lord Colonsay, "excepting from the warrandice the feu-rights or infeftments of the said lands granted by me and my predecessors and authors to the different feuars, and the vassals thereof, without prejudice to the said Duncan M'Neill, his challenging the said feu-rights upon any ground in law not inferring warrandice against me and my foresaids," conform to instrument of sasine recorded 8th November 1819.

By disposition dated 15th October 1832 Lord Bannatyne, the surviving trustee under the trust-deed of 1776, conveyed to Murdoch (2) and the substitute heirs of entail the whole lands contained in the trust-deed, except the lands which had been sold, under the declaration that the conveyance did not include the superiority of Scallastle. Upon this conveyance Murdoch (2) was infeft, his sasine being dated 11th, and recorded 30th January 1833. He then granted a charter of confirmation in favour of himself and the heirs of entail, as superior of the lands, except Scallastle and another small subject. This charter confirmed the trust-deed of 1776 and sasine thereon, and the reconveyance and sasine thereon.

Murdoch (2) died in 1844.* His son, Murdoch (3), made up his title [366] as heir of tailzie and provision to his father by special service, dated 1st October 1844, precept from Chancery dated 12th November 1844, and instrument of sasine dated 6th and recorded 14th December 1846. In the title thus made up the enumeration of the lands of the barony is the same as that in the investiture of his father in 1814. This title was reduced by Murdoch (3), conform to decree of reduction and declarator in absence, dated 30th November 1847.

The action of reduction was instituted with the view of furthering efforts which Murdoch (3) was making to free himself from the fetters of the entail. Previous to this decree of reduction the estates of Murdoch (2) had been sequestrated, conform to act and warrant of confirmation in favour of Archibald Borthwick, the trustee in the sequestration, dated 17th May 1847, abbreviate of adjudication in favour of the said Archibald Borthwick, as trustee foresaid, recorded 20th May 1847, and abbreviate of adjudication in his favour, recorded 26th November 1847, bearing that

* In 1840 a defect in the entail had been discovered. Sir John Cathcart, a creditor, raised an action of adjudication of the estate. The defender, Murdoch (2), died during the dependence of the action in 1844, and was succeeded by his son, Murdoch (3), who was sisted as defender in his room. In consequence of the defect the prohibitory clause was found insufficient to protect the estate against the contraction of debt by the heirs in possession, and decree of adjudication was pronounced on 1st July 1846—(8 D. 970).

the estates vested in Murdoch (3) as heir of Murdoch (2) are transferred and belong to the said Archibald Borthwick, as trustee foresaid. Murdoch (3) died in 1850. The whole entailed estate being at this time vested in the trustee for behoof of Murdoch's (2) creditors, the next heir, Donald Maclaine, brother of Murdoch (3), did not at first make up any title under the entail. In 1855 Donald purchased the bulk of the estate from the trustee on his father's sequestrated estate. The lands of Scallastle and others now in question were not included in this purchase. A disposition was executed by Mr. Borthwick, as trustee, in favour of Donald Maclaine, of the lands purchased, dated 4th, 5th, and 8th October 1855. Donald Maclaine expede a crown-charter of adjudication and resignation of these lands, dated 30th October 1855, on which he was infeft, conform to instrument of sasine recorded 31st October 1855.

On 31st May 1859 Lord Colonsay granted a disposition of the lands of Ardmeanich and Scallastle in favour of Donald Maclaine, which was recorded 10th June 1859. and was followed by crown-writ of confirmation dated 13th October 1859. On 2d June 1859, in consequence of some doubt as to the regularity of his previous sasine, his Lordship had expede a second instrument of sasine on the charter and disposition of Murdoch (2) in 1819.

Donald Maclaine made up his title to the barony by special service as heir of tailzie and provision of Murdoch (2), his father, dated 2d October 1862, and crown-writ of *clare constat* dated 25th and recorded 26th November 1862. On 28th May 1863 he obtained from Archibald Borthwick, as trustee foresaid, a disposition of the barony of Moy, proceeding on the narrative that he had sold certain parts of the estate, and that the whole debts had been paid.

Scallastle was always possessed as an integral part of the barony of Moy and estate of Lochbuy, which had been in the entailer's family upon a catholic title from time immemorial.

Donald Maclaine died in October 1863, leaving a trust-disposition and settlement in favour of the defenders, Mrs. E. G. Vincent or Maclaine and others, dated 13th March 1862, and a codicil thereto dated 2d May 1863, both recorded 16th October 1863, whereby he conveyed to his trustees all lands and heritable estate, of whatever kind, which should belong to him at the time of his death, for the purpose, *inter alia*, that they should make an entail of all the lands and other heritages situated in the island of Mull belonging to him at the date of the deed.

The pursuer pleaded;—(3) In consequence of the separation of the titles of superiority and property of the lands mentioned in the summons the same cannot be held to have been possessed by the successive heirs of [367] entail under the general title of the barony of Moy. (4) The deceased Donald Maclaine having made up no separate title to the lands in question the same could not be validly conveyed by him under his trust-disposition and settlement. (5) Assuming that the titles to the barony made up by the deceased Donald Maclaine included the lands in question, the same were not, on a sound construction of his trust-disposition and settlement, and other instruments regulating his succession and the rights of his family, disposed of by the said Donald Maclaine, but have descended to his son in virtue of the destination in the deed of entail.

The defender A. V. Maclaine pleaded;—(5) The conveyance to the entailer's trustees in 1776 was a mere burden on the radical right, and neither it nor the reconveyance by the surviving trustee in 1832 affected the title to the said lands. (6) More particularly, when the purposes of the trust were fulfilled the trustees' infeftment was extinguished in terms of the trust-deed and could not be made the basis of a title to the fee of the lands. (7) When the superiority of Scallastle was sold in 1801 the *dominium utile* was not withdrawn from the subsisting catholic title to the barony of Moy, made up in 1785, and has been possessed under that title ever since, as renewed in the persons of the successive heirs of entail. (8) At all events the crown title of 1814 to the barony of Moy was sufficient to contain the *plenum dominium* of the lands in question, and the crown vassals under that title having had exclusive possession of these lands for more than forty years after the alleged splitting of the fee, the crown title is the ruling title, and possession must be ascribed to it. (11) If the true feudal title to the fee of the lands is not to be traced to the crown title made up by Murdoch (2) in 1814 to the barony of Moy, then it must be attributed to the title under the Crown to the undivided fee vested in Lord Colonsay by his infeftment in 1819, subject to a claim at the instance of the successive proprietors of the entailed estate to demand

from him a title to the *dominium utile*, as holding under him. (12) As Donald Maclaine became invested with Lord Colonsay's feudal title in 1859, and at the same time the radical right to the lands, as heir of entail, stood in his person, all right and title to the lands was effectually conveyed to his trustees by his settlement.

The defenders Donald Maclaine's trustees stated similar pleas.

The solution of the questions thus raised between the parties depended to a great extent on the nature and effect of the trust-deed of 1776.

By this deed, dated 3d April 1776, "Archibald Maclaine, for certain good causes disponed to and in favours of Bannatyne William M'Leod, Esquire, advocate, and Allan M'Dougal, writer to the signet, or either of them . . . heritably and irredeemably, All and Whole" (the whole lands as described in the deed of entail) . . . "with power to them immediately to enter to possession, to uplift the rents, &c., sett tacks for nineteen years, . . . and likeways to intromit with, sell and dispose of my whole personal estate hereby conveyed, as also with power to borrow money and grant securities therefor upon the lands, and if it shall appear necessary or eligible to them to sell and dispose of such parts of the said lands and barony as they shall think proper, provided the lands thus sold do not exceed £200 sterling of yearly free rent, or that the price to be received therefor does not exceed the debts which shall then affect the said lands and estate, and those due to my said trustees, or for which they have become bound in the course of their administration: . . . But in trust only under the burdens and conditions, and for the uses and purposes after mentioned, viz., *primo*, with the burden of the jointure or annuity with which the said lands and others hereby disponed stand affected in favours of Katharine M'Dougal; [368] *secundo*, with the burden of a liferent annuity of 500 merks Scots provided to Isabella Maclaine, my mother, by the marriage-contract entered into between the said John Maclaine of Lochbuy, my father, and her, in the event of her surviving her said husband; *tertio*, with the burden of such provision as the said John Maclaine, my father, shall think fit to make and grant in favours of his younger children, in so far as the same do not exceed £700 sterling; *quarto*, for payment to me of an annuity or yearly sum not exceeding £100 . . . during the subsistence of the trust; *quinto*, for payment of the expenses of executing this trust; . . . *sexto*, for security, relief, and payment to my said trustees, their heirs and successors, of all debts due by me or by the said John Maclaine, my father, to my said trustees, or either of them; . . . *septimo*, for payment of all debts due by the said John Maclaine, my father, at the term of Whitsunday 1773, and all debts presently due by me, or in which I am liable as representing my predecessors in the lands and estate of Lochbuy, amounting to £10,206, 12s. 2¾d. sterling, conform to a list thereof signed and docqueted by me as relative hereto: Declaring not only that this conveyance shall be a valid and subsisting deed, irrevocable by me or my heirs and successors, until the purposes of the trust herein expressed shall be fully answered, but also that the whole debts contained in the foresaid list shall be a real burden affecting the lands and estate hereby conveyed to my said trustees as aforesaid; and that, whenever the purposes of this trust shall be fully answered, this conveyance, with the infeftment to follow hereon, shall become void and extinct, in the same manner as if such deed had never been granted nor infeftment taken, or in that case, and in the event that I or my heirs and successors shall make payment of the whole debts due by me to my said trustees, or for which they, or either of them, presently stand engaged for me as aforesaid, and likewise of such other debts as they shall contract or become bound for in the course of their administration as trustees for the purposes herein expressed, my said trustees, by their accepting hereof, become bound and obliged upon the charges and expenses of me, my heirs and successors, to grant and execute all deeds necessary for extinguishing the trust hereby created, and vesting my lands and estate hereby conveyed in the person of me or my foresaids. And in case my said trustees shall neglect or refuse to execute such deeds, it shall be competent to me or my heirs and successors, upon payment of the whole debts due to my said trustees, or for which they stand bound on my account as aforesaid, and relieving them of all engagements which they have come under for me or on my account, to bring an action before the Court of Session for declaring the trust hereby created void and at an end, and upon obtaining decreet of declarator in such action against my said trustees, it shall be competent to me, my heirs and successors, to revoke this disposition by a writing under my or their hand, upon recording of which revocation in the General Register of Reversions,

&c., this disposition, with the infeftment to follow thereon, shall become void and at an end, in the same manner as if no such deed had ever been granted or infeftment taken, providing always that any revocation to be executed by me shall not affect the securities that may be granted for the sums already due, or that may be borrowed or advanced by my said trustees, or any one of them, for the purpose of extricating my affairs, or the sales that may be made or dispositions granted in manner before-mentioned, in virtue hereof, prior to such decreet of declarator and revocation; but that all such sales shall be completed and carried into execution, and that the foresaid securities shall subsist until payment of the sums therein contained, any such revocation notwithstanding: . . . To be holden in manner aftermen-[369]-tioned, viz., the penny land of Grugline, . . . As also, All and Whole the lands of Ardmeanoch," &c. (the lands of Scallastle not being included in this enumeration), . . . "and the whole other lands" (including Scallastle) "hereinbefore disponed, to be holden by two several infeftments and different manners of holding, the one thereof to be holden of me, my heirs and successors, in free blench, for payment of one penny Scots money, upon the ground of the said lands and barony, at the term of Whity. yearly, in name of blench farm, if asked only, and the other of the said infeftments to be holden from me and my foresaids of our immediate lawful superiors of the said lands and others, by the same tenure by which I hold or may hold the said lands, and that either by resignation or confirmation, the one without prejudice of the other; and for accomplishing the said infeftment by resignation, I hereby constitute and appoint , and each of them, jointly and seally., my lawful and irrevocable prors., giving hereby, and committing to them full power, for me and in my name, in due form of law, to resign and surrender, as I do hereby resign, &c., the lands, barony, and others hereinbefore disponed, . . . but excepting always herefrom the lands of Grugline or Gruline, and others particularly before-mentioned, disponed, to be holden feu of me, in manner hereinbefore expressed, in the hands of my immediate lawful superiors, . . . but in trust only for the uses and purposes, and with and under the reservations, burdens, conditions, and declarations hereinbefore expressed, and particularly with the burden of the whole debts contained in the foresaid list subscribed by me relative hereto; and with and under this condition, that my said trustees and their foresaids shall not expede any charter of resignation or confirmation hereon in their persons, unless in the event of their selling and disposing of part of the lands and barony hereby conveyed, in virtue of the powers hereby conferred; and even in that event, that no charter of resignation or confirmation shall be expede hereon, excepting in so far as regards the lands that shall be then sold by my said trustees."

The Lord Ordinary pronounced this interlocutor:—"Finds that the lands to which the conclusions of the summons bear reference were held and possessed by the deceased Donald Maclaine, whose trust-disposition and settlement, dated 13th March 1862, is referred to in the 14th statement of facts for the defender Anthony V. Maclaine, under the disposition and deed of tailzie dated 31st May 1776, referred to in the 1st article in the revised condescendence for the pursuers, and subsequent progress of titles set forth on the record: Finds that the said disposition and deed of tailzie is defective and ineffectual as a tailzie under the provisions of the statute 1685, cap. 22, in so far and in respect that the same contains no prohibition against the alteration of the order of succession; but finds that the said deceased Donald Maclaine did not intend that the general conveyance of all the lands and heritable estate which should belong to him at the time of his death should extend to or embrace the lands foresaid; and finds, as a consequence, that the said lands were not conveyed or carried by the said trust-disposition and settlement to the trustees named therein: Further, finds, in respect that the said disposition and deed of tailzie is defective as a tailzie, as regards the matter of prohibition against the alteration of the order of succession as aforesaid, the same is invalid and ineffectual as regards all the prohibitions therein contained, by force of the provisions of the statute 11 & 12 Vict. cap. 36, sec. 43, and that the said lands are consequently subject to the debts and deeds of the heir in possession; and further appoints the case to be enrolled, with a view to the application of the above findings."

[370] The defenders reclaimed, and the Court, after hearing counsel, ordered minutes of debate, with reference more particularly to the following points:—

"1. Did the trust-infeftment of 1776, either by itself, or in combination with

the conveyance to Lord Colonsay, and infeftment on the crown-charter thereby assigned, effect a feudal separation between the *dominium directum* and *dominium utile*?

"2. Was the radical right, in the trust-estate (held by Lord Bannatyne and Mr. M'Dougall), which was vested in or competent to the truster, his heirs and successors, transferred to Lord Colonsay, or did it enure in any shape, real or personal, to the heirs of the truster, notwithstanding the constitution of Lord Colonsay's right?

"3. Had the exception from the warrandice of Lord Colonsay's conveyance any application to or efficiency in reference to the trust-right; and if so, did it debar his Lordship from reducing the trust-right, or anything done by the trustees in terms of the trust?

"4. What was the effect of Lord Bannatyne's conveyance and the infeftment thereon? (1) Was there thereby constituted in the person of Murdoch (2) an independent and indefeasible feudal right? (2) Or had these titles no other effect than an extinction of Lord Bannatyne's trust, leaving the *plenum dominium* unburdened in Lord Colonsay's person?

"5. Under the first of these alternatives,—Did Donald Maclaine, at any time of his life, become vested with the feudal right supposed?

"6. Under the second alternative,—Was Donald Maclaine vested with the *dominium plenum* by virtue of Lord Colonsay's conveyance to him of 1859, and his entry with the Crown following on said conveyance?"

The defenders argued;—The trust-conveyance of 1776 and the reconveyance of 1833 were not the leading titles to which the possession of the lands of Scallastle were to be ascribed. The infeftment of the trustees of 1776 was fundamentally incapable of becoming the basis of the title to the property of the lands, in respect that the trust was, and was declared *in gremio* of the deed to be, a mere burden, and that the reconveyance was only resorted to for the purpose of clearing the record. The unbroken possession which the successive heirs of entail had of the lands of Scallastle along with the rest of the entailed estate, was to be ascribed either to the original entail title to the whole barony with which the successive heirs of entail stood invested under the Crown, or to the title vested in Lord Colonsay, which, though intended to be only a superiority title, was in point of form a title to the *plenum dominium* of Scallastle. This title was acquired by Donald Maclaine in 1859. The cases * establish that the trust-deed 1776 was only a burden on the granter's right, leaving his feudal title to his estate, including Scallastle, as it was before,—that adjudication of it would have been competently led against him or his heirs,—that he was *in titulo* to grant securities over it,—and that it would be taken out of his inheritance by special service. The trust-deed had, when first granted, no effect upon the granter's title. It is not maintained that the true feudal title to the *dominium utile* of the lands other than Scallastle was in the trustees, and it follows that the infeftment of the trustees did not originally deprive the granter of his feudal title to the *dominium utile* of Scallastle, and it cannot be held that they were deprived of it when the superiority of Scal-[371]-lastle, which was sold to Murdoch (1) in 1801, passed into the hands of Lord Colonsay in 1819. The granter and his heirs were in possession of the *plenum dominium*, or both the property and superiority of Scallastle, on a complete feudal title for forty-three years after the trust-deed was granted; by parting with the superiority, they could not be *eo ipso* divested of their title to the property. The trustees' infeftment did not effect a splitting of the fee; but if the defenders' pleas are well founded they are entitled to prevail whether the fee was split or not. A splitting of the fee does not interfere with the full application of the principle developed in the series of cases which has been quoted. Both Rose *v.* Fraser and Lindsay *v.* Giles are cases in which the trust-conveyance was executed for the express purpose of splitting the fee, and using the superiorities for the purpose of creating freehold qualifications. Yet the feudal title to the *dominium utile* was held to remain with the granter, as *verus dominus*. If, therefore, the fee of the Lochbuy estate was split in 1776, the full title to the property as well as to the

* Donaldson *v.* Grant, March 11, 1786, M. 8689; Campbell *v.* Spiers, Dec. 14, 1790, M. 8652; Rose *v.* Fraser, Jan. 26, 1790, M. *voce* Terce, App. 1; Campbell *v.* Creditors of Ederline, Jan. 14, 1801, M. Appx. *voce* Adjudication, No. 11; M'Millan *v.* Campbell, June 28, 1832, 9 S. 551, affd. 7 W. and S. 771; Lindsay *v.* Giles, Feb. 27, 1844, 6 D. 771.

superiority of the whole estate, including Scallastle, remained with the granter, and descended to the heirs of entail by succession, and not through the intervention of the trust. The fee was clearly not split in 1776. The feudal title left in the granter of the trust-deed was his original title to an undivided estate. It may appear a somewhat more plausible proposition that the estate was placed in such a position by the trust-infeftment that the superiority left in point of form in the person of the granter was capable of being alienated by him, and the fee thereby split, and that this was done either in 1801, when the superiority of Scallastle was sold, or attempted to be sold to Murdoch (1), the heir of entail in possession, or in 1819, when that right was transmitted to Lord Colonsay, and his Lordship obtained a crown-charter. The true criterion is the meaning and intent of the trust-conveyance 1776. The true meaning of that deed was to be the foundation of a pure infeftment in security, like a heritable bond and disposition in security, and it could never at any time become the basis of a splitting of the fee.* An infeftment like that under the trust-deed which bears *in gremio* that it may be extinguished *rebus ipsis et factis* without any feudal procedure, is not a sufficient constitution of the vassal's estate. The effect of the sale under the articles of roup of 1801, by which "the superiority of the lands of Scallastle and Garmony" was for the first time sought to be withdrawn from the entailed estate by sale to the heir in possession, did not operate a feudal separation of the *plenum dominium* into two estates. If there was no distinct estate of superiority of Scallastle at the time an error of some kind was made. The words in the crown-charter of 1808, "una cum dominio directo de Scallastle," following a conveyance of other lands, were inept to effect a separation of the fee, and they conveyed no title to anything.† The regularity with which a splitting of the fee must be effected may be illustrated by reference to a single case.‡ Up to 1808 the fee of Scallastle was undivided, and Murdoch (2) had been possessing it, along with the whole of the estate, on apparency since his father's death in 1804. It is conceded that the superiority of Scallastle, in some shape, was supposed and intended to have been sold. The result of the infeftment of Lord Colonsay, on the assumption that the fee had not been [372] split, was to invest Lord Colonsay with a title to the *plenum dominium* of Scallastle—a nominal and defeasible title, but still a feudal title. The mere exception of feu-rights from the warrandice could have no effect in separating the property from the superiority, if a vassal's estate had not been already carved out in competent form. Lord Colonsay's title to Scallastle, being a title to the *plenum dominium*, if followed by possession, would have been the foundation of a complete right of property, if not reduced before prescription had run. But the possession of the estate remained with the heirs of entail, and any possession which Lord Colonsay may have had in the way of exercising the franchise is of no consequence, and had no effect, if the fee was not split.

If any title existed in the person of Murdoch (2) and the successive heirs of entail to whom Scallastle belonged, sufficient to carry that estate, then their possession is to be ascribed to it, and it worked off and extinguished by prescription Lord Colonsay's adverse title, upon which no possession followed. If, on the other hand, Scallastle was possessed upon no title in the persons of the heirs of entail sufficient to carry it, then they possessed it upon Lord Colonsay's title, his infeftment being in substance an infeftment in trust. If the fee was undivided, the conveyance by Lord Colonsay vested Donald Maclaine with the full feudal right to the subjects, in addition to the radical right which had all along remained with the heirs of entail.

The principle followed in Rose of Kilravock and Elibank supplied an answer to the second question. The property belonged to the heirs of entail, and the defenders' right to it, whether it be viewed previous to Lord Colonsay's infeftment in 1819 as a radical right against the entailer's trustees, or, as they maintain, a full right of property, was sustained and carried along in point of title for the benefit of these heirs by Lord Colonsay's own title. The exception of feu-rights from the warrandice had no application whatever to the trust-right. Scallastle and Garmony were two of ten subjects conveyed to Lord Colonsay. The remaining eight had been sold in

* Elibank *v.* Campbell, Nov. 21, 1833, 12 S. 74.

† Gardner *v.* Trinity House, Feb. 9, 1841, 3 D. 534; Hamilton *v.* Bogle, Feb. 23, 1819, F. C.

‡ Norton *v.* Anderson, July 6, 1813, F. C.

1801, and therefore it must be admitted had been finally and formally withdrawn from the trust, and cleared of the trustees' infeftment. But the heirs of entail had another title to Scallastle in their persons, which was independent of Lord Colonsay's, and which, it appears the most correct view to hold, had the effect of working off his title by prescription, and sopiting it, viz. the main title to the whole estate, the crown-title under the entail to the barony of Moy. The barony of Moy was co-extensive with the estate of Lochbuy when the estate was entailed, and the estate is described in the titles of the entailer and his successors as the barony of Moy, comprehending its various parts, which are enumerated. The crown-title of Murdoch (1) in 1785 enumerated all the original parts, no part having yet been alienated. But when his son Murdoch (2) made up his title as heir of tailzie and provision to his father in the barony of Moy, he omitted from the enumeration of its parts not only larger portions, the *plenum dominium* of which had been sold in the interval for payment of entailer's debt, but also Scallastle, of which, it was believed, the superiority had been sold. But as in 1819 he transferred the whole of the separate title which he made up to Scallastle to Lord Colonsay, his possession after that date ought to be ascribed to the catholic title to the barony which included Scallastle, and which was the only title in his own person, and with this title Donald Maclaine connected himself by his special service in 1862. The barony, as a general name, is a title which will cover Scallastle. But Scallastle being dropped from the enumeration in a new investiture, is a sign that the title to Scallastle has passed elsewhere, and raises a presumption that the new heir is not pro-[373]-prietor of it. The title, in point of fact, had passed to Lord Colonsay. But after forty years' possession adverse to that title the presumption is reversed, and it is held that the holder of the original general title is proprietor, and his title is recognised as a good title to all he has possessed.* But Donald and the preceding heirs of entail had equal power to deal with Scallastle under their title to the barony of Moy, even if the fee can be held to have been split. The cases of Ederline, M'Millan, Lindsay *v.* Giles, and the others of the same series which have been quoted, established the important principle of feudal conveyancing, that trusts of all kinds for behoof of the granter leave in his person not merely a personal right or *jus crediti*, which was never disputed, but an available feudal title.† The trust-deed of 1776 left a title to Scallastle in the person of the granter, Archibald. It was taken up by the title made up on the procuratory in the entail in 1785 by Murdoch (1), who lived till 1804. What became of that title if it was not contained in the investitures of Murdoch (2) and Donald Maclaine? Nothing could extinguish it, nor could anything except conveyance alienate it from the heirs of entail.

In answer to the fifth question, the defenders maintained that if the reconveyance of Lord Bannatyne constituted an independent and indefeasible feudal right, it vested in Donald Maclaine, because he obtained a conveyance from the trustee in the sequestration of Murdoch (2) of the whole rights of Murdoch (2) and Murdoch (3), as carried by the adjudication of the trustee for behoof of creditors. Assuming the fee to have been split, it appears clear to the defenders, *first*, that no feudal right was constituted by the reconveyance and infeftment; and, *secondly*, that if Murdoch (2) could be held to have thereby acquired an additional title, as he possessed under the entail title, Donald Maclaine did all that was necessary by connecting himself with the latter. When trustees in a trust for payment of debt formally denude that does not create any new title. The conception of the trust-deed itself shows this; the conveyance and infeftment were to become void and extinct whenever the purposes of the trust were fully answered. But then alternatively the trustees were taken bound to execute all deeds necessary for extinguishing the trust. and vesting the estate in the person of the granter, and his heirs and successors; and there is yet a third alternative, that, if necessary, the granter and his foresaids may obtain decree of declarator that the trust is at an end, and thereafter revoke the trust, the revocation to be registered in the Register of Reversions,—all showing that the trust was a mere burden. Like all infeftments in security, such as an infeftment of annualrent, it was extinguishable by renunciation, compensation, or payment.‡ The effect of such a reconveyance

* Countess of Moray *v.* Wemyss, 1675, M. 9636; Magistrates of Perth *v.* Earl of Wemyss, Nov. 16, 1829, 8 S. 82.

† Melville *v.* Preston, Feb. 8, 1838, 16 S. 457; 2 Bell's Lect. 974.

‡ Stair, ii. 5, 5—ii. 3, 48.

is seen from the cases of Rose *v.* Fraser, and Elibank *v.* Campbell, in which there were reconveyances, but no infeftment. Infeftment is not necessary in such a reconveyance, which shows that it does not affect the feudal title, but is a mere renunciation. And even if it were capable of forming the basis of a new title, Murdoch (2) did nothing by taking the reconveyance which imported the creation of a new title. The conveyance of Lord Bannatyne was not to a different series of heirs, and Donald Maclaine was quite entitled to take up the entail title only.*

The pursuers argued;—1. The pursuers maintain the affirmative of the [374] 1st question. It is indisputable that by the operation of a trust-deed such a separation of property and superiority may in certain cases be effected. In fact, a trust conveyance was the usual mode of effecting such a separation of estates, where the object in view was the creation of freehold qualifications without interfering with the substantial right of property. The only specialty is, that it was not necessary for Murdoch (1) to begin by conveying the estate to trustees for the purpose of constituting a feu-right, because a right of that nature was already in existence. A feu-right being constituted by the trust, Murdoch (1) took advantage of the split which it was capable of effecting when followed by a disposition of the *dominium directum* and a new investiture. He purchased the estate in the person of the heir of entail, as an estate of superiority, and his trustees made up a title to it by crown-charter, and thereby, it is submitted, effectually separated it from the subaltern estate in the person of the trustees of the entailer. The pursuers did not dispute the authority of the series of cases beginning with Campbell *v.* Ederline's Creditors, which establish the doctrine of radical right, and according to which a proprietor, after granting a trust for payment of debts, continues to possess feudally on his original investiture to the effect of supporting deeds affecting his reversionary interest. A trust may be made the means of completely divesting the granter of the property, leaving only a superiority in his person. In the class of cases next to be considered it is admitted that the trust is properly a burden, and that the estate remaining in the person of the granter is, to certain effects, an estate of property, and that the burden constituted by the deed of trust may be extinguished by discharge. The question now arises, what is the distinguishing circumstance in reference to these two descriptions of cases? The truster's radical right under a trust-deed is, properly speaking, his beneficial or resulting interest in the estate after the trust-purposes have been fulfilled; but that right may be either a feudal estate or a *jus crediti* against the trustee, according as the truster has or has not an infeftment to support his right. If he continues to possess on his original infeftment his radical right has all the incidents of a feudal estate. Under it the proprietor may grant heritable securities which, when followed by infeftment, will give a preference over personal creditors, as was found in Lindsay *v.* Giles, or may constitute an entail by procuratory of resignation, as in the case of M'Millan *v.* Campbell; and after his death, his right may be attached by adjudication directed against his apparent heir, which was the specialty of the case of Campbell *v.* Ederline's Creditors. Where the granter of the trust conveys the estate in his person to a purchaser to be held of the Crown, treating it as an estate of superiority, the radical right will not pass by that conveyance any more than it passed by the previous trust-conveyance. It will remain with the truster himself, the true proprietor; only, as the truster no longer possesses any feudal estate to which his radical right can attach, that right is necessarily reduced to the position of a personal claim against the trustee, and can be made effectual only by means of a reconveyance from him. The only tangible distinction between the freehold franchise cases, where the estate is undoubtedly split into superiority and property, and the cases of trust for creditors where there is no such split, but merely the creation of a burden, is, that in the one case the estate remaining in the truster is conveyed to a third party (who obtains a new investiture), while in the other it remains with the truster himself on his old investiture. The case of Lindsay *v.* Giles is very important to the pursuers' argument, as showing that the truster's radical right does not depend in any degree on the purposes of the trust, or the object contemplated in its [375] constitution, but solely on the continuance of the old investiture in the person of the truster. The pursuers submit that the radical right in the trust-estate in question did not pass by the sale of the superiority to Murdoch (1) in fee-simple, and consequently that it did not pass through his son,

* Ogilvy *v.* Erskine, May 26, 1837, 15 S. 1027.

Murdoch (2), to Lord Colonsay. In their view the radical right in the trust-estate was inseparable from the right of the heirs of entail, who alone were entitled to the reversion of the estate after payment of the entailer's debts. It is true that the feudal estate of superiority, which Murdoch (1) acquired by his service and crown-investiture, was intended to be transferred to the purchaser under the articles of roup; and accordingly (Murdoch (1) being himself the purchaser) his testamentary trustees, by expeding a charter of adjudication and infeftment, took up the feudal estate of which their constituent was possessed in his character of heir of entail. But this was merely as matter of title. The radical right of the heirs of entail to the property of Scallastle could not pass by that title, because the sale was merely a sale of the superiority. The radical right of a truster is truly an equitable title; it is personal to the truster and his heirs, and although it may support a conveyance executed by him with the intention of passing the property, it will not enure as a title to a purchaser whose contract gives him nothing more than a right to a bare superiority. According to the conception of the feudal titles, the right in the person of the first heir of entail was a mere superiority, the property having been transferred by the entailer to Lord Bannatyne and Mr. Macdougall by a disposition with a *de me* holding. Acting on the strictly feudal view of the position of the titles, the heir sold the estate as it stood in his person, meaning thereby to sell a superiority only. If it is held that in so doing he passed the radical right to the property, this is not putting a construction on the legal titles in harmony with the actual rights of the parties; it is introducing the notion of radical right as a disturbing element, giving the transaction a meaning not only different to what it feudally imports, but differing from that which the parties intended. According to the view maintained by the pursuers, the exception from the warrandice of Lord Colonsay's conveyance necessarily applied to the trust-right. The estate acquired by Lord Colonsay was nothing more than an estate of superiority. The trust-right was, in feudal form, an estate of property held originally of the entailer and his successors, and (in consequence of the transference of the superiority) afterwards held of Murdoch (2) as a fee-simple proprietor. Murdoch's title gave him in terms only the "*dominium directum de terrarum de Scallastle.*" It was not in his power to convey to Mr. M'Neill any other or more extensive right in the estate than that which he had acquired as purchaser under the decree of sale, and which was described in the charter of sale in the terms above quoted. It was therefore not only proper as a matter of conveyancing, but necessary to protect himself against the possible consequences of a contravention of the entail, that he should so guard the conveyance as to show that the right of the heirs of entail was not intended to be conveyed. It is to be observed that the only documents of title then existing which had reference to the right of the heirs of entail were the entailer's trust-deed and relative infeftment. In point of feudal relation this was a title subaltern to the crown title, which was to be conveyed to Mr. M'Neill, and the proper mode of protecting it against the acts of the purchaser of the superiority was by an exception in the clause of warrandice. This was accordingly done. There was no other title to which the exception from the warrandice could apply. According to the conception of the present argument Lord Colonsay could not have reduced the trust-right or brought a declarator of extinction of the trust, because [376] he had no right whatever to the particular estate which was protected by that trust. The proprietary right of the heirs of entail, which was represented by the trust, and which entered the Register of Sasines only through the medium of Lord Bannatyne's infeftment, was an independent estate, not in any way competing with Lord Colonsay's right, but operating in diminution of that right, and intended to remain as a perpetual burden upon it. Whether it is to be regarded as in point of form a proper feudal estate, or *dominium utile*, or whether it was in form a right in security capable of being converted into an estate of property by a charter to be granted by Lord Colonsay, it is indisputable that while Lord Bannatyne's sasine stood on the register the right of the heirs of entail was protected against the acts of any person claiming through Lord Colonsay. If Lord Bannatyne had reconveyed the Scallastle property to the heirs of entail with procuratory of resignation, the disponee might have compelled Lord Colonsay, as superior of the estate, to grant a charter of resignation in his favour, in terms of the entail. A charter from Lord Colonsay, applicable to Scallastle, would have given a title to that estate equally valid with that on which the heirs of entail have since possessed the larger portion of the barony. The want of such a charter

will not prevent the reconveyance from operating as a good title of property to Scallastle, though it may perhaps account for this subject having been overlooked by Donald when he made up his titles, and so having been left *in hæreditate jacente* of his brother, Murdoch (2).

The answer to the 4th question depends mainly on the view which is taken of the argument which is submitted under questions 1st and 2d. There were, prior to the granting of the reconveyance, three estates or interests in the subjects in question,—an estate of superiority vested in Lord Colonsay, an estate of property vested in Lord Bannatyne in trust for the heirs of entail, and a *jus crediti* or beneficial interest in the heirs of entail to the estate which was feudally vested in the trustee. The effect of Lord Bannatyne's deed of reconveyance, if its clauses and language are considered, was to reinvest the heirs of entail in the feudal estate or *dominium utile* of Scallastle, and thereby to constitute in their persons an independent and indefeasible feudal right. It is no doubt true that in certain cases the same object might be accomplished by a mere discharge and renunciation. If the person who is to be reinvested is in possession upon his old infeftment, or upon some separate title, a discharge may be a proper instrument to reinvest him in his estate, by extinguishing the burden affecting it. But in the present case the older and more eminent title had passed from the Maclaines to Lord Colonsay, and therefore a simple discharge of the trust would not have answered the purpose, as it would have left the heirs of entail without any written title to their property. Even in cases to which the doctrine of radical right properly applies, a reconveyance from the trustee is a *habile* mode of extinguishing the trust in favour of the beneficiary. The feudal effect of the proceedings evidently was to perpetuate the split which the trust had created, and to make the heirs hold the Scallastle property of Lord Colonsay, and the remainder of the estate of themselves, as superiors of the barony of Moy.

The answer to the 5th question is, that under that alternative Donald Maclaine did not at any time of his life become vested with that right. He could only have acquired that right by serving heir to his brother, Murdoch (2). But Donald Maclaine never made up a title to Scallastle by service; and accordingly on his death the right which had remained *in hæreditate jacente* of Murdoch (2) was taken up by the present proprietor.

Under the alternative of the 6th question (that the *plenum dominium* [377] passed into Lord Colonsay's person), Donald Maclaine became vested with the same right by his purchase from Lord Colonsay and entry with the Crown. But it is to be observed that in this transaction Donald Maclaine purchased a fee-simple estate, and in doing so came under the self-same obligation which was incumbent on Lord Colonsay to reconstitute a feu-right in favour of the heirs of entail. From this obligation he could not escape, because he was bound by the conditions of the entail to possess under it, and upon no other title. Even in this view of the case it is submitted that Donald Maclaine had not the power of disposing of Scallastle by his trust-settlement. There had been no prescriptive possession upon a defective investiture, as in the case of the Lochbuy property, because *ex hypothesi*, the entail had remained latent since 1819, in the shape of the personal obligation incumbent on Lord Colonsay to grant a conveyance, subject to its conditions and fetters. The right was therefore of the nature of an entailed personal right to land, the entail being subject undoubtedly to the objection of the want of a clause prohibiting the alteration of the order of succession, but subject to no other objection. But this objection could not be taken advantage of by Donald Maclaine in making his settlement, because it was *res judicata* in a question *inter hæredes*, under the decree in the original Lochbuy case,* that the entail contained a valid and effectual prohibition against altering the succession. The defect can only be taken advantage of by creditors in the position of the pursuers of the present action who are not bound by that decree, and who maintain, in conformity with the doctrine in the case of Lang *v.* Lang,† that the words of the clause do not constitute a valid and effectual prohibition against altering the order of succession.

At advising,—

LORD JUSTICE-CLERK.—(After explaining the nature of the action)—There are two questions raised for our decision :—

---

* Mor. App. Tailzie, No. 14. † M'L. and Rob. 871.

1. Whether the *dominium utile* of the lands of Scallastle and Garmony remained *in hæreditate jacente* of Murdoch (2).

2. Whether, if they were vested in Donald Maclaine, he intended to convey them by his settlement.

I shall state fully my opinion on the first of these points, and shall preface my observations by a summary of the feudal transmission on which it depends. I have found it a very complicated and troublesome question.

There are three different series of titles to be considered. 1. The entail title, comprehending the lands conveyed by the entail; 2. The trust title, also comprehending the whole lands conveyed by the entail; and 3. The superiority title, affecting only the lands of Scallastle and Garmony.

1. The entail title commences with a disposition and deed of entail of the barony of Moy and others, executed in 1776 by Archibald Maclaine, and recorded in 1785 by the institute, Murdoch (1), who in that year completed his title under it by obtaining a crown-charter, on which he was infeft.

Murdoch (1) died in 1804, and was succeeded by his son Murdoch (2), who in 1814 made up his title by service to Murdoch (1) in the barony and lands holding of the Crown, as heir of entail and provision. The lands of Scallastle were not enumerated in the retour, for a reason which I shall explain. Murdoch (2) died in 1844, and was succeeded by his son Murdoch (3), who died in 1856 without having completed any title. He was succeeded by his brother Donald, who in 1862 completed his title to the barony and lands holding of the Crown by service to Murdoch (2). These lands of Scallastle were not enumerated in this service.

From 1776 down to 1862 the entailed lands generally, including those of Scallastle, were possessed by Archibald Maclaine and his heirs of entail.

[378] 2. The trust-title.—Before executing his entail, and as a preliminary to doing so, Archibald Maclaine in 1776 executed a conveyance of all the lands he afterwards entailed to certain trustees for payment of family provisions and in security and in payment of certain debts specified in a list. The deed contained, in regard at least to part of the lands, including those of Scallastle, a double manner of holding, but it was provided that the trustees should not complete their title with the Crown unless they exercised the power of sale given them, and then only to the extent of the lands sold. The trust-deed declares these debts to be a real burden, and the trust to be irrevocable until its purposes were completed, but that then it should *ipso facto* come to an end. It also contained an obligation on the trustees to reconvey to the granter and his heirs and successors should they pay off the debts.

The trustees were infeft in 1776, and the deed of entail expressly confirms their powers. They never had possession; they never sold; and except giving their concurrence to a sale by the institute in 1801 they never acted at all.

All the debts, to a much larger amount than those contained in the list, were cleared off by 1822, but the trustees never used the rights conferred on them.

In 1832, for some reason not explained, Murdoch (2) took a reconveyance from the surviving trustees. In regard to the other entailed lands he first took infeftment on the disposition by the trustees, and then, as if as heir of entail he had held nothing but a right of superiority, confirmed that infeftment, and then resigned in his own hands *ad remanentiam*, as if to consolidate the *dominium directum* and the *dominium utile*. As regards the lands of Scallastle, the *dominium directum* was excepted in the conveyance from the trustees, on which Murdoch (2) was simply infeft. This is the title on which the pursuers found.

3. The Superiority, or what is called in the titles the *dominium directum* of Scallastle.—In 1787 Murdoch (1), in pursuance of a power reserved in the entail, brought a process of sale before the Court of Session to sell part of the entailed estate in order to pay debts of the entailer in terms of a power reserved in the deed of entail. Under this process Murdoch (1) sold in 1801, in pursuance of a decree of the Court, the *plenum dominium* of certain of the lands, and the *dominium directum* of Scallastle and Garmony. The trustees of 1776 consented to the sale. The lands were bought by Murdoch (1), who made up no title, but left them to his testamentary trustees, who completed their title in 1808, by adjudging from his heir-apparent, Murdoch (2), and from the trustees, and obtaining a charter of adjudication from the Crown of, *inter alia*, the *dominium directum* of Scallastle. In 1819 the trustees conveyed these lands to Murdoch (2), the heir in possession of the entailed estate, who thereupon

resigned in the hands of the Crown, and obtained a charter of the lands of Scallastle. Thereafter Murdoch (2) conveyed the lands of Scallastle to Lord Colonsay, excepting the feu-rights from the warrandice; and at the same time assigned to Lord Colonsay the unexecuted precept in the crown-charter. Lord Colonsay took infeftment in the disposition and in the crown precept; and in 1859 he conveyed these lands of Scallastle to Donald Maclaine, the heir of entail in possession.

Such are the titles. It is maintained by the pursuers that the superiority and property of Scallastle were effectually separated by the infeftment of the trustees; and that while Donald Maclaine held the *dominium directum*, the *dominium utile* was not taken up by him, but remained in the reconveyance by the trustees, in *hæreditate jacente* of Murdoch (2).

This is a purely technical point in feudal conveyancing. The key to its solution will be found in the answer to the question, whether the deed of 1776 did, or did not, divest the granter of his feudal title to the *plenum dominium* of these lands of Scallastle and the rest of the barony lands which were afterwards entailed. If the infeftment on the trust-deed did divest the granter I should be of opinion that the *dominium utile* of Scallastle and of all the other entailed lands was vested in the trustees from the date of their infeftment, and that it was validly conveyed to Murdoch (2) by the reconveyance of 1832. In that case it would no doubt follow that the service of Donald Maclaine, being limited to the lands held of the Crown, did not carry the *dominium utile* of Scallastle, and that nothing passed under the entail excepting a bare superiority, until the [379] reconveyance. On the other hand, if the trust-deed did not divest the granter, but left his feudal title vested in him, then I think it equally clear that the *plenum dominium* of all the entailed lands was conveyed by the deed of entail, and that the *dominium utile* was never vested in the trustees, and never created as a separate feudal estate.

It is apparent from the narrative I have given that the title of the trustees was not within the tailzied investiture at all. The *jus crediti* or right to demand a reconveyance is vested by the trust-deed in the granter and his heirs and successors, and the infeftment of the trustees was in no respect under the fetters of the entail.

I cannot hesitate as to the solution of this question. The granter, Archibald Maclaine, was not divested of his feudal title by the execution of the trust-conveyance; and the infeftment of the trustees, as long as the power of sale was unexecuted, was a security only, and a mere burden or incumbrance on the right of the granter, which affected neither his feudal investiture nor his beneficial enjoyment of the lands, and which required for its extinction nothing but the extinction of the debt for which the security was created. It had no more effect in divesting the granter than if he had granted a bond and disposition in security to an individual creditor. This principle is now firmly fixed. It was first applied in the noted case of Ederline's Creditors; but the leading case is that of M'Millan in 1831, decided both in this Court and in the House of Lords. The facts were entirely analogous to those of the present case. Campbell had granted to Ferrier a trust-conveyance for payment of creditors, with procuratory and precept. Ferrier took infeftment, and afterwards conveyed to Campbell, who thereupon resigned in his own hands, and afterwards executed an entail of the lands. After his death a creditor of the institute in the entail challenged the title made up under the reconveyance, which was admitted to be defective, and the question came to be whether Campbell had a title to entail the lands without having obtained a reconveyance. It was pleaded there, as it is suggested here, that there is a distinction between such a trust and an ordinary bond and disposition in security. But the Court found "that David Campbell, not having been feudally divested of the trust-deed, had power to execute the procuratory of resignation containing the entail, and that the titles made up under it were validly and feudally made up." Lord Moncreiff in his note states the law with great precision, to the effect that "such a trust-deed does not divest the granter of his feudal title, and is only to be considered as a burden on that title," and his views were affirmed by the Court and the House of Lords.

On this case, and the former case of Ederline, the law has long been considered as conclusively settled, and our best writers on conveyancing treat it as admitting of no dispute. Mr. Menzies in his Lectures says—"It is to be carefully observed, however, that a trust-disposition for payment of creditors does not divest the granter

of the radical right of property. Upon its face it is shown not to confer on the trustees an absolute right. It is a security, and may be extinguished by renunciation." Mr. Montgomerie Bell says—"The trust merely created a burden on his right; and in fulfilment of the purposes the burden is extinguished, and the lands are at his free disposal, just as if he had granted a bond and disposition in security, and had paid and obtained a discharge of the debt."

I have no doubt, therefore, that the trust-conveyance of 1776 did not divest the granter of, and did not invest the trustees in, the feudal title to the lands which were afterwards entailed. I am not sure if this is disputed by the pursuers; but they have endeavoured, with considerable ability, to avail themselves of an analogy which was unsuccessfully pleaded in the case of M'Millan. They say that a trust-deed of this description has precisely the same effect as an absolute disposition to be held of the granter qualified by a latent trust for the granter's behoof, such as was in use formerly for the purpose of creating freehold qualifications. But there is not the slightest analogy between the two rights, one being *ex facie* in security, and the other being *ex facie* a divestiture of the granter. In the case of M'Millan the same plea was attempted, on the authority of the case of Fairlie *v.* Fergusson,* which well illustrates the principle. In that [380] case Sir Adam Fergusson having granted a feu-right to his brother Lord Hermand *ex facie* absolute, although really in trust for himself, with a view to split the superiority and property executed an entail of the lands before obtaining a reconveyance. The entail being challenged by a creditor of the first institute, it was found that Sir Adam Fergusson was divested, and had no power to make the entail. Lord Moncreiff pointed out in the case of M'Millan that the conveyance in Fairlie's case was absolute; and in the House of Lords Lord Wynford, in moving the affirmance of the judgment, referred to this case, and said—"'But your Lordships will see the distinction between that case and this. In that case there was no object expressed, such as payment of debts. In the present case there is the expression of that object, and the object ceases for which it was made; so that every one would see that it was not conveyed to him absolutely, but for certain purposes." It is wholly immaterial that, even when the conveyance is absolute, the latent trust may preserve, to some extent, the radical right in the granter. When the conveyance is one in security it is not the radical right merely, but the original feudal title, which remains with the granter, whether the security be granted to a trustee or direct to a creditor.

If I am right in this view, the trust infeftment never did or could enter the progress as a substantive or independent title. It was a mere burden from the first. It required no feudal form to extinguish it, and as all the debts had been paid prior to 1822 it was extinguished at that date. Even a reconveyance could only operate to terminate the security, and free the dominant title from the burden; and therefore I am of opinion that the deed of 1832 was entirely ineffectual as a substantive title to the *dominium utile*.

If the deed of entail, therefore, effectually conveyed to the institute and heirs-substitute of entail the *plenum dominium* of the barony and lands of Moy, although these had been previously conveyed in security to the trustees, the question I am now considering seems to be concluded as regards the lands of Scallastle, as well as the rest of the entailed estate. The trustees' title to them was precisely the same. The sale of the *dominium directum* of Scallastle in 1801 by Murdoch (1), whatever complication it may have introduced into the progress, could not enlarge or alter the nature of the right conveyed by the trust-deed. If it was a right in security only before the sale; it was and could be nothing more after the sale. It is said, and truly said, that the conveyance of the crown title to Scallastle left Murdoch (1) with no separate feudal title to the *dominium utile* of Scallastle. But that only proves, what seems quite clear, that there never was any effectual separation of the superiority and property of any of the entailed lands,—a separation which could only be effected by an absolute feudal investiture in the *dominium utile* as a separate estate. A crown vassal, vested as Murdoch (1) certainly was with the *plenum dominium*, cannot create a separate estate in the *dominium utile* by conveying the *dominium directum*. This is well established, and the reason is that the superiority is the nobler and dominant right to the lands, and carries the whole feudal title, subject to the existing sub-

* Referred to in M'Millan *v.* Campbell, *supra*.

infeudations. The conveyance, therefore, of the *dominium directum* of Scallastle carried to the purchaser the whole right to the lands, under burden of the trustees' infeftment in security.

When a creditor is infeft base on a bond and disposition in security, a quasi-feudal relation is constituted between the granter and the disponee, but no separation is thereby effected of the granter's original title, which is only burdened, but in no part transferred, and the mid-superiority so created, of course, consists of the granter's original title of property under burden of the security. This was the real effect of the sale in 1801, and although at the time nothing was warranted to the purchaser but a bare superiority, a little consideration of the actual position of parties at the time of the sale will explain how that was.

In the case of Campbell *v.* Spiers, decided in the House of Lords, it was fixed that a trust-conveyance like the present, under which the trustees had power to complete their title with the Crown, still remained nothing but a security until sale or eviction, and did not divest the granter of his crown holding. The trustees, under the deed of 1776, while they only took infeftment on the precept, had a personal disposition to the *plenum dominium* of the whole entailed lands, [381] and for the purposes of a sale might have confirmed their infeftment, and carried off superiority and property together. It is plain, therefore, that in 1801 the institute, Murdoch (1), could not have sold an acre without their consent, because while the power of sale in their conveyance remained no purchaser was safe, and the proprietor could give no warrandice. As regards the lands which were sold out and out by Murdoch (1) in 1801, the consent of the trustees was an absolute discharge of their security, and thus the seller was able to give the purchaser a better title than he himself had, as it was disburdened of the security.

But in regard to these lands of Scallastle the trustees did not discharge their security,—that is to say, they still reserved their right to sell them for the purposes of the trust; but they did discharge their right to complete their title with the Crown, and in effect became bound to use in a sale their base infeftment only, and to give the purchaser only a right to hold base. The result of this is, that what was sold was the *plenum dominium*, subject to the security, just as the seller himself held it. He could warrant the crown title in virtue of the trustees' consent, but while they retained the power of sale he could warrant nothing more. If this was the true nature of the proceeding in 1801, there is no difficulty as to the rest of the progress. The charter of 1819, nearly twenty years afterwards, granted the lands to Lord Colonsay, who held at the same time a disposition, in the warrandice of which the feu-rights were excepted. Had the superiority and property ever been separated this title would have applied to superiority only, but as it was it gave him the whole lands, subject to the trust infeftment, which, by the payment of all the debts in 1822, became absolutely extinct.

It is of no moment, although quite certain, that Lord Colonsay meant to purchase, and Murdoch (2) to sell, only a superiority, for intention will not cure blunders in conveyancing. In 1801 the right sold was not worth more than a bare superiority, if, as is probable, a sale on the trustees' title was in contemplation. In 1819 the facts were forgotten, and the conveyancers may have assumed that there had been a separation of superiority and property, which there never was. Donald Maclaine in 1859 acquired Lord Colonsay's rights, and so absorbed the only feudal title which existed to the property.

That this is the accurate result, on technical principles of conveyancing, I cannot doubt, provided the sale of 1801 was valid. There are serious grounds on which it might have been impugned by the next heir of entail. It is also certain that Lord Colonsay, notwithstanding his title, never could have asserted a right to the beneficial enjoyment of the lands which he never possessed. But all these rights of challenge, personal to the heir in possession, centred in Donald Maclaine, and I need not pursue them further.

On the second question I only think it necessary to say, that in my opinion the terms of Donald Maclaine's settlement were sufficiently wide to comprehend these lands, and that I see no reason to infer that he did not intend to convey them.

LORD COWAN.—The pursuers have instituted this action as creditors of Mr. Gillian Maclaine, the present heir in possession of the entailed estate of Lochbuy, concluding primarily for decree against him for the sum mentioned in the libel, and decree of

constitution has been pronounced in absence; and further concluding for adjudication of the lands specially mentioned, viz. the penny land of Garmon, the penny land of Scallastlemore, and the penny land of Scallastlebeg, alleged to pertain heritably or otherwise to the said defender, or which pertained heritably or otherwise to the deceased Donald Maclaine, the defender's father, and to which the defender "might establish a right in his person were he served heir of entail and provision to the said deceased Donald Maclaine," with all right, title, and interest which the said defender might have "were he lawfully served, infeft, and seized as heir of entail and provision in special to the said deceased Donald Maclaine in such of the foresaid lands and others as he died infeft in, or lawfully served heir in general" to the said Donald "in such of the foresaid lands and others as he was not infeft in, but to which he had a personal right."

The substantial question thus put in issue regards the liability of the lands [382] mentioned, which formed part of the entailed estate, to be attached for debt due to the pursuers under the decree against Murdoch Gillian Maclaine; and this again depends upon the state of the title under which the lands were possessed by Donald Maclaine, his father.

That the original entail of Lochbuy and the investiture which followed on it were not apt and sufficient to protect the estate against adjudication for onerous debts of the successive heirs in possession cannot be made matter of dispute. No doubt it is contended that the prohibition against alteration in the order of succession, found to be effectual by this Court in 1807, *inter hæredes*, is conclusive also in a question with onerous creditors. This is disputed by the pursuers, on the ground that, by a subsequent judgment of the House of Lords, a prohibition expressed in precisely the same terms was held to be ineffectual. But it is not necessary to enter on this argument, for in completing the investiture under the entail in 1785 a fatal error was committed,—inasmuch as the word "debitum" was omitted in stating the prohibition against the contraction of debt. The result was that the estate was held attachable for debt by this Court in 1846 in an action at the instance of Sir John Cathcart; and thereafter in September 1846 the whole estates of Murdoch (2), including the entailed estate, were sequestrated for his debts; he had died in 1844, and the sequestration was directed against him as a deceased debtor; and under it the estates were transferred to Mr. Borthwick as trustee, by whom so much of the estates as was required to pay the debts were sold and subsequently transferred to Donald Maclaine in 1855. The error in the investiture, which thus laid open the entailed estate to be attached for debt, has been continued in the subsisting entail title; and so far as I can judge, the lands of Scallastle and others were liable to be attached for the debts of Donald Maclaine,—assuming him to have completed titles to the estate in terms of the original investiture.

Founding upon this state of matters, the pursuers maintain (1) that assuming the titles made up by Donald as heir of entail to have included the lands of Scallastle, they were not conveyed to the defenders, the trustees under his disposition and settlement, but descended to his son Gillian in terms of the entailed destination; (2) that holding the intention of Donald to have been to include the entailed estate in his trust-settlement, the lands of Scallastle at least were not so vested in him as to permit of their being carried by that deed; and (3) that consequently, on either ground these lands are liable to be adjudged for the debt of their debtor, under the charge to enter heir to his father Donald implied in the summons,—the usual proceedings for that purpose being duly followed.

The state of the title to the lands sought to be adjudged is much involved, and notwithstanding the very able pleadings before the Court, I have had no inconsiderable difficulty in arriving at a satisfactory conclusion; but in the view I take of the principles established by authoritative precedents, I think it must be held, 1st, that a radical right to the *dominium utile* of the lands of Scallastle has all along belonged to the successive heirs taking the entailed estate and barony; 2d, that the extinction of the trust created in 1776 by the fulfilment of its purposes, not less than the reconveyance in 1832, conferred on Murdoch (2) a complete title to the *dominium utile*, in respect of his radical right to the entailed estates and lands; 3d, that Donald Maclaine effectually took, *ex hæreditate* of Murdoch (2), the very right that was in him at the time of his death, either directly or through the trustee on his sequestrated estate, Mr. Borthwick, and whether that right be regarded as personal or feudal;

and 4th, that such right was carried to the trustees by Donald's trust-disposition and settlement.

Archibald Maclaine of Lochbuy executed two deeds in 1776 regulating the succession to the lands and barony of Moy (otherwise known as Lochbuy), and generally his whole lands and estates, the one deed being an entail of these lands, and the other deed a trust-conveyance of the same lands intended to take immediate effect, and specially referred to in the deed of entail as a burden on the right of the heirs of entail. The sole object of the trust-deed, which was declared irrevocable until its purposes should be fulfilled, was to provide for payment of the truster's debts, amounting to upwards of £10,000, as set forth specifically, and declared to form a real burden on the lands; and for this pur-[383]-pose with full power to his trustees to sell lands to the extent necessary to pay off these debts, and so to disburden the estate. And it is specially provided "that whenever the purposes of this trust shall be fully answered, this conveyance, with the infeftment to follow hereon, shall become void and extinct, in the same manner as if such deed had never been granted, nor infeftment taken." Infeftment was taken on this deed in favour of the trustees in May 1776.

The deed of entail conveys the lands, barony, and estate (subject to the granter's liferent) to and in favour of the heirs-male of the granter's body, and failing them to the other heirs-substitute described in the deed. It further reserves power to the granter to pay off all outstanding debts now affecting the estate according to the tenor of the trust-disposition foresaid; and also declares it to be not disallowable for the heirs of entail, to alienate so much of the lands as should be necessary to satisfy the debts owing by the granter at the time of his decease to the extent specified in the trust-deed. This entail was not feudalised or recorded in the lifetime of the entailer; but on his death in 1785 Murdoch Maclaine (1), the next heir in succession, completed titles by expeding crown-charter of resignation in favour of himself and the other heirs of entail, on which he was infeft.

With the view of providing for payment of the debts affecting the estate Murdoch (1), with concurrence of the trustees, raised an action of sale in 1787, and disposed of so much of the lands from time to time under judicial authority as was necessary for that purpose, and it is an admitted fact that thereby the object of the trust-conveyance was fully accomplished. To use the words of the trust-deed, its purposes were "fully answered," and that deed and infeftment following thereon became "void and extinct in the same manner as if the deed had never been granted nor infeftment taken." There was no necessity for any declarator of extinction or other judicial proceeding. Nor was there any necessity,—and this is the great peculiarity of the present case,—for any reconveyance by the trustees to the heir of entail then in possession and his successors. The deed of entail, and the completed title following thereon, was the foundation of their right to the estate, and required no subsidiary conveyance to confer on them the *plenum dominium* of the whole entailed barony. The contemporaneous trust created by the entailer, so long as the debts were not paid, was no doubt a burden upon the entail title; but it was no more such than any heritable bond or security over the estate granted by the entailer would have been. Its purposes being fulfilled the trust-conveyance became altogether effete, just as an heritable bond would be on payment of the debt, and the lands and estate under the original tailzied conveyance were thenceforth vested in and taken by the successive heirs of entail *in pleno dominio*, altogether free of the trust-deed and infeftment, and of the debts, to secure payment of which alone the trust had been created.

The peculiarity now noticed distinguishes this case essentially from all the cases to which reference was made in course of the discussion. Even that of Melville *v.* Preston—in which there occur the valuable remarks quoted by the defenders from the opinion of Lord Corehouse—was essentially different. Cases do occur where a proprietor, desirous of entailing his estate, and of freeing the succession thereto of debt, conveys his estates to trustees for the purpose of paying his debts and thereafter entailing the lands upon a series of heirs; but in such cases the entail is the creation of the trustees. Other cases there are where a proprietor conveys his lands in trust with a view to payment of debts, leaving his property, subject to that burden, to revert to himself and his successors in such terms as to make this reversionary right truly subordinate to the trust-infeftment; and this was the peculiarity in the case of Melville. Questions in such cases may arise as to the necessity of reconveyance

by the trustees in order to vest the parties entitled to succeed with a valid title. But in the more usual case Mr. Sandford, 196–7, says justly, that the truster is alone considered as proprietor in every question with the truster, his kin, or creditors. And in the present case that rule falls short of the legal position of the institute and substitute heirs, whose essential title to the estate was the original deed of entail. The contemporaneous trust-right created by the entailer for payment of specific debts was a mere excrescence on the entail title, which by its very terms became [384] extinct when the debts were paid. The true and only title of the successive heirs to the entailed estate was altogether apart from and exclusive of the trust-conveyance.

This was the state of matters even prior to the death of Murdoch (1) in 1804; and, at all events, in the person of his successor, Murdoch (2), who possessed the estate until 1844, the entailed lands were vested and possessed,—whether by feudal or by personal title will be afterwards considered,—exclusively under the deed of entail. And when the surviving trustee under the trust-deed of 1776 reconveyed the lands and estate to Murdoch (2) in 1832, he did not by that deed confer on the heir in possession for the first time a title to the estate and lands. The only effect of it, except in the light I shall immediately explain, was to afford conclusive evidence that the trust-burden had been long previously extinguished.

No doubt infeftment was (as I think unnecessarily) taken on that reconveyance; but assuming it entitled to effect, this may be viewed as having had the effect of converting the radical right to the *dominium utile* of the lands that was in Murdoch (2) as heir-apparent into a feudal right; but it could have no other effect. For it was no new title, but simply auxiliary to and supplementary of the radical right to the lands already in Murdoch (2), under the deed of entail, to the *dominium utile* of the whole entailed estate, including the lands of Scallastle. But with these lands he could not deal as he did with the other entailed lands, of which he was himself superior under the Crown; for these special lands were held under a subject superior, as has now to be explained.

One of the parcels of the lands sold under the action of sale in 1801 included "the superiority" of Scallastle and others, the purchaser being Murdoch Maclaine (1) himself, and he conveyed this along with his other general estate to trustees for certain purposes of his own. These trustees obtained, in implement of the said purchase, decree of adjudication, and expede crown-charter, including therein the said superiority; and thereafter, having disponed in favour of Murdoch (2), he obtained crown-charter, and subsequently disponed the same to Duncan M'Neill, Esq. (Lord Colonsay), by whom infeftment was taken in 1819 as crown vassal.

That a good title to the *dominium directum* may be held to have been thus constituted for the purpose of conferring a vote on the disponee does not require to be disputed. It is the effect of this title to the superiority on the right to the *dominium utile*, vested in the heir of entail in manner just explained which is alone matter of controversy.

That Murdoch (2), on his succession in 1804, had right to the *dominium utile* of the lands, and was entitled to complete a feudal title thereto, notwithstanding the sale of the superiority, cannot admit of doubt—assuming that the trust-conveyance of 1776 had became inoperative, and was extinct and void. As the heir of investiture, he had right to the *dominium utile* of Scallastle and others as part of the entailed estate; and if he did not vest himself feudally, he had at all events a personal right as heir-apparent, which he might make feudal whensoever he thought fit. As the lands in question, however, were no longer held under the Crown, the special service of Murdoch (2) in 1814, with a view to the completion of his title as heir of tailzie, did not and could not include the lands of Scallastle. The superiority of them was at that time (1814) the subject of the proceedings by adjudication in implement, and subsequent resignation under the Crown, which have been referred to, and which ultimately issued in the completion of Mr. M'Neill's crown title in 1819. He then became intermediate superior; and no infeftment was consequently expede by Murdoch (2) in the *dominium utile* at that time. But the infeftment subsequently taken by Murdoch (2) under the deed of reconveyance of the whole estate in 1832 may possibly be held to have effeired to his radical right, as heir-substitute of tailzie, —though this is not essential to the argument, as will be immediately shown. His title in that view became thereby feudalised,—its basis, however, being the deed

of entail under which he had all along possessed the lands, and his superior being, from 1819 downwards, Mr. M'Neill (Lord Colonsay). The conveyance by the surviving trustee was a mere form, adopted to validate and [385] perfect his inherent and radical right to the lands as such heir—to demonstrate on the face of the records that all right under the trust of 1776 was extinct.

The pursuers contend that when the *dominium utile* of the lands is conveyed to trustees with a view to the creation of a freehold franchise, and a conveyance of the *dominium directum* made to a purchaser to be held of the Crown, the effect of that conveyance is to change the legal character of the radical right in the granter of the trust,—not that the right is destroyed, but that its legal character is changed into that of a personal claim or *jus crediti*. It is said "it will remain with the truster himself, the true proprietor; only as the truster no longer possesses any feudal estate to which his radical right can attach, that right is necessarily reduced to the position of a personal claim against the trustee, and can be made effectual only by means of a reconveyance from him"; and it is urged that the only distinction between the freehold franchise cases and the cases of trust for creditors is "that in the one case the estate remaining in the truster is conveyed to a third party who obtains a new investiture, while, in the other, it remains with the truster himself on his old investiture.

Now, *first*, had it been maintained, which it is not, that, by the transference of the superiority title, the truster had entirely divested himself in favour of the disponee of his whole right to the property, this reasoning might have been more plausible; but it is conceded that the superiority disponee took nothing, and could claim nothing, but what effeired to that estate, and that the truster still continued the true owner as regards the *dominium utile*. Assuming this, on what ground can it be said that the radical right that was in the truster to that estate, before divesting himself of the superiority title, can be affected by that divestiture? The character of the right in him remains the same. He is still the true proprietor as regards the *dominium utile*, burdened only with the trust-conveyance. The reality of the case is that his radical right has legal relation only to the *dominium utile*; and as much *after* as before his conveyance of the superiority to another, the extinction of the trust had the effect of disburdening his radical right to the *dominium utile* under the old investiture.

But, *second*, this reasoning is quite fallacious as applicable to the present case. The trust-conveyance of 1776 was exclusively to provide for payment of debts. It did not divest the granter of the radical right of property in any sense. Far less can it be said to have affected the right of the institute and heirs-substitute, called to the succession by the entailing deed of 1776. This trust-deed was a mere burden on the title, otherwise complete under the entail, becoming extinct and void *eo ipso* of the trust-purposes being fulfilled. There was no change in the character of Murdoch's right, or of his title as regards the *dominium utile*, effected by means of the conveyance of the superiority. The investiture of 1785 was, from the first, and continued to be throughout, the title under which the successive heirs of entail possessed the property or *dominium utile* of the lands.

Nor, *third*, can it be said that in this state of the title the transference of the superiority, ultimately conveyed to Mr. M'Neill, could at all affect the right of the disponer as regards his position of true proprietor. Advantage may have been taken of the supposed split effected by the trust-conveyance of 1776, but which, as a mere trust for payment of debt, could not legally so operate; and the freehold franchise only may have been thereby conferred in 1819 on Mr. M'Neill, as vested with the superiority,—although his title was legally sufficient in terms to carry the *plenum dominium*, had there been possession. But the possession from 1804 downwards has all along been in the successive heirs-apparent, in virtue of their rights of succession under the entail, and the charter following on it in 1785.

This being the state of matters affecting the title under which Murdoch (2) possessed the lands, the title made up by Donald, and the rights in him, have now to be considered. He succeeded to the entailed estates in 1850. (1st) Having purchased a large portion of the lands and barony of Moy or Lochbuy, he obtained a disposition in his favour in 1855 from the trustee on the sequestrated estate of Murdoch (2). (2d) Thereafter he obtained from Mr. M'Neill, then Lord Colonsay, *inter alia*, a disposition of the lands in question, on which he was duly infeft in 1857–9, confirmed by the Crown in 1859. (3d) In 1862 he ob-[386]-tained decree of special service as heir of entail and provision to his father, Murdoch (2), in the lands and barony

of Moy, upon which he obtained crown writ of *clare constat*, recorded in the Register of Sasines 26th November 1862, and in virtue of the general service therefrom to be inferred, vesting in himself every personal right to the estate which was in his ancestor. (4th) And finally, in 1863 he obtained from the trustee on the estate of Murdoch (2) a second disposition of the lands and barony of Moy, comprehending the lands therein described, but subject to the entailed fetters and conditions contained in the previous deeds.

In this state of his title, Donald Maclaine died in 1863, leaving a trust-disposition and settlement dated March 1862. The questions are—First, whether, under these several titles, or any one or more of them, Donald Maclaine had not vested in himself the whole interest, right, and title which was in Murdoch (2) to the *dominium utile* of Scallastle and others; and, second, whether he did not transfer the same to his trustees for the general purposes of his trust-disposition and settlement.

On the first of these questions I have explained the grounds on which—if the infeftment of 1832 by Murdoch (2) shall be held to be entitled to any consideration—it may be regarded as having feudalised the radical title to this *dominium utile* held under Lord Colonsay. But it may be thought that this cannot be held to be its legitimate effect, and that his possession as heir-apparent after as before 1832, was in virtue of his personal title as such; and it is not necessary that it should be otherwise held to support the view I take of this part of the argument. It is sufficient that the infeftment cannot be held to affect the personal right as heir-apparent which Murdoch (2) all along had to those lands, and under which he and his predecessors had been the exclusive possessors from 1804. That title of possession remained with Murdoch (2) until his death in 1844. The infeftment under the reconveyance in 1832 was not intended, and could not have the effect, of placing the heirs of entail in the position of vassals to their own trustee. Be it that it did not feudalise the heir's personal title, it did not destroy it; and therefore on his death Murdoch (3) and then Donald became successively heirs-apparent under the entail, and in virtue of that title in possession of the lands, and no one else ever had such possession.

Assuming this to have been Donald's position, it is all-material, in estimating the effect of the title completed by him after his succession, to observe that the Entail Amendment Act had come into operation before he succeeded in 1850. Under the provisions of that Act, the original deed of entail being indisputably defective in at least one of its prohibitions, the estate became liable to be affected by the debts and deeds of the heir in possession, whether onerous or gratuitous. He had therefore complete power to deal with the estate and complete his title thereto, in the manner best fitted to promote the object he had in view, of providing for the execution of a new entail under his trust-deed and settlement. Having this in view, what he actually did was to purchase from Lord Colonsay the whole real right he had in the lands of Scallastle, and to obtain from him the disposition of 1859. The terms of that conveyance, in strict conformity with the title in his Lordship's own person, were such as to carry the *plenum dominium* of the lands, subject only to the exception in the warrandice clause of all subsisting feu-rights. This disposition, with warrant of registration thereon, was recorded in the General Register of Sasines 10th June 1857, and crown writ of confirmation thereon, dated 13th October 1859. In this way a crown title to the *plenum dominium* was vested in Donald, and the radical right and title to the *dominium utile* which he had as heir-apparent became clothed with the formal title. Nor could the exception of the feu-rights affect its validity as such, for the feu-right of these lands of 1776 had been long previously extinguished.

The other proceeding adopted by Donald was to obtain from Mr. Borthwick the conveyances in 1855 and 1863 of the whole estate and barony of Moy or Lochbuy vested in him under his adjudication title as trustee in the sequestration of the estates in Murdoch (2), in so far as those estates remained unsold after payment of the creditors. Donald had vested in himself the right to demand such reconveyance, the special service which he expede as heir of entail being impliedly [387] a general service, and carrying to him every personal right and claim relative to the entailed estate. Even, therefore, were it to be held that the infeftment in 1832 had the effect of creating a separate title in Murdoch (2) (a view which I cannot at all entertain as the reality of the case), that estate, along with the rest of the entailed lands, were carried to Mr. Borthwick by his adjudication title, and if so, he had full power to convey them to Donald in virtue of his personal right as heir-apparent. The con-

veyance of 1863 was therefore *habile* to carry that right to Donald, and although the lands are not specifically mentioned, nor infeftment followed on it, the conveyance of the barony may be held sufficient for that purpose; but if not, the personal right or *jus crediti* to claim from Mr. Borthwick still a conveyance to validate the right was certainly in Donald before his death, and formed part of his general estate conveyed to his trustees. Even this view, therefore, is sufficient to support Donald's right and power to deal with the lands in question, as he did with the rest of his estate.

There remains the inquiry whether, by his trust-disposition and settlement, Donald intended to convey, for the purposes of the deed, those parts of the entailed estate of which he had not acquired the property by purchase, but had succeeded to as heir-substitute of entail. On this branch of the argument, the views I entertain are the same with those held by all your Lordships. It is clear to me that the object and purpose of the granter of the deed was to convey to his trustees all the property that it was in his power to convey, with a view to that new entailed settlement upon the family of the barony and estate of Lochbuy, for which his deed provides. The ground on which the Lord Ordinary proceeds in pronouncing the interlocutor under review is explained in the note, and is, that Donald "had no intention whatever of effecting a conveyance of the entailed estate, or of the portions thereof" which are the subject of this action—*i.e.* not Scallastle only, but all the rest of the lands vested in him under the old entail, and to which he had right as heir of entail, and not as purchaser. I cannot so view the intended effect of this deed. Throughout its provisions reference is made to parts of the entailed estate, other than those which he had purchased. The entail was no longer in existence as a bar to his dealing with the lands as a fee-simple estate in his person. He had power to execute a gratuitous deed regulating the succession to those lands. Then why is he to be held to have left the old entail to regulate the succession to one portion of his lands over which he had power, while he made provision for a new entail as to the rest of his estate? I cannot think this at all probable. But at all events, to exclude the operation of the general conveyance in the trust-deed of his whole lands, some evidence must be shown that such was his intention. But no such evidence exists. I cannot think that subsequent bonds of provision can be viewed as demonstrative that the lands of Scallastle were not intended by Donald to be disponed to his trustees. The object of their execution appears to have been to provide for the contingency of his not having succeeded in vesting himself with such a title to the lands as should support his conveyance of them with the rest of the entailed estate and his other estates; and this is corroborated by the reduction provided to be made from the provision settled on his wife and family by the trust-deed, in the event of bonds such as those in question being subsequently executed in their favour. Assuming that his general conveyance of "all and sundry lands and heritable estate of whatever kind" belonging to him at his death were effective to carry these entailed lands, the full annuity and provisions which he intended to give to his family were provided for. And it may be remarked that the designation he assumes in these bonds, of "heir of entail in possession of the entailed lands" of Scallastle, demonstrates that he himself held, whatever difficulties there might be from the state of the title as regarded his power to convey, that a full and complete feudal title to these lands had been vested in his person.

On these grounds I am of opinion that this action of adjudication cannot be sustained, and that the defenders are entitled to be assoilzied.

LORD BENHOLME.—I look upon this as a very important case, involving principles of feudal law which are second in importance to none that can be stated; [388] and for that reason, contrary to my usual practice, I shall state, a good deal in detail, the views that I entertain of the progress of titles upon which the present question depends, especially in regard to the lands of Scallastle, and the effect that that progress must have upon the ultimate power of Donald Maclaine to convey these lands to his trustees, defenders in this case.

The various feudal points that are involved in the decision of this case were considered to be of such importance that they were set out specially as the subjects of discussion and argument in the interlocutor by which these minutes of debate were ordered; and I take it, that we shall best understand how this case ought to be decided by considering what answer ought to be given to these several questions of feudal

law. In my opinion these questions, one and all of them, ought to be decided (with reference to the argument for the parties) in favour of the pursuers. If so, it will be very extraordinary if ultimately it be found that the defenders are to succeed, and to gain their case, although they are wrong (on my hypothesis) in all the questions that they undertook to argue.

The first thing to which I ask attention is the trust-deed executed in 1776, about the time that the tailzie was executed; and I am anxious in the outset to express my opinion on the nature and effect of that deed; for, if I mistake not, its true character, and ultimate efficiency form the key to the solution of this case. It has been represented, in terms which I cannot agree to, as operating no more than a heritable bond would have done. The trust-deed appears to me to stand in a very different position from an heritable security. Let me call attention to the terms of the trust-deed, which have not been fully and completely expounded. It is a conveyance heritable and irredeemable (not redeemable as is every heritable bond) of the whole of the entailed estates in favour of the trustees, of whom the last survivor was Lord Bannatyne. It was in trust, and among the lands conveyed it is admitted that the three subjects called Scallastle were included. The trustees took infeftment upon the precept, and thus held the *dominium utile* or base fee.

The trust-deed contains various purposes: 1st, The payment of a jointure to Catherine M'Dougall; 2d, the payment of a liferent annuity of 500 merks to the mother; 3d, a burden of such provisions as the said John Maclaine might grant in favour of his younger children; 4th, payment of an annuity to the granter himself; 5th, payment of the expenses of executing this trust; 6th, for securing all debts due to the trustees; 7th, for payment of all debts due by the truster, amounting to £10,206, conform to a list; "Declaring that whenever the purposes of this trust shall be fully answered, this conveyance, with the infeftment to follow hereon, shall become void and extinct, in the same manner as if such deed had never been granted nor infeftment taken." But there is another alternative: "Or in that case, and in the event that I or my heirs and successors shall make payment of the whole debts due by me to my said trustees, or for which they or either of them presently stand engaged for me as aforesaid, &c., my said trustees, by their accepting hereof, become bound and obliged, upon the charges and expenses of me, my heirs and successors, to grant and execute all deeds necessary for extinguishing the trust hereby created, and vesting my lands hereby conveyed in the person of me or my foresaids." This was the case that happened, for the heirs of entail did pay those debts. Now, I think there is here an alternative of the utmost importance. One of the purposes of this trust-deed was a reconveyance on the demand of the truster or his heirs of entail. That was contemplated from the beginning; and it cannot be said that the truster's right to have that reconveyance, if it were to be of essential use to him in the fortification, or perhaps in the eventual constitution of his right to the *dominium utile* of Scallastle, was done away with by the other alternative which he might have adopted in regard to the rest of the lands, viz., that the trust infeftment should vanish and the *dominium utile* be merged in the *dominium directum* of the estate. For your Lordships will observe how different the position of these lands of Scallastle came to be from that of the rest of the lands. I shall mention immediately how it came to pass that the crown title to Scallastle got out of the progress, and that it no longer subsisted in the person of the heirs of entail, whilst the crown title to the great bulk of the rest of the lands remained entire. As to Scallastle, the [389] trustees would not in the end have performed their duty to the truster and his heirs unless they took the active step of reconveying. Very different was the position of the rest of the entailed estate to which the heirs of entail still retained the crown title. Having lost the crown title (as I shall show) to Scallastle, they had no feudal title by which they could retain their hold of that part of the estate, except the infeftment in the trustees held for their behoof. The crown title being gone, it became a matter of extreme importance that there was here an alternative provided in favour of the heirs of entail; that they were to be entitled to ask a reconveyance as the only feudal title that they possibly could make up to the lands of Scallastle. For, as they could not possibly obtain a crown title, the only feudal title which they could enjoy was the base title vested in their trustees, to which, as the truster's heirs, they were entitled to resort, and to take the full benefit of it, as stipulated expressly in the trust-deed. Now, the necessity of holding that the heir of entail was entitled to demand this

conveyance, and to demand it as necessary to himself, is to be found in the subsequent history of Scallastle.

After the trust-deed was executed it appears that the debts of the estate were all paid by the heir of entail. That appears very distinctly from statement 5 of the defence: "The trustees had no intromissions with the estate during this period, except that they concurred in the articles of roup by order of the Court, as concluded for in the summons of sale. They did not liquidate the debts affecting the estate, the prices of the subjects sold having been paid to creditors directly under the authority of the Court." Now, that authority of the Court was obtained under an action of sale in which the heir of entail, Murdoch (1), was the pursuer; and in 1801 the sale took place. It is of importance to observe the terms of the articles of roup—what was set up to sale—and upon what footing the articles of roup must have been drawn up. The articles of roup, or excerpts from them, are to be found in the print. The first lot is to consist of certain portions of the estate which were to be conveyed in *pleno dominio*, "with the superiority of the lands of Scallastle and Garmony."

Now, the footing upon which these articles of roup were drawn up (being the understanding of all parties concerned) was this: That there was a superiority of Scallastle disengaged at that time from the *dominium utile* by the infeftment of the trustees; for, although that was a trust-infeftment, it was a good subsisting infeftment, and until it was reconveyed or abandoned in some regular way it subsisted as an infeftment in the *dominium utile*. Upon that footing the whole of these articles were drawn up, and they subsume that not only the *dominium directum* of Scallastle had been separated from the *dominium utile*, and was capable of being sold by itself, but the superiority of various other lands—in short, that there had been such a separation between the superiority and the *dominium utile* of these lands as enabled the Court, in giving effect to this sale, to sell the *dominium directum* separately from the *dominium utile*. Nothing can be clearer than that the *dominium utile* of these lands of Scallastle was not sold, but was retained by the trustees. By the sale which took place the *dominium directum* was taken out of the entail, and was henceforth held in fee-simple; whereas the *dominium utile* remained with the trustees as part of the entailed estate. The title to the *dominium directum*, after the sale, was first taken in favour of the testamentary trustees of Murdoch (1) under a crown-charter expressly mentioning the *dominium directum*; but a more regular title was taken when the crown-charter in favour of the ultimate purchaser was expede, on which the Crown conveyed the lands themselves, which was the proper style of conveying a superiority. The exact extent and efficacy of such a conveyance depends upon other writings. If there are feu-rights, or if there are infeftments of any kind, these remain as burdens on the right of the purchaser; it cannot be doubted that when, in 1819, Lord Colonsay purchased this *dominium directum*, his right was confined to that subject, and did not extend to the *dominium utile*. Can it be supposed that he purchased more? Had the party who sold to him any right to sell more? He had purchased no more, he had no right to sell more, and, from the conveyance that he granted, to which I have now to refer, it will be seen that he had no intention of conveying more, and [390] that Lord Colonsay never intended to obtain more than a mere *dominium directum*. Upon this part of the case, if I mistake not, your Lordships that have spoken before me entertain different opinions in reference to a question of vital importance. I understand your Lordships' opinion to be, that by the conveyance to Lord Colonsay, his Lordship took Scallastle *in pleno dominio*, notwithstanding the express terms of his title. But Lord Cowan seems to agree with me that nothing could have passed, and nothing did pass to Lord Colonsay except the *dominium directum*. Now, as to that difference of opinion, I submit that it is solved by a reference to the conveyance itself in favour of Lord Colonsay. The terms of the disposition to Lord Colonsay are decisive in ascertaining what he intended to buy, and what was actually sold. What was the price he paid for this estate, the *dominium utile* of which we have been told is worth between £600 and £700 a-year? The disposition is in the shape of an assignation of a crown-charter; and it proceeds: "In consideration of the sum of £420 sterling instantly advanced and paid to me by Duncan M'Neill, Esq., advocate, the agreed on price of the superiority of the subjects after specified," &c. Can that be considered as a conveyance of the *plenum dominium*? The price and the terms of the conveyance are utterly inconsistent with that idea. Then the lands of Scallastle are conveyed, "excepting from the

warrandice the feu-rights or infeftments of the said lands granted by me and my predecessors and authors to the different feuars, and the vassals thereof, without prejudice to the said Duncan M'Neill, his challenging the said feu-rights upon any ground in law not inferring warrandice against me and my foresaids." This is just the ordinary clause by which a superior's right is limited; and here it is limited, not only in favour of the feuars, that is to say, persons who hold in feu, but of all the vassals who are infeft. Can it for a moment be supposed that all parties did not intend that the trustees' right to the *dominium utile* should be comprehended under that reservation? Can it be imagined that any of the parties thought that Lord Colonsay's right was not to be limited by the infeftment in trust in favour of Lord Bannatyne and the other trustees? I cannot imagine it. This conveyance appears to me to speak a language that cannot be mistaken. Lord Colonsay takes his infeftment under this reservation; and, undoubtedly at this time, in any point of view, the trustees' infeftment was an existing and valid infeftment; because they held for all the trust-purposes, and, especially, for the purpose and the duty of reconveying the *dominium utile* when the truster's heir should demand a reconveyance. Now, what was the position of Murdoch (2), the heir of entail, in regard to Scallastle, after the superiority was sold? He had no title under the Crown to those lands, and he never acquired any such title.

And here an important fallacy of the defenders requires to be exposed, upon which one alternative of their pleading is founded.

Murdoch (2), in 1814, expede a special service to his father, and infeftment under the Crown, in the rest of the barony of Moy, which had not been sold; but in this special service none of the lands which had been sold by his father for payment of debt were included, amongst which was Scallastle. The special retour enumerates categorically all the lands embraced in it, as follows: "In totis et integris terris et baronia de Moy comprehenden diversas terras molendina silvas piscationes aliaque postea memoratis viz." Then follows a detailed specification of all the minute parts and portions of the barony that had not been sold, to the exclusion of all those which had been sold. In this enumeration Scallastle does not occur, for this plain reason, that by this time they had been sold in superiority, and were held in fee-simple under the Crown by the purchaser's trustees.

Now, the defenders' fallacy consists in this, that they suppose the special service of 1814 embraced Scallastle.

Then, in answer to condescendence 6, they explain "That from 1814 the said lands (the lands of Scallastle) were held by the heirs of entail of the Crown under the catholic title of the barony of Moy." And their statement 7 commences as follows: "Murdoch (1) was succeeded in 1804 by his son, Murdoch Maclaine (2), who completed his title in 1814 by serving himself heir of tailie and provision in special to his father in the lands and barony of Moy, which catholic title in-[391]-cludes the lands of Scallastlemore, Scallastlebeg, and Garmony, conform to retour of his special service, dated 22d January 1814."

The capital mistake committed by the defenders in making these statements is exposed by reference to the special retour itself.

Subsequent to 1814, therefore, and until he obtained the reconveyance from Lord Bannatyne in 1832, Murdoch (2) had no title to Scallastle except through his trustees. Thus his right to demand a reconveyance was of the last importance to him. In the interim he possessed through his trustees. Their infeftment was his infeftment, because the infeftment of trustees is in the law substantially identified with an infeftment in the truster. That has been held in a great many cases. The truster is entitled to identify himself with the feudal title of his trustees, and it would be extreme injustice to him to hold that his trustees' title was liable to evanish when that title was of such importance to himself as the only bar between him and the party who held the superiority under a general title to the lands. If it be held that Murdoch (2) was bound to consider the trust-infeftment absolutely gone when the primary purposes of the trust were completed, just look at his position. In that point of view, Lord Colonsay, being no longer burdened by the reservation in favour of the vassal, had the *plenum dominium*,—nothing standing between him and the *plenum dominium* except this infeftment in the trustees. Murdoch (2), as the original truster's heir, was said to have been vested with a radical right in the trust lands, and that is true enough; but that radical right in Murdoch was merely personal, it was not a feudal

right. He had no feudal title under the Crown to which it could attach in the ordinary sense. His right was a mere personal right to call on his trustees to reconvey to him the feudal right which they held. It cannot be represented as a right held by him under the Crown. This peculiar radical right was no longer a right held under the Crown. The crown right was gone. And thus, if it be argued that Murdoch (2) was under the necessity of holding contrary to his interests, and in order to swell the interests of a third party, a stranger,—that the infeftment of his trustees was entirely evacuated,—just look at his position. He was then in the possession of this estate without a title at all, or any right to obtain a title. Now, it appears to me that this consideration is quite sufficient to prevent its being held that Murdoch (2) was bound to consider the trust infeftment as gone, and that he was not entitled to say, "I shall take back the infeftment from the trustees and hold that as an independent title." Murdoch himself took a very different view of this matter. He called upon Lord Bannatyne as the only surviving trustee to reconvey to him the whole trust-estate except what had been sold. The reconveyance executed in 1832 included expressly Scallastle. Murdoch (2) took infeftment in the whole lands reconveyed. If your Lordships do not consider that Murdoch got an independent right—a feudal right—under this reconveyance, then what was his position down to his death? He was possessing the lands of Scallastle; he was in actual beneficial possession of them; he had no infeftment under the Crown. He was not heir-apparent in any crown title to Scallastle. He could never take an infeftment under the Crown. His radical right, which might have adhered to his crown title had he retained it, then resolved into a mere personal right—a right to the *dominium utile*, but a right which was feudal in no sense unless it be supposed that there was a feudal title derived from his trustees. Now, just suppose that Murdoch had left a widow, and the question had been asked, Was she entitled to her terce? On the supposition that is made by the defenders here she would have had no right to her terce. I should have held that even had the husband died before he got the reconveyance, his trustees' infeftment was so far his infeftment that his widow might have claimed her terce; and that was exactly the case of Rose *v.* Fraser, 26th January 1790, Ross's Leading Cases, vol. i. p. 449. In that case an heir of entail, whose estate had been the subject of a trust-infeftment, as here, made up his titles under the Crown, but his infeftment was irregularly expede, and on his death the question arose, was his widow entitled to her terce. Certainly not in respect of any infeftment under the Crown or any infeftment in his own person, but he was held to be infeft through his trustees, though that infeftment had not reached his own person. [392] She was held to be the widow of an infeft proprietor, because such is the identity between trustee and truster that the trustee's infeftment is always to be assumed to subsist for the benefit of the truster, never against him; and in the employment of the trust-infeftment effect is to be given to it in the most beneficial way for the truster. It is even to be held to subsist in his own person if that be necessary, although he is not infeft himself. But in this case Murdoch (2) after 1832 was actually infeft in these lands. Can there be a doubt that there was vested in him a real right in the *dominium utile* of these lands, and that that was the only right remaining to the heirs of entail in the *dominium utile* of Scallastle? It has been suggested that it was very difficult to discover what was the object of this reconveyance. It was said to have been unnecessary; nay, it is said to have been a perfect nullity, and more especially it is said it is not to be considered as existing, because it was unnecessary to the party in whose favour it was granted. I think what I have already said will clear up this part of the subject. There can be no uncertainty as to the object which Murdoch had in view when he demanded a reconveyance. And it is important to observe how Murdoch dealt with the lands after he got the reconveyance, and to mark the difference of his actings as to Scallastle and as to the rest of the barony to which his crown title of 1814 applied. As to the latter, being his own superior, he completed his title by charter of confirmation, dated 25th May 1833. This charter commences as follows:—"Know all men by this charter that I, Murdoch Maclaine, Esq. of Lochbuy, immediate lawful superior of the lands, barony, and others underwritten, and conveyed by the disposition of Sir Wm. Bannatyn after confirmed, excepting the penny land of Cameron, the penny land of Garmon, the penny land of Scallastlemore, and the penny land of Scallasterbeg." As superior of the lands he had taken by special service under the Crown in 1814 he confirms the writs relative to these lands, but he specially excepts Scallastle, because he has no right of superiority in these lands. He was content to hold them in base

fee under Lord Colonsay, in virtue of the reconveyance of Lord Bannatyne unconfirmed. An observation of extreme importance occurs on this charter. Murdoch styles himself superior. But how could he be superior unless the trustees' infeftment had separated the *dominium directum* from the *dominium utile*? Upon the hypothesis which your Lordship in the chair was inclined to adopt, Murdoch was *plenus dominus* of all the estate he held under the Crown, whilst Lord Colonsay was *plenus dominus* of Scallastle. Certainly Murdoch entertained a very different view of his own position.

Lord Colonsay retained the superiority of Scallastle till 1859. He then sold and reconveyed it to Donald Maclaine, the then heir of entail. He conveyed it just in terms of his own right. He conveyed it back under the same reservation from the warrandice of the feu-rights and the infeftments that had been contained in his own title. By that time the infeftment of Murdoch (2) had been completed, and this reservation, of course, comprehended not only the infeftments of the trustees but the infeftment of Murdoch, taken on the reconveyance of Lord Bannatyne.

This case has been argued in two points of view in a very able argument on the part of the defenders, although I am bound to say that these two views are utterly inconsistent. They cannot both be correct, but they may both be incorrect, and that is my own opinion. The first view is one about which I think I need say very little more than I have said. It is argued that Murdoch (2) had a feudal title to Scallastle under the Crown, under what is called the catholic entail title. Now, it is true that the original title under the Crown, made up in completing the disposition of entail, contained Scallastle as well as various other lands subsequently sold to pay debt. But these had been eliminated from the crown title; the superiority of Scallastle had been vested in fee-simple purchasers, and ultimately in Lord Colonsay. Murdoch (2), therefore, had no feudal title to these lands, except the title to the *dominium utile* derived from the trustees. The second view is the one which I think your Lordship supports, that Murdoch (2) was never infeft at all in Scallastle. He certainly never was infeft under the Crown. That is clear. But your Lordship inclines to think he never was infeft even in the *dominium utile*, the reconveyance by Lord Bannatyne being a nullity, and the infeftment taken by Murdoch (2) also a nullity.

[393] The result, your Lordship thinks, is to deprive Murdoch of all title to Scallastle during his whole life, although he always possessed and enjoyed the property, and to attribute to Lord Colonsay the *plenum dominium*, although he never enjoyed the property, and his own title was inconsistent with that idea. It has been suggested, but it appears to me a very strange view, that Lord Colonsay, whilst he had a good right to the *dominium directum* of these lands, was trustee as to the *dominium utile* for the heirs of entail. But that is a very strange supposition. He took a title immediately from a purchaser who had his right in fee-simple, and that fee-simple proprietor sells him these lands under the burden of the feu-rights and infeftments. If this reservation was inoperative then Lord Colonsay could be nothing less than a fee-simple proprietor. The idea that somehow or other, unknown to himself and all the parties concerned, he became trustee for the heirs of entail in that *dominium utile* is, I think, of all the suppositions made in this case, the most untenable.

What I have already said convinces me that it would be contrary to all legal principle to hold that Murdoch (2) had not a feudal right in his own person after the reconveyance, and if that be the case all the arguments of the defenders are overthrown, for the concession with which they undertook to argue this case, and upon which they undertook to plead the important questions above referred to is, that if the trust right was a valid title and could be the means of vesting a feudal title in Murdoch (2) they had no case. That is unquestionably the footing on which this case is argued, and I confess that it has been with extreme diffidence that I have considered any argument to be suggested in their favour which they have not themselves suggested. They do not say that there was ever a special service in the *dominium utile* expede to Murdoch (2) by Donald Maclaine. No doubt Donald expede a special service under the Crown; and under that crown service he just took up what the former proprietors had taken up, exclusive of Scallastle. But there was no special service in Scallastle. That is clear. The *dominium utile* of Scallastle remained in the *hæreditas jacens* of Murdoch (2) until it was taken up by Murdoch Gillian Maclaine by special service in 1866. For there is no conveyance of Scallastle which was ever granted in favour of Donald from anybody except Lord Colonsay, and Lord Colonsay's

conveyance, as I have already fully explained, upon its own terms as well as upon the titles by which it was preceded, could only convey the *dominium directum*. On the whole, I submit that all the questions of law directed to be argued by the parties ought to be decided in favour of the pursuer. If that be so, I do not trust myself to speculate upon any other view beyond these questions. A suggestion has been made (not raised at the bar), and, as I understand, not concurred in by your Lordships who have spoken before me, that the sequestration of Murdoch (2) and the appointment of Mr. Borthwick as trustee might give rise to some right or *jus actionis* in favour of Donald. He never, however, got a conveyance of any kind. Is seems doubtful whether Borthwick ever had right to this *dominium utile*, and it is certain that he never dealt with it or conveyed it to any one. I think it would be useless to enter upon an argument that has not been ventilated at the bar at all. I think it would be very unsafe to do so, and as at present advised I see no reason to think that Donald was ever vested with any right to the *dominium utile* of the lands. This general conveyance of all lands belonging to him can never carry lands to which he had no vested right.

Upon the question of intention on the part of Donald your Lordships will see at once that in my view of the case it was unnecessary to form any opinion, but I think it right to say that had Donald been distinctly vested with the *dominium utile* of Scallastle, it might be held that, under the general words of his conveyance to his trustees, he intended to convey it as well as his other estate.

I conclude by stating my opinion that the pursuers, the creditors of Murdoch Gillian Maclaine, who have taken up this estate, are entitled to prevail against the defenders.

LORD NEAVES.—This case has been treated as involving a number of points of nicety and difficulty; but the view that I take of it is a simple one. I com-[394]-mence with the inquiry: At the death of Murdoch (2), which took place in 1844, where was the *dominium utile* of Scallastle, and the other lands in dispute? We have here to consider the original trust-deed with its various clauses, the conveyance to Lord Colonsay, and the reconveyance by Lord Bannatyne, surviving trustee, which had taken place in 1832. Various views may be taken as to where the right was, and how it came to be where it was. It may, or rather it must, have been either in the trustees, or in Murdoch (2), or in Lord Colonsay. It would be difficult to say it was in the trustees, for whatever view may be taken of their right, they had in 1832 reconveyed to Murdoch Maclaine all that they thought they could reconvey. Then, was it in Murdoch Maclaine, or was it in Lord Colonsay? That depends upon the nature and effect of the original trust-deed. The trust-deed is unquestionably a peculiar one in connection with the question whether the estate could be permanently split into two parts of superiority and *dominium utile*, because it is granted with a double manner of holding, which is not the usual preparation for creating freehold qualifications; and it was specially granted for the payment of debts. It could have been extinguished in certain events by the mere payment of the debts, and the truster could treat the estate as his own as long as the superior infeftment which was in him when he granted the trust-deed had not been impaired or extinguished. But it has been argued that the continuance of the truster's radical right depended upon the continuance of his infeftment as it stood when he granted the trust-deed, and that anything which extinguishes that infeftment extinguished his radical right as a feudal estate. Murdoch Maclaine's feudal title, it is maintained, did not exist, although his right as a beneficial interest still subsisted as a right of the nature of a *jus actionis*. Falling back on the second view presented in the trust-deed, by which he was entitled to get a legal conveyance when the purposes of the trust were accomplished,—I am inclined to adopt that view, and to hold that after his conveyance to Lord Colonsay, and so long as that lasted, Murdoch Maclaine had no feudal connection with the lands. As to Lord Colonsay, I need not go over in detail the various views that may be taken of his position. If the trust-deed had no effect in splitting the estate, then Murdoch Maclaine's conveyance to Lord Colonsay could not competently give him the mere superiority, but must have transferred to him the *dominium plenum*, subject to an equitable claim to get from him a feu-right, so as to vest in Maclaine the *dominium utile*, which it was not intended that Lord Colonsay should acquire; but I shall at once say here, that in my opinion the trust-deed was a valid and *habile* mode of splitting the superiority and property, and consequently that the conveyance

to Lord Colonsay by Murdoch Maclaine was a good conveyance of the *dominium directum*. But that conveyance still left a personal *jus crediti* in Murdoch Maclaine under the clause of reversion which existed in the trust-deed, and that claim of reversion was eventually carried out by the actual reconveyance executed by the trustees to Murdoch (2) in 1832. This reconveyance, which I hold to be a good deed, was subsisting at the time of his death. I hold, therefore, that the *dominium utile* of Scallastle was in Murdoch (2) when he died. If that be the case, it was *in bonis* of him at his death, and fell under his sequestration when he was sequestrated as a deceased debtor. An intermediate title had been made up by Murdoch (3), but in my opinion that was a title which never could have stood in competition with the trustee's; because, under the Sequestration Act, a trustee on the estate of the deceased debtor is entitled to demand a conveyance from the heir, even although the heir should have in the interim made up a title. But Murdoch (3) removed any such difficulty by reducing the title he had made up, so that the estate of Scallastle,—that is the *dominium utile* of it,—came to be vested in the trustee of Murdoch (2), for the purpose of paying his debts. Three it remained till the sequestration should come to an end. It came to an end at a late period by the sale of certain of the lands. Some of these were bought by Donald Maclaine himself, a prosperous member of the family, and, as I understand, all the debts were paid off in the sequestration. Now, what was then the position of the residue of the estate which had been sequestrated? The residue of the estate remained nominally in Mr. Borthwick, the trustee; and, [395] besides getting from him a special conveyance of certain lands which Donald Maclaine had bought, he, as the heir of his ancestor in this matter, made a requisition upon Mr. Borthwick for a reconveyance of the whole remainder of the estate, which, under the Bankrupt Act, he was entitled to demand. Mr. Borthwick, with that view, granted a disposition on 28th May 1863 in favour of Donald Maclaine. It sets out—"Considering that I, as trustee foresaid, sold a portion of the heritable estate so transferred to me, and out of the proceeds thereof paid the whole debts of the said Murdoch Maclaine that had been ranked in the said sequestration; that Donald Maclaine, Esq. of Lochbuy, eldest surviving son, and nearest lawful heir-male of tailzie and provision of the said Murdoch Maclaine, conform to decree of special service by the Sheriff of Chancery in his favour dated the 2d and recorded in Chancery the 4th days of October in the year 1862, has required me to denude of the remainder of the said lands and others, transferred to me as aforesaid, by conveying the same to him, as heir foresaid, and that it is reasonable and just that I should do so,—Therefore I, as trustee foresaid," &c. That was a demand by Donald Maclaine not as purchaser, but as heir of his ancestor, served in special, which also included a general service, calling on Mr. Borthwick to perform the last function which a trustee in a sequestration has to do,—a function very rarely performed, that of conveying back to the party interested the free residue of the bankrupt estate. If, in the reconveyance that was granted, Scallastle had been included *nominatim*, it cannot, I think, be doubted that it would have been a good conveyance of that estate that had been in the person of the deceased debtor, and had so been sequestrated. But it is not mentioned *nominatim*, and what is the consequence? There is a plea that it is meant to be included under the barony of Moy, and its omission otherwise is a sort of confirmation of that view. But whether that be so or not appears to me to be unimportant, for this reason, that by that transaction Donald Maclaine, the person then entitled to demand Scallastle, intimated and made known his right to Mr. Borthwick, the person bound to give it to him, and in this way the personal *jus crediti* was completed as between those parties for a conveyance of the whole remainder of the estate, whatever technical steps might be necessary to explicate the title. If by any mistake or accident a thing that ought to have been and was meant to be given is omitted from such a conveyance, it may affect the feudal right falling under it in Donald Maclaine's person, but it will not affect the existence of the *jus crediti* then vested in him, for the demand and its general acceptance amount to a declaration that now that the debts are paid the whole residue of the estate belongs to the bankrupt or his heirs or assignees, and the time was then come for that denuding taking place, and for the reinvesting of the bankrupt's heir. The demand for the conveyance was the assertion and exercise of a right, though it was not fully carried out, from some mistake or other. Now, I take it to be clear law that a *jus actionis* to obtain a conveyance from a trustee or trustees, by a party designated and ascertained to be the

true creditor, becomes, when the time for enforcing it has arrived, a completely vested right. If, after all this prosperity, Donald Maclaine had become bankrupt, I cannot doubt that his trustee and creditors would have obtained in some way or other the right to Scallastle for payment of his debts. I cannot doubt that it was *in bonis* of him in that sense, that he had a *jus crediti* in it. These things are extremely well explained in the case of Gordon *v.* Harper,* and in the case of Russel *v.* M'Dowall,† both quoted in the cases. But what is the import of these decisions? Where any party has a *jus actionis* under a trust he can convey it, though he never obtains fulfilment of it—he can convey it to his trustees under a general conveyance of his whole means and estate. The case of Gordon *v.* Harper is, I think, better reported in the folio Faculty Collection than in Shaw; but it is explained afterwards in the case of Russel, and it comes to this that when the creditor, in the right of action to obtain an estate to himself, is vested fully [396] with it as a *jus ad rem*,—for it is not a *jus in re*, but a *jus ad rem*,—he can include it in his general conveyance. It may arise in different ways. In Gordon's case, the beneficiary was the creditor designated in the trust-deed; at a certain time the son of so and so was declared to be the person entitled to get the estate. He died without getting the conveyance, and it was carried by his general settlement. Something of the same kind occurred in Russel's case. But it may also arise where the party is not *nominatim* in the trust, but possesses a certain character as heir of some one else. If he ascertains the character he is entitled to, and if the time is come for making the claim, the mere *mora* of carrying the subject into effect will not affect the vesting of the right; if the term is come when the denuding may be demanded, and if the party possessing the character asks for it, his situation gives him the personal right. He may require a general service in some cases of succession; but if a general service was required here, that was supplied by the fact that Donald Maclaine had special services which established his general character to get the whole of the *debris* of Murdoch, his ancestor's estate, which then stood in the trustee in the sequestration, and which belonged to the heir the moment the purposes of that sequestration had been accomplished. That is the view I take, if the estate was in Murdoch Maclaine at the time of his death, by virtue of any one thing,—a radical right or anything else.

But if, on the other hand, it is said that it was incompetent to split the estate by the trust-deed, and consequently, that although nothing more was meant to be given to Lord Colonsay than the superiority, yet the terms of the dispositive clause were such as to carry to him the whole estate nominally, but with an equity in favour of Murdoch, then the result would be that Donald got Murdoch's equitable right when the sequestration ceased, and he also in 1859 got from Lord Colonsay every right that his Lordship ever acquired. It would thus happen that by the time when Donald Maclaine makes his settlement he was vested with the *dominium utile*, either as a remnant of Murdoch Maclaine's own estate, which had been sequestrated, but which had passed to his representative, which Donald Maclaine was, or if it, the *dominium utile*, had even passed to Lord Colonsay, Donald Maclaine had in 1859 got from Lord Colonsay all Lord Colonsay had, and in that way he was once more crown vassal of that estate. Being so, could he not convey? He could, unless he was restrained by entails, and that is the next question. But it is quite plain that he was not restrained by an entail, for by the time he executed the deed in 1863 Lord Rutherfurd's Act had passed, and that which might have been a good entail against heirs, except for Lord Rutherfurd's Act, was no longer so. I do not go into the decision of the important case of Oswald, that where an old entail has passed down from generation to generation without a nullity being suspected in it an heir making a general settlement does not intend to carry the estate by it, or to make what he would consider an irritancy. But here we cannot suppose that Donald Maclaine was ignorant of Lord Rutherfurd's Act. I presume most heirs of entail have a pretty good notion as to that Act, and the heirs of entail in possession at the time were glad to see it. It is not reasonable to suppose that Donald Maclaine was ignorant of it. Take the whole entailed estate. Was the buying back with his own hard-earned money an estate which had been sequestrated from Murdoch Maclaine for his debts, to set up the old entail again, which would have enabled it to be equally carried off by the

* Gordon's Trustees *v.* Harper, Dec. 4. 1821, F. C., and 1 S. 185.

† Russel *v.* M'Dowall and Selkrig, Feb. 6, 1824, F. C., and 2 S. 682.

next heir, or when he shows his purpose to make a new and valid entail under the new law, did he not mean to include in it all the lands entailed before, so as to preserve them in the groove of succession he had now chosen. His deeds of provision as heir of entail under the old deed were obviously so framed *ob majorem cautelam*, and not at all as interfering with the plain intention that all estate belonging to him in any way shall be settled in this new channel. I therefore think the trustees are entitled to have their defences sustained.

THE COURT pronounced this interlocutor:—"Alter the interlocutor of the Lord Ordinary reclaimed against of date 20th March 1871: Find that the late Donald Maclaine had power to convey the lands [397] of Scallastle and Garmon, and that he did effectually convey the said lands by his trust-disposition and settlement to the defenders, the trustees under that deed: To that effect sustain the defences, and assoilzie the defenders from the conclusions of the summons, and decern: Find the defenders entitled to expenses, and remit," &c.

TODS, MURRAY, & JAMIESON, W.S.—JOHN MARTIN, W.S.—Agents.

No. 73. X. MACPHERSON, 397. 21 Jan. 1872. 1st Div.—M.

REV. ANDREW BROWNE, Pursuer.—*Trayner.*
REV. JOHN ORR AND OTHERS (Spier's Trustees), Defenders.

Process—Proving the Tenor—Public Records—1617, c. 16.—In an action of proving the tenor of a deed recorded in the Register of Sasines, *held* that, notwithstanding the recording of the deed, the pursuer had a sufficient interest to entitle him to sue.

Expenses.—Where the *casus amissionis* in a proving the tenor was the act of the defenders' author, the granter of the deed, and the defenders expressed by letter to the pursuer's agent their wish that the question of expenses should be left to the determination of the Court, the pursuer's motion for expenses against the absent defenders granted.

On 3d March 1860 Mrs. Margaret Gibson or Spier executed a bond of annuity and disposition in security, whereby she bound herself and her heirs and successors to pay to the pursuer, as minister of the parish of Beith, and his successors in office, an annuity of £25, for the benefit of poor persons in the parish. By her instructions the deed was recorded in the General Register of Sasines at Edinburgh on 30th July 1860; and in November 1860 it was delivered by her to the pursuer as an irrevocable deed. He afterwards intimated from the pulpit that the gift had been made. The annuity was regularly paid and expended by the pursuer in terms of the directions in the bond during the life of Mrs. Spier. She died in February 1870. In November 1862 Mrs. Spier had sent to the pursuer and got the deed "to read." It was never returned to him; it was not found in her repositories at her death; and it appeared that she had destroyed it.

The pursuer brought this action for the purpose of proving its tenor, calling as defenders the trustees under Mrs. Spier's trust-disposition and settlement, who did not appear.

After a proof in the usual way, in which the facts above stated were proved, the case came before the Court on the pursuer's motion for decree.

The LORD PRESIDENT expressed a doubt whether, the deed being recorded, the pursuer was not able to make his right effectual by the extract without the aid of this extraordinary remedy; and whether, that being so, he had such an interest as entitled him to sue an action of proving the tenor. The case was continued that counsel might consider the exact effect of recording the deed under the Acts 1617, c. 16, and 1681, c. 13.

At next calling,—

Argued for the pursuer;—The deed, the tenor of which is sought to be proved, contained a personal obligation on the part of Mrs. Spier, the granter, to pay the pursuer and his successors a certain yearly sum, in security of which obligation certain lands were conveyed. To complete the heritable security, the deed had been

disponed to a nephew, Robert Armour; and a third portion called Priestgill, to William Armour, another of his nephews, and both brothers of Andrew Armour, through whom the pursuer claims. No alteration is, however, made by this deed on that of 1787, or on the codicils of 1803, 1808, and 1813, as bearing upon the moveable estate; but by two undated deeds, found in the repositories, which are admitted to be holograph of the testator, he makes a variety of special bequests in favour of those of his nephews and nieces to whom the residue was conveyed by the deed of 1787, who were then alive, and to the children of such of them as were dead. These two undated deeds are in substantially the same terms and to the same effect; and both proceed upon the narrative that, 'taking into consideration the uncertainty of life,' the testator has 'thought fit to make the following testament.' He then appoints Mrs. Agnes Gilmour or Clark his executor, and he farther appoints her to be 'universal intromitter with my goods and money, except what is otherwise mentioned afterwards, and that under the following burdens—to pay my debts, and the following legacies.'

"Parties are not agreed as to the date at which these undated testaments were executed, but it appears to the Lord Ordinary to be pretty clearly established by the deeds themselves that they were executed subsequently to the deed of June 1821 disposing of the heritable estates. Because there is in both deeds a bequest of a legacy of £20 to William Armour, to assist him in entering with the superior of Priestgill, and it is only by the deed of June 1821 that the property of Priestgill is settled on William Armour. And this view is further corroborated by a cancelled holograph writing in substantially the same terms as the undated deeds, which bears to be dated on the 5th of October 1821."

By one of the undated holograph writs the testator appointed "Agnes Gilmour of Newhouse, spouse of Mr. Robert Clark, to be executor—and she, by the assistance of her husband, will do the business very correctly—universal intromitter with my goods and money, except what is otherwise mentioned afterwards, and that under the following burdens, to pay my debts and the following legacies." "These last-named sums due by John Steven and William Gilmour to be paid to the executor, that they may divided to the legatees as well as the rest, being part of the sums which are to be given to the other legatees." (Signed) "WILL. GILMOUR."

By the other he appointed "Agnes Gilmour, spouse of Mr. Robert Clark, to be executor of this my testament, who, with the assistance of her husband, will do the business very correctly; and I appoint her to be universal intromitter with the whole good and gear except what shall be [401] otherways appointed, and that under the following burdens; and I hereby bequeath," &c. "All these sums sterling money, and payable at the first term that shall be six months after my death; and as some of the legatees have given bills for sums which they have received, these may be turned in payment of the legacies so far as they go. As to my cloths, books, and plenishing, harrow, spade, ax, and other tools, to be divided among the friends; if they cannot do this business themselves, they may chuse a man to do it." (Signed) "WILL. GILMOUR." "Poor people, when they get a legacy or any gift, are often in a great hast to get it ended, tho they have often much reason to regret their hast."

Meetings of the relations of Mr. Gilmour were held at the opening of his repositories on March 23, 1823, and again on the 9th of April 1823, at both of which formal minutes of meeting were drawn up.

Mrs. Clark entered upon the office of executrix on the footing stated in this minute, was confirmed, and gave up an inventory, amounting to £8749, 7s. 11½d. She paid the legacies bequeathed by both of the undated deeds, and among the rest one of £50 to Mrs. Helen Armour or Jamieson, a daughter of Andrew Armour, one of Mr. Gilmour's nephews, and mother of the pursuer. This legacy was discharged by her and her husband on Dec. 16, 1823. On Feb. 2, 1826, Mrs. Clark gave up a residue account on which she paid duty, amounting to £7424, 19s. 9½d., which she declared to be "the amount of the said residue and monies which I am entitled and intend to retain to my own use as executrix and residuary legatee of the deceased, being descendant of a brother of the deceased."

The pursuer averred, *inter alia*, that Andrew Armour, his mother's father, had right under the disposition and settlement of 1788 and other testamentary writings of the late Mr. Gilmour to one-thirteenth share of the free residue of his estate, and

that Andrew Armour was not aware of the existence of any settlement by Mr. Gilmour other than the two testamentary writings referred to, which were represented by Mrs. Clark and her husband to have been the only settlements of the deceased.

The pursuer pleaded, *inter alia*;—(1) The foresaid disposition and settlement and relative codicils by the said William Gilmour were not recalled by either of the said undated testamentary writings, and the moveable estate left by him fell to be disposed of at his death under and in terms of the whole of the said settlements and testamentary writings executed by him. (3) The defenders, as the representatives and next of kin and intromitters with the estate and effects of the said Mrs. Agnes Clark, the executor-nominate under the said testamentary writings and the said Robert Clark, her husband, are bound to account to the pursuer for the intromissions of the said Robert Clark and Mrs. Agnes Clark with the estate and effects of the said William Gilmour, and to make payment of the share of the residue of the said estate to which he has right.

The defender pleaded;—(3) In the circumstances stated, and upon a sound construction of the foresaid two undated testamentary writings, the moveable succession of the deceased was exclusively regulated by the said two writings, or one or other of them. (4) The claims of the pursuer have, in any view, been extinguished by the negative prescription. (5) The said claims were discharged by the pursuer's mother, and the same are now barred by said discharge, and by *mora* and taciturnity.

A proof was led, after which the Lord Ordinary pronounced this interlocutor:—"Finds that the right of the pursuer to enforce the claim made under the present action is cut off by the negative prescription: Therefore, and to that extent, sustains the defences, and assoilzies the defenders from the conclusions of the action, and decerns: Finds them [402] entitled to expenses, of which appoints an account to be given in, and remits," &c.*

---

* NOTE.—(After the narrative above quoted)—"After the death of William Gilmour his executrix appears to have proceeded to administer the estate, upon the footing that the disposal of the personal estate fell to be regulated by the two undated deeds. For although the other deeds and codicils were found in the repositories of the deceased, the inventory of the personal estate, with the relative disposition and the executry accounts, which were settled with the Stamp-office authorities in the year 1826, show the one that the two undated testaments were assumed to be the will of the deceased, and the other that the legacies bequeathed by those undated deeds to the testator's nephews and nieces and their children were paid to them in the course of the years 1823 and 1824, and duly discharged. The receipt granted by the pursuer's mother for the legacy of £50 bequeathed to her is dated on the 16th December 1823.

"It is in these circumstances that the present action has been brought, forty years after the date when the executry accounts were settled, and the estate realised, and the balance of the residue after payment of the legacies appropriated, as alleged by the pursuer, by the executrix to her own uses and purposes. To this demand various defences have been stated, but the two mainly insisted in before the Lord Ordinary were, 1st, that the claim was excluded by the negative prescription, and, 2d, even if that were not so, that, upon a sound construction of the undated testamentary writings, the moveable succession of the deceased fell to be regulated by them, as the heritable estate did by the deed of 1821, inasmuch as these three deeds taken together operated as a recall or revocation of the deed of 1787, by disposing of the *universitas* of the estate; and it was farther pleaded that the pursuer's claims were barred by the discharge granted by his mother, and by her *mora* and taciturnity.

"1st, With reference to the last of these defences, and assuming the claim not to be met by the negative prescription, the Lord Ordinary, as at present advised, does not think that there are in the circumstances of the case materials to warrant him in giving effect to it. Because there is no evidence to show when the pursuer's mother died, or that she ever was aware that there was any other will than that under which her legacy was paid. Neither does it appear at what precise time the pursuer himself became aware of the existence of the deed of 1787;—all that is proved is, that it was known to some of the family about 1839, when the pursuer was not of age, that such a deed had been executed; but it does not appear that he himself was then made aware of its existence. And in the absence of any distinct proof

[403] The pursuer reclaimed, and argued;—The negative prescription did not apply to a claim against an executor, who is truly a trustee, and liable to account

---

on this point the Lord Ordinary is disposed to hold that the plea of *mora* and taciturnity cannot be maintained.

"2d, But upon considering the authorities he has come to the conclusion that the plea of prescription constitutes a good defence against the present claim. The statutes by which the negative prescription was introduced, and under which it has been regulated, have for long been construed to apply to almost every species of claim or ground of action which has been allowed to lie over without being insisted in for forty years—Stair, ii. 12, 11 and 12, and More's Notes; Bankton, ii. 12, 18; Erskine, iii. 7, 8. In particular, they have from an early date been held to apply to the case of a claim under a testament—Lindsay, June 19, 1627, D. 10,718—'albeit,' as the report bears, 'the Acts mention only prescription of obligations, and this title was a testament whereto the pursuer alleged these Acts could not extend.' And in the more recent case of Briggs, January 24, 1854, although the interlocutor of the Lord Ordinary finding the claim against the executor prescribed was altered on the ground that the prescription had been interrupted, no doubt seems to have been thrown on the general doctrine that a claim against executors or general representatives might in the ordinary case be cut off by the negative prescription.

"The Lord Ordinary has carefully examined the case of Barns, March 5, 1857,* relied on by the pursuers, but he has been unable to find that it in any [403] respect derogates from the weight of these and other authorities. The case of Lindsay is, on the contrary, distinctly recognised as an authority in disposing of the case of Barns; while the later case of Kinloch, 27th May 1800 (M. App. Prescription, Nos. 4 and 7), is referred to and adopted by the Lord President as deciding in regard to trust-funds 'which had been recovered or possessed beyond the forty years that the obligation to compel the application of them to trust-purposes had been lost.' Now, the decision in the case of Kinloch appears to the Lord Ordinary to have a direct bearing upon the present case. For it was there ruled that when a disponee in trust, who had been directed to invest funds in the purchase of land to be entailed, had realised those funds beyond the forty years, but neglected so to apply them, and mixed them up with his general estate, his representatives could not, after the lapse of forty years, be called on to account for them; and substituting the misapplication of residue for the misapplication of trust-funds, the cases appear to the Lord Ordinary to be in principle substantially the same, inasmuch as what is here complained of is the failure to divide among residuary legatees funds realised by the defender's predecessors upwards of forty years ago, which might have been made the subject of action by any of the numerous beneficiaries alleged to be injured by that transaction at any time since the year 1823.

"3d, The question whether the undated testaments operate a revocation of the deed of 1787 in regard to moveables depends, in the view the Lord Ordinary takes of it, upon whether these testaments, or either of them, can be held to constitute Mrs. Clark 'universal legatary' or 'residuary legatee' of the deceased—Erskine, iii. 9, 6; Menzies' Lectures, p. 465. If they do, they are then quite inconsistent with the provisions of the deed of 1787 relative to the disposal of residue, and the case would then fall within the rules applied in Sibbald's Trustees, 13th January 1871.† The usual style of a will, where a testator leaves his moveable estate to one executor, under burden of debts and legacies, is to nominate the party 'sole executor and universal legatary,' with power to intromit with the estate—Styles, ii. p. 433, 3d edition. Now, although the expressions here used are somewhat different, they rather appear to the Lord Ordinary to amount substantially to such a nomination, and to indicate an intention on the part of the testator to bequeath his whole moveable estate to his niece, Mrs. Clark, under burden of the legacies mentioned, which is just another way of making provision for the residuary legatees of the deed of 1787; and if that be so, there was no misappropriation of the funds. But as, upon the assumption that there was misapplication as alleged, the Lord Ordinary is of opinion that the negative prescription applies, he has disposed of the case upon that prejudicial ground."

---

* 19 D. 626. † *Ante*, vol. ix. 399.

as long as he has trust-funds in his hands. Upon a true construction of the whole testamentary writings Mrs. Clark was not appointed residuary legatee. These writings did not deal with the whole of the testator's estate, and the previous settlements under which the pursuer was entitled remained operative.

The defenders argued;—The negative prescription had been construed so as to apply to almost every kind of claim or ground of action; and in this case there could be no doubt as to its application, the claim being for a debt due by Mrs. Clark as executrix. The expressions in the holograph writings were substantially a nomination of a sole executor and residuary legatee, and indicated clearly the testator's intention to leave his whole moveable succession to his niece, Mrs. Clark, under burden of the legacies.

At advising,—

LORD PRESIDENT.—In this case the Lord Ordinary has found that the right of the pursuer to enforce his claim is cut off by the negative prescription; and he [404] "therefore, and to that extent, sustains the defences, and assoilzies the defenders from the conclusions of the action." Before we can determine whether the Lord Ordinary has rightly sustained the plea of prescription as applicable to the pursuer's claim, we must distinctly understand what that claim is. It arises out of the succession of the late William Gilmour, who died in the year 1823. After his death various testamentary deeds were found in his repositories. There were two holograph testaments undated, but ascertained by the evidence of circumstances to have been executed subsequent to 1819—probably in 1821. There was also a formal tested disposition and settlement, dated 26th June 1787, and other deeds which it is not necessary to mention particularly. The whole of these deeds were delivered to Mr. Clark at the meeting of relatives held for opening the repositories of the deceased on 28th March 1823, in order that he might record them, which he agreed to do. The minute bears, that "it is understood and declared that the rights of all parties concerned are reserved entire, and noways prejudged or injured by the recording of said writings." Mr. Clark did put them on record in the Sheriff-court Books of Ayr the next day, 24th March 1823, and there they now stand recorded, and extracts are produced.

The deceased had many relatives, chiefly nephews and nieces. He had had a brother who predeceased him, but at the date of his death his nearest relatives were nephews and nieces and their descendants. All these relatives were more or less interested in knowing the state of the succession and their interests in it, and it was for the benefit of all concerned that Mr. Clark put the deeds on record.

On 9th April 1823 there was another meeting, at which many of the deceased's relatives were present, and a discussion took place regarding the settlement, and as to how it was to be worked out; and Mr. Clark, on behalf of his wife, Agnes Gilmour, niece of the testator, claimed for her the character of executrix and universal legatary. He did not use these very words, but that in substance was the claim made. So that at this time—one month from the death of the testator—Mrs. Clark's claim to be executrix was distinctly announced at that meeting of the relatives, where some who were absent were represented by others acting for them. It is alleged that Helen Armour, as whose representative the pursuer claims, was represented at that meeting by John Armour. Be this as it may, we cannot doubt that the character Mrs. Clark claimed to be invested with by the deeds of the testator was made known to the other relatives at a very early period after the death of the testator.

Now, there were two questions that might have been raised on the construction of the testator's settlement, and that was the time to raise them. The one was, whether at the date of the holograph testaments Mrs. Clark (Agnes Gilmour) was entitled to the character not merely of executrix, but of universal legatary. The chief objection now urged against her claim is that the residue of the testator's estate was effectually disposed of by the deed of 1787. But another objection might have been taken at the time of the testator's death, to the effect that, even supposing the deed of 1787 to have been effectually superseded by the holograph deeds, the deeds in which she was named as executrix might be construed so as to give her that character, but not that of universal legatary, and that the residue would then go to the next of kin. Both these questions might have been raised at the time of the testator's death. But neither objection was taken, and Mrs. Clark accordingly proceeded, having assumed the office not only of executrix but of universal legatary,

to administer the estate. She collected the outstanding debts and assets belonging to the estate, amounting, as the account delivered to the Stamp-office shows, to £9361. She deducted from that sum certain debts, and the legacies, amounting to £1300, contained in the two holograph testaments. The total deductions amount to £1936 and the residue to £7424, 19s. 9½d. This residue she took to herself, and she paid duty on it as "devised to a daughter of a brother of the deceased," which was precisely her character. The account concludes in the usual form with a declaration "that the foregoing is a just and true account and valuation of the residue of the personal estate of the deceased, and a just and true account of the moneys which [405] have arisen from the real estate by the will of the deceased directed to be sold or burdened; and I now offer to the Commissioners of Stamps the sum of £222, 14s. 10d. for the duty, after the rate of £3 per cent. upon the sum of £7424, 19s. 9d., being the amount of the said residue and moneys which I am entitled and intend to retain to my own use as executrix and residuary legatee of the deceased, being descendant of a brother of the deceased."

Now, this account was not completed nor the declaration signed till the 2d February 1826. In the meantime Mrs. Helen Armour or Jamieson, the mother of the pursuer, obtained payment of the legacy of £50 directed to be paid to her under one of the holograph testaments which confer the character of executrix on Mrs. Clark, and we have her discharge for that legacy. She thus deals with Mrs. Clark as executrix and universal legatary, and she must have known the latter intended to keep the residue.

The question then arises, whether the pursuer, as representing his mother, is precluded by the lapse of forty years from maintaining that Mrs. Clark was not entitled to that residue, but that the residue falls to be disposed of under the settlement of 1787.

In every such question it is important to fix the *terminus* from which the forty years is to be reckoned; and it seems to me that here that *terminus* should be 2d February 1826, when Mrs. Clark took the residue and signed the final settlement of the account in the Stamp-office.

Now, it has been said that the negative prescription does not apply to a case of this description; that an executor is nothing else than a trustee, and that so long as he has the funds in hand undisposed of he is liable to account for them.

This argument is based on a misunderstanding of the office of executor. An executor is not a trustee in the sense of being a depositary. A trustee has to hold as a depositary; not so an executor, who has to administer, not to hold. An executor must pay legacies and debts within a certain time, and is liable in interest if he does not. An executor is nothing else than a debtor to the legatees or next of kin. He is a debtor with a limited liability; but he is nothing else than a debtor; and the creditors of the deceased and the legatees who claim against him do so as creditors.

Now, it appears to me that that principle solves this question, because every claim of debt is barred by negative prescription, and the moment any claim of debt arises, you then have a *terminus* from which to calculate the forty years. Now, can any one doubt that in 1826, when Mrs. Clark took to herself the residue, the pursuer's mother's claim might have been made? But it was not then made; and therefore it appears to me that this claim of debt has been cut off by the negative prescription.

LORD DEAS.—There were two questions argued before us. The first, as to the character conferred on Agnes Gilmour by the will or wills of the deceased William Gilmour, and the second, as to whether any claim which might otherwise have been made against her has been cut off by the long negative prescription. Mr. Watson, in his argument, admitted that if this lady's character under the will of the deceased were that of universal legatary, the case would be at an end, and no question of prescription would arise. Now, it appears to me that in a case of this kind the first thing to ascertain is what was the character conferred on this lady by the testator. If she was made trustee or executrix simply, then we must inquire what prescription applies to an intromitter in that character. If she was universal legatary, we have of course nothing to do with any question of negative prescription.

Now, my opinion, formed upon full consideration of the case is, that Mrs. Gilmour or Clark was appointed universal legatary. The testator did not call her so in so many words, but he used terms which clearly had that meaning. The documents which are to be held as constituting this gentleman's will are, I think, without doubt

fee under Lord Colonsay, in virtue of the reconveyance of Lord Bannatyne unconfirmed. An observation of extreme importance occurs on this charter. Murdoch styles himself superior. But how could he be superior unless the trustees' infeftment had separated the *dominium directum* from the *dominium utile*? Upon the hypothesis which your Lordship in the chair was inclined to adopt, Murdoch was *plenus dominus* of all the estate he held under the Crown, whilst Lord Colonsay was *plenus dominus* of Scallastle. Certainly Murdoch entertained a very different view of his own position.

Lord Colonsay retained the superiority of Scallastle till 1859. He then sold and reconveyed it to Donald Maclaine, the then heir of entail. He conveyed it just in terms of his own right. He conveyed it back under the same reservation from the warrandice of the feu-rights and the infeftments that had been contained in his own title. By that time the infeftment of Murdoch (2) had been completed, and this reservation, of course, comprehended not only the infeftments of the trustees but the infeftment of Murdoch, taken on the reconveyance of Lord Bannatyne.

This case has been argued in two points of view in a very able argument on the part of the defenders, although I am bound to say that these two views are utterly inconsistent. They cannot both be correct, but they may both be incorrect, and that is my own opinion. The first view is one about which I think I need say very little more than I have said. It is argued that Murdoch (2) had a feudal title to Scallastle under the Crown, under what is called the catholic entail title. Now, it is true that the original title under the Crown, made up in completing the disposition of entail, contained Scallastle as well as various other lands subsequently sold to pay debt. But these had been eliminated from the crown title; the superiority of Scallastle had been vested in fee-simple purchasers, and ultimately in Lord Colonsay. Murdoch (2), therefore, had no feudal title to these lands, except the title to the *dominium utile* derived from the trustees. The second view is the one which I think your Lordship supports, that Murdoch (2) was never infeft at all in Scallastle. He certainly never was infeft under the Crown. That is clear. But your Lordship inclines to think he never was infeft even in the *dominium utile*, the reconveyance by Lord Bannatyne being a nullity, and the infeftment taken by Murdoch (2) also a nullity.

[393] The result, your Lordship thinks, is to deprive Murdoch of all title to Scallastle during his whole life, although he always possessed and enjoyed the property, and to attribute to Lord Colonsay the *plenum dominium*, although he never enjoyed the property, and his own title was inconsistent with that idea. It has been suggested, but it appears to me a very strange view, that Lord Colonsay, whilst he had a good right to the *dominium directum* of these lands, was trustee as to the *dominium utile* for the heirs of entail. But that is a very strange supposition. He took a title immediately from a purchaser who had his right in fee-simple, and that fee-simple proprietor sells him these lands under the burden of the feu-rights and infeftments. If this reservation was inoperative then Lord Colonsay could be nothing less than a fee-simple proprietor. The idea that somehow or other, unknown to himself and all the parties concerned, he became trustee for the heirs of entail in that *dominium utile* is, I think, of all the suppositions made in this case, the most untenable.

What I have already said convinces me that it would be contrary to all legal principle to hold that Murdoch (2) had not a feudal right in his own person after the reconveyance, and if that be the case all the arguments of the defenders are overthrown, for the concession with which they undertook to argue this case, and upon which they undertook to plead the important questions above referred to is, that if the trust right was a valid title and could be the means of vesting a feudal title in Murdoch (2) they had no case. That is unquestionably the footing on which this case is argued, and I confess that it has been with extreme diffidence that I have considered any argument to be suggested in their favour which they have not themselves suggested. They do not say that there was ever a special service in the *dominium utile* expede to Murdoch (2) by Donald Maclaine. No doubt Donald expede a special service under the Crown; and under that crown service he just took up what the former proprietors had taken up, exclusive of Scallastle. But there was no special service in Scallastle. That is clear. The *dominium utile* of Scallastle remained in the *hæreditas jacens* of Murdoch (2) until it was taken up by Murdoch Gillian Maclaine by special service in 1866. For there is no conveyance of Scallastle which was ever granted in favour of Donald from anybody except Lord Colonsay, and Lord Colonsay's

conveyance, as I have already fully explained, upon its own terms as well as upon the titles by which it was preceded, could only convey the *dominium directum*. On the whole, I submit that all the questions of law directed to be argued by the parties ought to be decided in favour of the pursuer. If that be so, I do not trust myself to speculate upon any other view beyond these questions. A suggestion has been made (not raised at the bar), and, as I understand, not concurred in by your Lordships who have spoken before me, that the sequestration of Murdoch (2) and the appointment of Mr. Borthwick as trustee might give rise to some right or *jus actionis* in favour of Donald. He never, however, got a conveyance of any kind. Is seems doubtful whether Borthwick ever had right to this *dominium utile*, and it is certain that he never dealt with it or conveyed it to any one. I think it would be useless to enter upon an argument that has not been ventilated at the bar at all. I think it would be very unsafe to do so, and as at present advised I see no reason to think that Donald was ever vested with any right to the *dominium utile* of the lands. This general conveyance of all lands belonging to him can never carry lands to which he had no vested right.

Upon the question of intention on the part of Donald your Lordships will see at once that in my view of the case it was unnecessary to form any opinion, but I think it right to say that had Donald been distinctly vested with the *dominium utile* of Scallastle, it might be held that, under the general words of his conveyance to his trustees, he intended to convey it as well as his other estate.

I conclude by stating my opinion that the pursuers, the creditors of Murdoch Gillian Maclaine, who have taken up this estate, are entitled to prevail against the defenders.

LORD NEAVES.—This case has been treated as involving a number of points of nicety and difficulty; but the view that I take of it is a simple one. I com-[394]-mence with the inquiry: At the death of Murdoch (2), which took place in 1844, where was the *dominium utile* of Scallastle, and the other lands in dispute? We have here to consider the original trust-deed with its various clauses, the conveyance to Lord Colonsay, and the reconveyance by Lord Bannatyne, surviving trustee, which had taken place in 1832. Various views may be taken as to where the right was, and how it came to be where it was. It may, or rather it must, have been either in the trustees, or in Murdoch (2), or in Lord Colonsay. It would be difficult to say it was in the trustees, for whatever view may be taken of their right, they had in 1832 reconveyed to Murdoch Maclaine all that they thought they could reconvey. Then, was it in Murdoch Maclaine, or was it in Lord Colonsay? That depends upon the nature and effect of the original trust-deed. The trust-deed is unquestionably a peculiar one in connection with the question whether the estate could be permanently split into two parts of superiority and *dominium utile*, because it is granted with a double manner of holding, which is not the usual preparation for creating freehold qualifications; and it was specially granted for the payment of debts. It could have been extinguished in certain events by the mere payment of the debts, and the truster could treat the estate as his own as long as the superior infeftment which was in him when he granted the trust-deed had not been impaired or extinguished. But it has been argued that the continuance of the truster's radical right depended upon the continuance of his infeftment as it stood when he granted the trust-deed, and that anything which extinguishes that infeftment extinguished his radical right as a feudal estate. Murdoch Maclaine's feudal title, it is maintained, did not exist, although his right as a beneficial interest still subsisted as a right of the nature of a *jus actionis*. Falling back on the second view presented in the trust-deed, by which he was entitled to get a legal conveyance when the purposes of the trust were accomplished,—I am inclined to adopt that view, and to hold that after his conveyance to Lord Colonsay, and so long as that lasted, Murdoch Maclaine had no feudal connection with the lands. As to Lord Colonsay, I need not go over in detail the various views that may be taken of his position. If the trust-deed had no effect in splitting the estate, then Murdoch Maclaine's conveyance to Lord Colonsay could not competently give him the mere superiority, but must have transferred to him the *dominium plenum*, subject to an equitable claim to get from him a feu-right, so as to vest in Maclaine the *dominium utile*, which it was not intended that Lord Colonsay should acquire; but I shall at once say here, that in my opinion the trust-deed was a valid and *habile* mode of splitting the superiority and property, and consequently that the conveyance

one or both of those undated holograph deeds. These are plainly subsequent to the other deeds executed by him, and it is clear that one or both of them superseded what went before, as regarded the moveable estate—the heritable estate being dealt with separately. I do not at all go [406] upon the ground that these writings commence with the usual introduction to a last will and testament, and that this is conclusive that they were intended to supersede all that had gone before. Before you can hold that, you must read on and consider the whole deed. I quite recognise the doctrine laid down by the House of Lords in Stoddart's case (1 Macq. 163). In that case it was plain on the face of the deeds that, in spite of their narrative at commencing, they did not supersede the previous ones, for they did not dispose of nearly the whole property left by the previous deeds. What I go on here is that, besides this introductory narrative, it is clear from the terms of the deeds that they were, one or both of them, intended to supersede the earlier writings—and I do not think it matters much which of the two is held the last executed, or whether we hold them both together as composing this gentleman's last will. The only material question on these deeds is whether they constitute his niece, Mrs. Clark, the universal legatary, subject to the burden of his debts and certain specific legacies to his other relations. There seems to me no doubt that he did so appoint her. He says in the one, "I hereby appoint Agnes Gilmour to be executor"; that is all he says about executor, but then he goes on to add, "universal intromitter with my goods and money, except what is otherwise mentioned afterwards." This he explains by the subsequent words, "and that under the following burdens, to pay my debts and the following legacies." He then provides certain specific sums of money for his different nephews and nieces. The other deed is equally clear in its terms, which are almost precisely the same. The testator's nephews and nieces and their children are beneficiaries under both, and one thing which makes it clear to me that these deeds, one or both of them, superseded the previous settlements of the moveable estate is that these very nephews and nieces who were to receive these specific legacies were just the very persons, or rather the survivors of the persons, who in the previous deeds were made residuary legatees. Now, the words "universal intromitter," as applied to Mrs. Clark, are just as good as "universal legatary," if it is quite clear from the deed that they are used in that sense. The word "legatary" is not an essential technical phrase, and it is clear that the testator meant the whole beneficial interest in his estate, except those special legacies, to go to his niece, Mrs. Clark. I am of opinion that on the face of these deeds Mrs. Clark was made universal legatary, and for forty years and upwards these deeds have been so construed by the parties most interested in them.

With reference to the knowledge of all this on the part of the pursuer's mother, far the most important circumstance is that these deeds were registered together, in 1823, as probative writs, and that in her own receipt, dated 16th December 1823, she acknowledges Mrs. Clark as executrix-nominate, and takes payment from her of a "pecuniary legacy of fifty pounds," in her own character, as "descendant of a sister of the deceased." It is altogether out of the question that a party who signed that receipt should now be allowed to say that she did not know the terms of these testamentary writings, and it places it beyond all doubt that she claimed nothing more than her legacy of £50. We have, therefore, enough to show that the pursuer's mother herself so construed these deeds as to acknowledge Mrs. Clark to be universal legatary. These views are to me conclusive of the whole case before us. But they equally bear upon the point of prescription. If Mrs. Clark retained the money in the character of universal legatary the question of prescription cannot arise, but if that be held doubtful the question of prescription does come in. And if it must be considered I have little hesitation in saying that the whole difficulty here in holding prescription applicable lies in the question whether there is a sufficient *terminus* established from which the prescription is to run. If a party hold a properly fiduciary position, I do not mean to suggest that a claim against him in that character will be cut off by the negative prescription. But if a party hold also for himself as well as in a kind of fiduciary character the case may be different. If a specific claim exists against that party,—as at the instance of a special legatee,—and is not insisted in, then I have no doubt that the negative prescription does run against that claim. The difficulty here is to find a term of payment. If it can be held that there was a specific time at which this claim ought to have been paid over, then [407] there

is no difficulty in determining whether the years of prescription have run or not. But though that is a delicate question, I do not differ from your Lordship in thinking that there is sufficient evidence to fix the term of payment, and that prescription has run against the claim.

LORD ARDMILLAN.—The Lord Ordinary has sustained the plea of negative prescription. The case is one in which the claim was made far more than forty years after it emerged, and at first sight it seems that the negative prescription is applicable. The pursuer says, however, that Mrs. Clark had, by the deeds under which she acted, a character imposed upon her of the nature of trust or fiduciary mandate, and he argued that in such a case the plea of negative prescription cannot be maintained.

I propose to begin with the consideration of the ground of that plea, and to ask, did Mrs. Clark hold the position attributed to her? I have carefully considered the deeds, and I do not think it material which of these undated deeds we hold to have been first executed. Whichever of them we hold to be the first, and I do not know that we have the means of deciding between them, I am quite of the opinion expressed by Lord Deas that one or other of them supersedes the older deed of 1787. In both of these undated deeds Mrs. Clark is named executor; but they do not stop there, they go on to make her universal intromitter with the whole funds and moveable estate of the deceased, subject to certain debts and legacies specially enumerated. This is, to my mind, only intelligible as a burden or deduction upon the residue, which, as universal intromitter, she would otherwise take,—that is to say, if we can hold universal intromitter as equivalent to universal legatary. I think that there is little doubt that we must here do so. We have the word "intromit" used with a special meaning by the testator in the previous deed of 1787. By its use there he clearly intends to give it the character of beneficial enjoyment. To the same word used in the undated deed I am of opinion the testator meant the same meaning to apply. Now, if it be the case that Mrs. Agnes Gilmour or Clark was universal legatary, or residuary legatee, there can be no room for the plea urged against the negative prescription here.

But I think we must go further, and consider whether, apart from this, even assuming that Mrs. Clark was not universal legatary but only executrix, the plea of negative prescription can be maintained. I do not wish to touch the question as to what might be the law were the attempt made to plead negative prescription by an executor acting in a really fiduciary character in relation to the residue of an estate, and who wrongfully appropriated that residue to his own use. No such case as that is before us. Here, in any view of the case, the question is whether Mrs. Clark was residuary legatee or only executrix. It was a fair question to raise, and might have been raised at the time. Mrs. Clark made her claim to the character she assumed openly and regularly, and in that character she distributed the estate, and above forty years have elapsed. I can see no possible ground for throwing any doubt upon the uprightness of her conduct and intentions, and I think that the exclusion of this action at the present date by the operation of the negative prescription is one of the very best uses to which that exception of our law can be put. Though I hold that Mrs. Clark was clearly under the deeds universal or residuary legatee, still I should have no doubt that even on the other view the plea of negative prescription would be properly sustained.

LORD KINLOCH.—If the question were here on the merits, apart from the plea of prescription, I should have no hesitation in deciding against the pursuer's claim. I cannot read the documents without thinking that the deed of 1787 is superseded by the two undated deeds executed subsequently to 1819. A difficulty arises owing to an obscure clause in one of them. That difficulty disappears if the deed which is last printed can be shown to be last executed. In any view, however, we must come to the conclusion that Mrs. Clark was universal legatary. When I find that the testator "appoints her to be universal intromitter with the whole goods and gear, except what shall be otherways appointed, and that under [408] the following burdens," I can put no rational meaning on the words except that she is to be universal legatary, subject to all burdens.

But I think any discussion on the merits is excluded by the negative prescription. And though I have thought it necessary to intimate my opinion on the merits, still the plea of prescription must be treated as a separate question.

I have no doubt that in certain circumstances the plea of prescription can be main-

tained by an executor. If there is a specific claim arising against the executor at a specific time, prescription then begins to run against that claim. The pursuer has tried to give his claim the aspect of a general accounting, which it is not. If it had been, I do not say what opinion I would have expressed as to the bearing of the negative prescription.

The settlement of the executry affairs we must hold to have taken place in 1826. If the pursuer now comes against Mrs. Clark, and says she was not universal legatary entitled as such to take to herself at that time the surplus of the succession, but that he himself was, then the negative prescription comes in. It is then an action for a specific claim. It is truly an action of declarator, and for payment, though brought in the form of a count and reckoning.

I am of opinion that the interlocutor of the Lord Ordinary should be *simpliciter* affirmed.

This interlocutor was pronounced:—"Adhere to the interlocutor, and refuse the reclaiming note: Find the defender entitled to additional expenses since the date of said interlocutor; allow accounts," &c.

A. & A. CAMPBELL, W.S.—CAMPBELL, ESPIE, & BELL, W.S.—Agents.

No. 75. X. MACPHERSON, 408. 24 Jan. 1872. 2d Div.—Lord Ormidale.

ROBERT MACFIE, Pursuer.—*Lord-Adv. Young—Shand—Moncreiff.*
SIR MICHAEL ROBERT SHAW STEWART, Defender.—*Sol.-Gen. Clark—Asher.*

Process—Jury Trial—Road—Public Right of Way—Servitude Road.—Held that an action concluding alternatively for declarator of public right of way or a servitude road was of too complex a nature to be tried by jury.

This was an action by Robert Macfie, Esq. of Airds, against Sir Michael Robert Shaw Stewart, Bart., concluding for decree "that the road commonly called the Beattockburn road, and marked A, B, C, D, F on the plan herewith produced, being 24 feet or thereby in breadth from the point marked A on said plan to the point marked D thereon, and varying from twenty-four to fifteen feet or thereby in breadth from the said point marked D to the point marked F on said plan, and 485 yards or thereby in length, and which leads from the public road between the village of Innerkip and Finnochbog, both in the parish of Innerkip and county of Renfrew, to the Beattockburn, which it reaches at or near the point F on the said plan, has been for time immemorial, or at least for forty years, and is now, a public highroad or highway for foot-passengers, horses, carts, carriages, and cattle, and that the pursuer and all other members of the public are entitled to the free and uninterrupted use, enjoyment, and possession thereof, and that the defender has no right to impede or obstruct the pursuer and others foresaid in the free use, enjoyment and possession of the said public highroad or highway; and the defender ought and should be decerned and ordained to take down and remove the gates recently erected, or caused to be erected by him, across the said road, at or near the points marked A and C respectively on the said plan, and the fence or paling, also recently erected or caused to be erected by him on the said road, from the point marked B to the point marked D on said plan; and also to uplift and remove the trees and shrubs planted or caused to be planted by him on the said road, between the said fence or paling and the march-dyke of the pursuer's said lands of Langhouse, from the part of the said road marked B on said plan to the point marked K there-[409]-on; and failing the defender doing so, the pursuer ought and should be authorised and empowered to remove the said gates, fence, or paling, and trees and shrubs, at the expense of the defender: And the defender ought and should be prohibited, interdicted, and discharged from placing any gate or other obstruction across or on the said road, or interfering therewith in any way whereby its usefulness may be impaired or destroyed, or the pursuer and others foresaid impeded or obstructed in the use thereof, as aforesaid: Or otherwise it ought and should be found and declared, by decree of the Lords of our Council

and Session, that the said road or access from the point A on the said plan to the point D thereon, and thence to the point E thereon, being the gate or entrance to the field on the pursuer's lands of Langhouse, called the Beattockburn Park, extending in length 330 yards or thereby, is a servitude road or access for foot-passengers, and for horses, carts, carriages, and cattle, in passing to and from the pursuer's lands of Langhouse, or, at least, part thereof, and the said public road between Innerkip and Finnochbog; and that the pursuer, as proprietor of these lands, his family, servants, cottars, tenants, and dependants, are entitled to use the said road or access from the said point A to the point D on said plan, and thence to the point E thereon, for foot-passengers, horses, carts, carriages, and cattle, in passing to and from the said lands of Langhouse and the said public road."

The Lord Ordinary reported the case on the question whether it ought to be sent to a jury.

The pursuer argued;—There was no reason why the usual course of sending cases of right of way to be tried by jury should not be followed.

The defender asked the case to be tried by a proof before the Lord Ordinary, on the following grounds:—(1) It was a special case, as there was an alternative issue raised by the summons that the road was a public road for all purposes, or that it was a servitude road, to which the pursuer, as proprietor of Langhouse, was entitled. (2) It was denied by the defender that one of the *termini* of the road was a public place; and that question also would require to be settled by the jury. (3) Recent experience had shown that juries were not good judges in cases of right of way, being prejudiced in such questions. Juries had difficulty in distinguishing between mere tolerance and use as of right, and upon this the whole question turned.*

Answered by the pursuer:—There was no specialty in this case to distinguish it from others of the same class. The Court was quite familiar with the alternative issue which was presented in the present instance.

At advising,—

LORD JUSTICE-CLERK.—We have to consider the way in which this case is to be tried. It is an action of declarator which has two alternative objects, either to have the road marked on the plan as A to F declared to be a public road, or to have part of that road, from a point A to D, declared to be a servitude road. In order to decide whether the matters raised would be more properly tried by the Court or a jury it is not necessary to consider the general qualifications of juries to try cases of public right of way. I am not prepared to lay down any new general rule on that matter, or to alter the practice, which has undoubtedly been to send such cases to a jury. There have been a good many instances in which the verdicts of juries have been held by the Court not to have been well [410] founded on the evidence. I am afraid that it must often happen that opinions will be divided in cases which depend on evidence of remote and long-continued possession, in whatever way they may be tried. But I see no reason for holding that a jury is a better tribunal than the Court for trying questions of servitude roads. In such cases there are always peculiarities and questions of mixed law and fact which are more properly tried by the Court.

It may be doubted if the two rights claimed in this summons should have been included in the same action. The difficulty in trying such a case is that there is a double set of claims referable to the same possession. If the pursuer will abandon his conclusion for a servitude road, there is no reason why the other question should not be tried by jury. But if the action is to be insisted in as it stands I think it should be tried by the Court.

One observation which occurs to me is that it seems doubtful how far the *termini* alleged are sufficiently stated to be public places. It might perhaps be possible to amend the record so as to make it similar to the Burntisland case.†

LORD COWAN.—If the case had simply contained an allegation of a public right of way I would have had no hesitation in saying that it was a case to be tried, as

* Mackintosh *v.* Moir, Feb. 28, 1871, *ante*, vol. ix. p. 574; Cuthbertson *v.* Young, July 9, 1851, 13 D. 1308; Duncan *v.* Lees, June 20, 1871, *ante*, vol. ix. p. 855; Jenkins *v.* Murray, July 12, 1866, *ante*, vol. iv. p. 1046; Craufurd *v.* Menzies, July 12, 1849, 11 D. 1127.

† Cuthbertson *v.* Young, 13 D. 1308.

such cases have up to this time been tried, by a jury. Whether the allegations on record are sufficient to enable the Court to frame an issue to send to a jury may be doubtful. The two *termini* must be alleged to be public places, and I doubt if there be any sufficient statement to that effect in the record. But assuming the pursuer to limit his case to the assertion of a right of public way, it will be for the Lord Ordinary to consider whether there is room for an alteration such as will allow the case to go to a jury. There is, however, conjoined with that primary assertion of public right, a claim personal to the pursuer and the tenants of his lands and estate to a servitude road over the property of the defender. I agree with your Lordship that there may be much nicety in questions of servitude between the owner of the dominant tenement and the owner of the servient tenement. This makes it at least questionable whether this alternative action can, with safety to the just interests of the defender, be tried under alternative issues by the same jury in one trial. And on the whole it seems to me, now that the Court have power to try such cases, we should exercise it, and let the proof be taken before the Lord Ordinary.

LORD BENHOLME.—The general question whether cases of public right of way ought to be tried by jury does not appear to me to be governed by any inflexible rule of law. Actions of right of way are not among the enumerated cases. Whether such cases are appropriate to jury trial is a matter for the discretion of the Court in each particular case, although I am free to admit that the practice has been to send such cases to be tried by jury. The demand of the pursuer is of so complex a nature that I do not see our way to allow the case as it stands to go to a jury.

LORD NEAVES.—I think the view taken by your Lordships is correct. I should be sorry to lay down an inflexible rule as to a simple right of way, that it must be sent to a jury or ought not to be so. Much may depend on circumstances. The alleged interruptions on the part of the defender may often create great nicety in such cases, and make it peculiarly proper that they should be tried by a Judge and not a jury; while in other cases no such considerations may concur.

In the present case I think there are various complications. The pursuer does not sue on a single or simple ground of action; he sues in two different characters. As a member of the public he alleges the road to be public; and alternatively, as a private proprietor, he alleges a part of it to be a servitude road.

The question whether the road was ever used as a public road or a servitude may be one of nicety. And if there is a mixture of the two kinds of possession it may be difficult to determine if either has been sufficiently proved. It depends on the footing on which the possession has been had, the *animus* with which it [411] was enjoyed or allowed to be used. The jury are peculiarly liable to confound the two classes of road, and it is desirable that such a case should be as much as possible in the hands of the Court.

FINLAY & WILSON, S.S.C.—M'EWEN & CARMENT, W.S.—Agents.

No. 76. X. MACPHERSON, 411. 24 Jan. 1872. 2d Div.—Sheriff of Lanarkshire, I.

PETER M'MARTIN, Pursuer and Respondent.—*Mackintosh.*
ALEXANDER HANNAY, Defender and Appellant.—*R. V. Campbell.*

Fault—Negligence—Proprietor of Common Stair—Factor.—A child was killed by falling through the railing of a common stair where one of the banisters was wanting. *Held* that the proprietor of the property was liable in damages to the father of the child, in respect that warning of the state of the stair had been given to the factor appointed to look after the property.

Fault—Contributory Negligence.—Observation by Lord Neaves on contributory negligence.

This was an appeal from the Sheriff-court of Lanarkshire in an action at the instance of Peter M'Martin, moulder, Glasgow, against Alexander Hannay, proprietor of a

house in 52 Stewart Street, Glasgow, concluding for £200 as solatium for the death of the pursuer's child through the fault of the defender.

The following facts were proved:—The defender was proprietor of a house containing a number of apartments let to separate tenants, and entering from a common stair, and he managed the property by a factor, Mr. Stewart, and a superintendent, Peter Sanderson, the latter of whom was constantly about the property. For many months before 4th October the common stair rail next below the landing on the second flight was out. Notice of this was given at the factor's office, and verbally to Peter Sanderson. The breadth of the gap caused by the want of the rail was about nine inches, wide enough to admit of a man's head and shoulders passing through. On 4th October 1869 Tiny M'Martin, the pursuer's daughter, seven years of age, fell through the gap in the railing and was killed.

On these facts, the Sheriff-substitute (Erskine Murray) found that the defender "through those for whom he is responsible, was in fault," and decerned against him for £20 damages.

The Sheriff (Glassford Bell) adhered.

The defender appealed, and argued;—The defender is not responsible, having had no personal knowledge of the defect in the stair, and having appointed a qualified factor and superintendent to look after the property.* The accident arose from the fault of the little girl. The tenant knew the state of the stair, and had acquiesced in and consented to the condition in which his premises were kept.† The deceased was only a visitor to a tenant on the stair, and the defender was not liable for accidents to visitors.‡ No action would lie for deceased's death any more than for death of tenant's own child.

The pursuer argued;—The defender was bound to have the staircase in a safe condition for all who had a lawful right to use it. The girl was not a visitor; but assuming she had been so, that did not relieve the defender of responsibility. In a question of contributory fault, a child is not to be looked on in the same light as an adult.

[412] LORD COWAN.—There is some nicety in the case, and at first sight it appears to be hard that the proprietor, who was not personally a delinquent, and who as soon as he knew the defective state of the railing got it put in order, should be found liable in damages. But on examining the grounds of the Sheriffs' judgments I am satisfied that the result at which they have arrived is consistent with the facts instructed by the evidence, and with the legal principles applicable to the case.

The defender is proprietor of a tenement of houses occupied by twelve different families, all of whom have access by one common stair from the several landings on which the separate houses of the tenants enter. The accident arose from defect in the railing of this outside stair. This railing it was the landlord's duty to keep in repair, and he cannot escape responsibility for the consequences of its being left in a dangerous condition. There are two questions, which are well stated by the Sheriff in his note. The first is, "whether the child Christina M'Martin met her death by accidentally falling through the gap in the stair railing occasioned by the absence of one of the banisters?" And this, the leading question on the evidence, he thus answers—"Although no one actually saw the occurrence, the circumstantial coincidence, including the facts of some of her hair being found on the gas bracket adjoining the gap, and of her being physically incapable of climbing over the cope of the railing, is such as to leave no rational doubt that the above question must be answered in the affirmative." I accede to this view of the way in which the girl met her death. The second question is thus stated by the Sheriff—"The next is, whether there was such culpable or undue negligence on the part of the defender in permitting the existence of so dangerous a state of disrepair in his property as to subject him in damages?" And in answer to this, the conclusive facts established by the proof are—(1) that the state of disrepair had continued for at least six months; (2) that the gap was quite large enough to permit of a child falling through; (3) that the stone of the step in which the banister had been fixed was itself worn away, which would more readily lead to a child missing its foot; and (4) that the defender's factor and overseer had been warned of the state of

* Begbie and Others *v.* Frame, Nov. 24, 1857, 20 D. 81; Alison on Torts, 582.

† Maugan *v.* Atterton, April 30, 1866, L. R. (Exch.) vol. i. 239.

‡ Southcote *v.* Stanley, June 4, 1856, 1 Hurlst. and Norm. 247; Robertson *v.* Adamson, July 3, 1862, 24 D. 1231.

matters, and that nothing was done to put the railing into a safe state till after the fatal occurrence had taken place. I think these facts have been established; and although the defender himself may not have been aware of the state of the railing, the person who acted for him was, and this is tantamount to his having been personally warned of the danger. Nor can it be truly stated that the injured person at all contributed to the fatal occurrence by her own conduct. The child had a legitimate object for being on the stair, having been called up by one of the tenants with the view of being sent to do an errand for her, and thus stood in the same position as any party might have been who was called or had occasion to go up the stair for some lawful purpose, and who was entitled to rely on the entrance to these houses by this stair being in that safe condition in which it was the duty of the landlord to have kept it. And the child having thus been for a legitimate cause at the place where the accident occurred, the facts established by the proof exclude the defence of her having been in fault, so as to have contributed to her own death by recklessness. The Sheriffs have justly found that there is no room in this case for that view.

LORD BENHOLME.—I concur. Whenever property is left unfenced, and in such a state as to be dangerous to the public entitled to be there, the proprietor, or someone in his stead, must be answerable for the damage or injury which may thereby be occasioned. The only question here is, whether, this property being let, you ought to go against the landlord or against the tenant.

But in the present case it is plain the landlord undertook to be answerable for the outside stair. He actually kept a man in his employment for the purpose of looking after it and other similar stairs in his various tenements. This relieves my mind of considerable doubts; for often the landlord is not near the place where his property is situated, and knows nothing about the dangerous condition into which it may have got. In such cases there may be considerable room for arguing that the tenant may have incurred a certain responsibility. But in the [413] present case this doubt is entirely excluded, for here the landlord had undertaken the responsibility.

On this ground, this girl having lost her life, and the state of the stair having led to this fatal consequence, the landlord must be liable in damages awarded by the Sheriff.

LORD NEAVES.—The question here is whether the defender has incurred liability for not doing before the accident what he did afterwards. I cannot doubt that he has so become liable.

The ownership of a common stair imposes sundry obligations on a proprietor towards tenants or occupants, which he is bound to attend to. And the proprietor here virtually admitted his obligation to repair the stair, as he kept a man for the purpose of looking after it and after his other property in a similar position. It was reasonable that he should look after the stair. He had an interest in the whole stair, while each tenant had only a divided interest.

When this proprietor found the stair not properly fenced it was his duty to repair the banisters. He was bound to do so, to insure the safety of all who had a right to be there, whether invited or not. Policemen, tax-gatherers, officers of the law serving process, and such like, might all have a right to be there, and this gap ought not to have been standing open so as to be in a dangerous state.

This little girl was lawfully there, and was thus under the protection of the law.

On the question of joint negligence I would observe that if in a case of this kind it is clear that a pursuer has been negligent the pursuer will not recover, but if it is clear that the defender has been negligent, and merely doubtful if the pursuer has, the pursuer will be entitled to recover. The defence of joint negligence must be as clearly established as the ground of action requires to be. It is beyond doubt here that the defender was guilty of negligence of a serious character, and I doubt if there was any serious carelessness on the part of the little girl.

On the whole, I concur in holding that the judgments of the Sheriff and Sheriff-substitutes should be affirmed.

LORD JUSTICE-CLERK.—I concur in the result at which your Lordships have arrived. The only difficulty is whether it is sufficiently established that the girl did not, to a certain extent, participate in causing her own death. Even though it had been shewn that the gap might have caused the accident, I am not sure that it would have been enough. But there was a fracture in the step as well as a gap in the railing, and to my mind that is conclusive as to the cause of the accident.

The case of Robertson (24 D. 1231) was decided on a broader and sounder ground,

viz., that there was no sufficient allegation of negligence to make the proprietor responsible.

This interlocutor was pronounced:—"Find that the defender, although he was warned of the dangerous state of the staircase in question, neglected to cause the same to be put in proper repair: Find that, in consequence of such neglect, the pursuer's daughter fell through the opening in the rails of the said staircase, which had been improperly allowed to remain, and was thereby killed: Therefore dismiss the appeal, and affirm the judgment appealed from: Find the appellant liable in expenses in this Court, and remit to the Auditor to tax both accounts and to report, and decern."

MAITLAND & LYON, W.S.—J. & R. D. ROSS, W.S.—Agents.

[*Approved*, Potter *v.* N. B. Railway Co., 1873, 11 M. 664. *Distinguished*, Ross *v.* Keith, 1888, 16 R. 86.]

No. 77. X. MACPHERSON, 414. 25 Jan. 1872. 2d Div.—I.

EVAN BAILLIE, Pursuer.

BAXTER AND MITCHELL, Agents-Disbursers.—*Pearson.*

Process—Expenses—Decree in name of Agent.—A defender was found entitled to expenses, but died before the account was audited. The agents moved for decree in their own name, and no appearance was made for the pursuer.

THE COURT refused the motion, holding that the representatives of the defender must be sisted before the agents were entitled to decree.

MITCHELL & BAXTER, W.S.—Agents.

No. 78. X. MACPHERSON, 414. 26 Jan. 1872. 1st Div.—Sheriff of Lanarkshire, M.

BAIRD AND BROWN, Appellants.—*Sol.-Gen. Clark—Paterson.*

J. L. SELKIRK (Trustee in the Sequestration of Hugh Stirrat and Son), Respondent.—*Lord-Adv. Young—Asher.*

Bankruptcy (Scotland) Act, 1856 (19 & 20 *Vict. cap.* 79), *sec.* 127—*Appeal—Competency.—Held* that an appeal against a deliverance of the trustee in a sequestration upon the claim of a creditor competently brought under review of the Court the general scheme of ranking, and that it was not necessary that the appellant should also appeal against the deliverance on any other claim thereby preferred.

Bankruptcy—(Scotland) Act, 1856 (19 & 20 *Vict. cap.* 79), *sec.* 107—*Mode of Ranking—Inhibiting Creditor.*—Inhibition was used against a debtor, whose estates were sequestrated three months afterwards, some of his debts having been contracted before, and others after, the date of the inhibition. *Held* (*dub.* Lord Deas) that the proper mode of ranking in the sequestration, upon the proceeds of the heritable estate, was, in the first place, to rank all the creditors entitled to a dividend *pari passu*, and then to give to the inhibiting creditor, by way of drawback, the difference between an equal dividend to all and the dividend which he would have drawn had there been no debts contracted subsequent to the inhibition.

On 22d February 1871 letters of inhibition were raised and executed by Melville and Company, timber-merchants, Grahamstown, against Hugh Stirrat and Son, wrights and tun-builders in Glasgow, and Hugh Stirrat, sole partner of that firm. The inhibition proceeded upon two bills drawn by Melville and Company upon Stirrat and Son, payable six months after date, the first dated 27th May 1870, for £199, 4s. 8d., the second for £84, 5s. 2d., dated 24th August 1870.

The estates of Stirrat and Son, and of Hugh Stirrat as sole partner of that firm, and as an individual, were sequestrated on 22d May 1871, and Mr. James L. Selkirk was appointed trustee in the sequestration.

At the date of the sequestration, and also at the date when inhibition was used by Melville and Company, the bankrupt, Hugh Stirrat, was possessed of heritable property in Glasgow and Helensburgh, part of which was realised by the trustee, who, on the 4th September 1871, issued a deliverance, in which he admitted a claim by Messrs. Baird and Brown, timber-merchants in Glasgow, for £165, 17s. 4d., in respect of an account incurred to them by the bankrupts on 21st April 1871, being subsequent to the date of the inhibition used by Melville and Company. At the same time, however, the trustee, in preparing a list of those creditors entitled to be ranked upon the estate, divided them into two classes, first (or class A), those whose debts were contracted prior to the inhibition by Melville and Company; and second (or class B), those whose debts were contracted subsequently. To the whole of the creditors in the first class the trustee gave the preference equally over the proceeds of the heritable [415] estate, to the exclusion of those in the second class; but Messrs. Baird and Brown objected to this scheme of ranking, and appealed to the Sheriff (Glassford Bell), who, on 24th November 1871, pronounced this interlocutor:—"Finds that it is settled—(1st) That an inhibitor cannot be prejudiced by posterior debts; (2d) That anterior creditors, adjudgers within year and day of the inhibitor, cannot be prejudiced by the inhibition, and are entitled to be ranked *pari passu* with the inhibitor (Bell's Com., 7th ed. vol. ii. pp. 409 *et seq.*): Finds that it is enacted, *inter alia*, by section 102 of the 'Bankruptcy (Scotland) Act, 1856, that the act and warrant in favour of a trustee in a sequestration has the effect of vesting in him, as at the date of the sequestration, 'for behoof of the creditors,' the bankrupt's whole heritable estate, as if a decree of adjudication had been pronounced in his favour: Finds that the vesting as above in the respondent's person occurred within year and day of the inhibition used by one of the creditors, and the effect of such vesting was to put all the anterior creditors on a par with the inhibitor: Finds that it is the duty of the trustee to rank all the creditors according to their several rights and interests (*id.* section 121): Finds that the scheme of ranking adopted in the present instance is equitable, and in conformity with the above principles: Finds farther, and *separatim*, that to sustain this appeal would be tantamount to recalling all the deliverances which have been pronounced by the respondent on the claims of the anterior creditors, and that as no appeal has been taken by the appellant, as he might have done, against all or any of these deliverances, they are consequently final, and cannot now be cut down either directly or indirectly: Therefore adheres to the deliverance appealed against, and dismisses the appeal: Finds the appellants liable in expenses: Allows an account," &c.

Messrs. Baird and Brown appealed, and argued that the effect of the sequestration under the Bankruptcy Act was to vest the trustee with the estate for behoof of the creditors, as if they had all obtained separate adjudications of the same date. The creditors, therefore, in regard to legal diligence, were all *in pari casu* except the inhibiting creditor, who alone was entitled to the benefit of the inhibition. In such a case, where there is an inhibiting creditor, and others whose debts were contracted both prior and subsequent to the inhibition, the whole of the creditors, according to the authority of Professor Bell,* ought, in the first place, to be ranked *pari passu*, and afterwards the inhibiting creditor alone receives the benefit of the inhibition as against the posterior creditors. Thus, if the debts were of equal amount, and the estate capable of yielding to each creditor a dividend of 10s. in the pound, the anterior creditors would be ranked for that sum, the inhibiting creditor would be ranked for 15s. in the pound, and the posterior creditors for 5s. in the pound. But the result of the Sheriff's interlocutor and of the trustee's deliverance was to give the benefit of the inhibition equally to all the anterior creditors, adopting a scheme of ranking totally inconsistent with the law as laid down by Professor Bell.

Argued for the trustee;—(1) The appeal was incompetent, in respect that the appellants had not appealed against the respondent's deliverances on the claims of the creditors ranked in the first class, and these deliverances were now final as regards the dividend in question. (2) The result of the Sheriff's judgment, although opposed to the doctrine laid down in Bell's Commentaries, was nevertheless correct and equitable. If the creditors had each followed out separate diligences, and there had been no

* Com. (5th ed.) vol. ii. pp. 508–513 (M'L.'s ed. p. 413).

sequestration, there could have been no other scheme of ranking; but the effect of the Bankruptcy Act being to put all the creditors *in pari casu*, [416] as if they had all adjudged on the same day, the anterior creditors must be held as being adjudgers within year and day of the inhibiting creditor, who could not be prejudiced by his inhibition, and were therefore entitled to be ranked *pari passu* with him.

At advising,—

LORD KINLOCH.—The present is an appeal against a deliverance by the trustee in the sequestration of Hugh Stirrat and Son, ranking the creditors for a dividend; and against the judgment of the Sheriff of Lanarkshire affirming that deliverance.

I have no doubt that this appeal is competent. The deliverance of the trustee, whilst admitting generally the claims of the creditors, lays down a scheme of ranking applicable to all, and in which some have a preferable, others a postponed place. This scheme the trustee intimated to all equally. I am clearly of opinion that an appeal against the deliverance on the appellants' claim brought up for review the general scheme of ranking, and that it was not necessary to this end that the appellants should also appeal against the deliverance on any other claim thereby preferred. The trustee is in Court as a proper party contradictor, to defend his scheme of ranking; and whatever judgment is pronounced on this scheme will affect all concerned in it equally.

On the merits, the question is raised by the circumstance of one of the creditors having used inhibition on his debt some months anterior to the sequestration,—this inhibition being posterior to the contraction of some of the debts, and anterior to the contraction of others. The main question is, how this inhibition tells on the distribution of certain heritable estate belonging to the bankrupts, which has been sold, and the proceeds of which are included in the fund of division.

By the 107th section of the Bankrupt Statute, 19 & 20 Vict. c. 79, it is declared that "the sequestration shall, as at the date thereof, be equivalent to a decree of adjudication of the heritable estates of the bankrupt, for payment of the whole debts of the bankrupt, principal and interest, accumulated at the said date." The effect of this enactment is to place all the creditors in the position of adjudging creditors, having a *pari passu* ranking at the date of sequestration, but subject to any preferences *inter se* by inhibition or otherwise. In the present case there are (1) the creditors anterior to the inhibition, being in law adjudging creditors on the heritable estate; (2) the inhibiting creditor, who is an adjudging creditor, but who has also an inhibition; (3) the posterior creditors, who are equally adjudging creditors with the others, but whose debts are struck at by the inhibition.

In such a case the grand principle of ranking is to give full effect to the preferential or exclusive right, but only to give it effect in favour of those to whom its benefit enures by law, and not in favour of others who have no right to found on it. In the present case the inhibition gives the inhibiting creditor a full right of preference against the posterior creditors, entitling him to be put in the same position in a question with these as if their debts did not exist at all. But the inhibition gives the inhibitor no preference over the anterior creditors, at whose debts it does not strike. Further, the inhibition gives no right of preference to the anterior creditors other than the inhibitor, for by them or for their behoof it was not used; and in any question with these, the posterior creditors are entitled to a *pari passu* ranking, being all equally adjudging creditors. The proper mode of ranking is therefore that which gives the benefit of the inhibition only to the inhibiting creditor, and leaves matters as to the others as if no inhibition had been used.

How to accomplish such a ranking was for a while a difficulty in our law,—a difficulty at least as old as the case of the Creditors of Langton in 1709, Mor. 2877. But a formula of ranking was at last laid down, which I consider quite settled. It is explained by Mr. Erskine in book ii. 12, 32; and more fully and clearly by Mr. Bell in his Commentaries, 2d volume, from p. 402 (last edition) onwards. At p. 413 he thus lays down the primary canons of ranking—"(1) That the first operation in the ranking and division is to set aside for each of [417] the creditors who hold real securities the dividend to which his real right entitles him, without regard to the exclusive preference. (2) That the rights of exclusion are then to be applied in the way of drawback from the dividends of those creditors whose real securities are affected by them, taking care that they do not encroach on the dividends of other creditors. (3) That the holder of such exclusive right is entitled thus to draw back the difference between what he draws upon the first division and what he would have drawn had

the claims struck at by the inhibition not existed." These canons of ranking I consider so firmly established and so trite that I almost wonder at their having been overlooked in the present case.

Applying these canons in the present case, the proper mode of ranking involves the following process: The proceeds of the heritable estate are first tentatively divided among all the creditors *pari passu*, as all equally adjudging creditors, having a *pari passu* ranking. This would be the mode of ranking if no inhibition existed; and it fixes the rights of the anterior creditors and the inhibiting creditor *inter se*, because the interests of these are not affected by the inhibition. Under the second step in the process the ranking is made as if the posterior creditors did not exist at all. This of course shows an increased ranking to both anterior creditors and inhibitor. But the anterior creditors cannot take advantage of it, because they have no right of preference over the posterior creditors. The benefit belongs alone to the inhibitor. The third step accordingly is, that the inhibitor draws back from the posterior creditors the difference between an equal dividend to all, and the enlarged dividend which he would have individually drawn had no posterior creditors existed. There is thus brought out the true order of ranking. The anterior creditors get their proper ranking, which is *pari passu* with all. The inhibitor gets the benefit of his inhibition, which he draws back from the posterior creditors, at whose debts the inhibition strikes. The posterior creditors suffer the defalcation brought upon them by the inhibition, but only in a question with the inhibitor, not with the anterior creditors, who have no preference over them.

The arithmetical result was very clearly and accurately stated in the course of the argument. Suppose that the debts of the three classes were each class of equal amount, and that, on a *pari passu* ranking of all the dividend is 10s. per pound,—this represents the dividend which will belong to the anterior creditors, who have no right except to a *pari passu* ranking with all. But if the posterior creditors had not existed the inhibitor would have drawn 15s. per pound, because the 30s. which is divided, in the *pari passu* ranking of all, to the extent of 10s. to each class, would have been in that case shared in the proportion of 15s. each, between the anterior creditors and the inhibitor. In other words, the inhibiting creditor would have had one-half in place of one-third. The difference, or 5s. per pound, is drawn back by the inhibitor from the postponed creditors. The ranking then stands—Anterior creditors, 10s. per pound; inhibiting creditor, 15s. per pound; posterior creditors, 5s. per pound.

The trustee and Sheriff have not followed this method of ranking, but one wholly different. It is unnecessary to go into details. The admitted substance of the ranking is that the anterior creditors are ranked along with the inhibitor, in preference to the posterior creditors; in other words, the anterior creditors have given to them the benefit of the inhibition. The result, as appears, is that the anterior creditors and inhibitor exhaust the heritable estate, and leave no part of that estate for the posterior creditors, though adjudging creditors quite as much and to the same full effect with the anterior. This is plainly erroneous. The posterior creditors must suffer the effect of the inhibition, and be postponed, in consequence, to the inhibitor. But there is no ground on which the anterior creditors are, in consequence of the inhibition, to be made better than the posterior creditors, against whom as *inter se* they have no right of preference.

The deliverance and interlocutor must therefore be altered, to the effect of remitting to the trustee to rank the creditors on the heritable estate according to the formula above referred to.

With regard to the ranking on the general or moveable estate, which is also involved in the trustee's scheme, there is no difficulty. The creditors are, in [418] regard to the moveables, all in the same predicament. They are therefore to be ranked *pari passu*, subject to the qualification that all holding a preferable security over the heritable estate must value and deduct the value of the security, in terms of the Bankrupt Statute. The amount will of course be easy to state, after the ranking on the heritable estate is fixed, for the amount of that ranking will denote the deduction.

LORD ARDMILLAN.—I have no doubt of the competency of the appeal.

On the merits, the interlocutor of the Sheriff requires most attentive consideration. Few men are better acquainted with the subject than he. But after much consideration I have come to be of the opinion of Lord Kinloch. I think that the law, clearly expressed by Mr. Bell, in accordance with Lord Kilkerran, must be held as established, and even if the question could be considered open, I should have come to the same

conclusion. There is no adjudication prior to or apart from the sequestration. The sequestration operates as an adjudication for behoof of all the creditors, and does not disturb the rights of creditors *inter se*. The inhibition affects no rights except those which it strikes at, and gives no right except to the inhibitor.

LORD DEAS.—I cannot say that I participate in the surprise expressed by Lord Kinloch at the conclusion at which the learned Sheriff has arrived, for I can quite appreciate the grounds upon which he pronounced the judgment appealed from.

There can be no doubt that, under the Bankruptcy Act, the trustee is vested with the bankrupt's heritable estate as if decree of adjudication had been obtained for behoof of the whole body of creditors according to their respective rights and interests, so that matters are much in the same position as if they had all obtained separate decrees of adjudication of the same date. If such separate decrees had been actually obtained the case would have stood thus,—the inhibiting creditor would, of course, have been preferable to all adjudications by subsequent creditors, but prior creditors adjudging within year and day of the inhibition would have been entitled to come in *pari passu* with the inhibitor. If, then, there had been no sequestration, and each creditor had followed out his separate diligence, the result would have been that at which the Sheriff has arrived. The principle on which his interlocutor proceeds is, as I understand it, that as the effect of the sequestration is to prevent creditors from following out their separate diligences you must hold matters to be in the position in which they presumably would have been if these diligences had been all followed out. That is quite an intelligible ground of judgment. No doubt, where a debtor has sold his heritable property to an onerous purchaser after inhibition, but before any adjudication by the competing creditors, they are all postponed to the inhibitor (M'Lure, 1807, Dict. *voce* Competition, Appendix, No. 3; note to Ivory's Erskine, ii. 11, 14); but if creditors, whose debts were contracted prior to the inhibition, have been prevented by the sequestration from following out their diligences, then, according to the Sheriff, the effect of the trustee's adjudication under the Bankruptcy Act is to entitle them to be ranked along with the inhibiting creditor, as they might have been but for the sequestration. Whether that be right or wrong, it is, I repeat, a ground of judgment which I am not surprised that the Sheriff should have adopted. The decisions referred to by Professor Bell in the passage in his Commentaries, cited during the discussion, were all pronounced long before the passing of the Bankruptcy Act, and there might have been a great deal said as to their applicability to the present case, but, as the Lord-Advocate did not contend for any view of that kind, but entirely conceded the point, the difficulties which would have occurred to me for discussion are not such as to lead me to dissent from the judgment proposed by Lord Kinloch.

LORD PRESIDENT.—I should be sorry if a judgment of such importance as we are now about to pronounce should be thought to rest in any degree on admissions or concessions made by counsel in argument, and therefore I think it right to say that my opinion does not rest upon, and is not influenced by, any such con-[419]-siderations. I concur entirely in the opinion of Lord Kinloch, as expressing a perfectly well settled rule of ranking, clearly applicable to this case. The rule is usually stated without reference to the existence of a sequestration, and very naturally, because it was established before the introduction of the process of sequestration. The rule contemplates an inhibiting creditor, creditors whose debts were contracted prior to the inhibition, and creditors whose debts were contracted subsequent to the inhibition. All those creditors adjudge within year and day of one another, so that it does not matter which is the leading adjudication. In respect of their adjudications they all rank *pari passu*. But the inhibiting creditor has a preference over those whose debts were contracted subsequent to the inhibition. The prior creditors are to be neither hurt nor benefited by the inhibition. In these circumstances the clear and equitable rule of ranking was established, that the inhibitor's preference must be secured to him entirely at the expense of the subsequent creditors, while creditors whose debts were contracted prior to the inhibition draw just what they would have done had the whole creditors been ranked *pari passu*. Lord Deas's difficulty, as I understand it, is in applying the rule to a sequestration. I confess I do not see it. The adjudication in favour of the trustee is an adjudication for the benefit of all the creditors exactly in the order of their rights and preferences as they stand at the date of sequestration, and it must have the same legal effect as if each one of the creditors had separately adjudged for his own debt at the same date. Here the creditors are all in the position of adjudging creditors, with

this peculiarity, that one of them has used inhibition, which is subsequent to the date of one set of debts and anterior to another. The case of M'Lure *v.* Baird (1807, M. Compet. App. 3) seems to me to illustrate very satisfactorily this principle. There was the peculiarity in that case, that after the debts had been contracted, and inhibition used upon one of the debts, the debtor sold his estate. The prior creditors, who had not used inhibition, could not of course adjudge after the sale, but the inhibiting creditor brought a reduction *ex capite inhibitionis*, and reduced the sale. But he reduced only in so far as his own right was concerned, and his reduction gave no benefit to any one else; and he was proved entitled to payment out of the price and rents of the estate. Now, that was giving a preference to the diligence of inhibition, precisely to the same effect as we are doing here in a different set of circumstances. The rule, when once understood, is perfectly simple.

The following interlocutor was pronounced:—"Recall the deliverance of the trustee and interlocutor of the Sheriff complained of: Find that the order of ranking of the creditors on the proceeds of the heritable estate is to be ascertained as follows,—first, the whole creditors are to be ranked *pari passu* as adjudging creditors on the said proceeds, and the dividend thereby arising is to be held the dividend payable to those creditors whose debts were contracted anterior to the use of the inhibition; secondly, for the purpose of ascertaining the dividend payable to the inhibiting creditors, the said anterior creditors and the inhibiting creditors shall be ranked *pari passu* on the said proceeds as if no debts had been contracted subsequently to the use of the inhibition, and the inhibiting creditors shall draw back from the posterior creditors the difference between the dividend arising on the first *pari passu* ranking, and that arising on this second ranking, and the said differences, added to the dividend arising on the said *pari passu* ranking, shall be held the dividend payable to the said inhibiting creditors; thirdly, the dividend on the said *pari passu* ranking, less the amount so drawn back by the inhibiting creditors, shall be held the dividend payable to the posterior creditors: Find that all the creditors are entitled to be ranked *pari passu* on the proceeds of the moveable estate, each of the said creditors valuing and deduct-[420]-ing the value of any security held over any part of the bankrupt estate, in terms of law: Remit to the trustee to frame a scheme of ranking in accordance with these findings, and decern: Find the appellants entitled to expenses, both in this Court and in the Sheriff-court: Allow accounts," &c.

J. & A. PEDDIE, W.S.—J. & R. MACANDREW, W.S.—Agents.

No. 79. X. MACPHERSON, 420. 30 Jan. 1872. 1st Div.—Lord Jerviswoode, B.

ARCHIBALD THOMAS FREDERICK FRASER, of Abertarff, Pursuer.—*Strachan.*
A. T. F. FRASER AND OTHERS, Defenders.—*Balfour.*

Process—Reclaiming Note—13 & 14 *Vict. c.* 36, *sec.* 11—31 & 32 *Vict. c.* 101, *sec.* 54.—The Judicature Act, 6 Geo. IV. c. 120, enacted that any interlocutor of a Lord Ordinary might be reclaimed against within twenty-one days.

The Act 13 & 14 Vict. c. 36, sec. 11, enacted that it should not be competent to reclaim against an interlocutor not disposing, in whole or in part, of the merits of the cause after ten days.

The Act 31 & 32 Vict. c. 101, sec. 54, enacted that until the whole cause has been decided in the Outer-House it shall not be competent to reclaim without leave of the Lord Ordinary, but where such leave has been obtained, a reclaiming note, presented before the whole cause has been decided in the Outer-House, may be lodged within ten days from the date of the interlocutor granting leave.

Held that an interlocutor by a Lord Ordinary disposing of part of the merits of the cause may be reclaimed against within twenty-one days of the date when it is signed, provided that the Lord Ordinary's leave to reclaim be obtained, and the reclaiming note be lodged within ten days of the interlocutor granting leave.

A. T. F. Fraser of Abertarff, institute under a deed of entail executed in 1812 by the Honourable Archibald Fraser, brought this action against the heirs of entail, concluding for declarator (1) that certain sums were entailer's debts, paid by the pursuer; (2) that the entailed estates were held under the burden of these sums, and of a sum of £7293 incurred by the pursuer as expenses of litigation, &c., in reference to the constitution and ascertainment of these debts, and to relief of which the pursuer was entitled under a special provision in the deed of entail—(see 16 D. 645; 21 D. 1154; *ante*, vol. iv. H. of L. 32)—and also under burden of certain other sums.

The Lord Ordinary, on 9th January 1872, pronounced an interlocutor, finding that certain sums contained in an accountant's report were established as debts of the said deceased Honourable Archibald Fraser, due by him at the date of his death, and paid by or on account of the pursuer, and that certain other sums in said report were not proved as such debts.

The Lord Ordinary, on 19th January 1872, granted leave to reclaim, and the reclaiming note was lodged on the 25th January.

The defender objected to the competency of the reclaiming note, on the ground that it was too late, under section 11 of the Court of Session Act, 1850, and section 54 of the Act of 1868.*

LORD PRESIDENT.—The Lord Ordinary's interlocutor in this case was pronounced upon 9th January. Upon the 19th day of the same month he granted leave to reclaim against this interlocutor, and on the 25th a reclaiming note was lodged by the pursuer. This reclaiming note is therefore lodged within ten days of the interlocutor granting leave to reclaim, but not of the interlocutor reclaimed against. It is, however, within twenty-one days of that interlocutor. [421] The question is, whether this reclaiming note is incompetent, in consequence of its being lodged too late.

Now, the interlocutor reclaimed against is, in my opinion, an interlocutor disposing in part of the merits of the cause. It contains findings which, so far as they go, dispose of the first conclusion of the libel. The term used in the Act of 1850, "interlocutors disposing in whole or in part of the merits of the cause," means only interlocutors containing a decerniture which in effect disposes of a part or the whole of the merits of the cause. The question, therefore, is, if the interlocutor (being, as I think it is, of that nature) can be reclaimed against under the Act of 1850, in like manner as at the passing of that Act, whether any objection to the reclaiming note can be raised under the Court of Session Act of 1868.

The Act of 1850 introduced for the first time a limitation of the period within which a certain class of reclaiming notes should be presented. Formerly all reclaiming notes were, in respect of time, in the same category. But this statute provided that it should not "be competent to reclaim against any interlocutor of the Lord Ordinary at any time after the expiration of ten days from the date of signing such interlocutor, with the exception only of reclaiming notes against interlocutors disposing in whole or in part of the merits of the cause, and against decrees in absence, which relaiming notes shall continue to be competent in like manner as at the passing of this Act." Now, no doubt, the statute of 1850 did regulate, in a very important respect, the period during which reclaiming notes were to be competent. It divides them, for the first time, into two classes. The Act of 1868 introduces another division, and provides that a third class of reclaiming notes shall be presented within six days, namely, those under sections 27 and 28 of that Act. There are now, therefore, three different classes of reclaiming notes, each competent within a different period of time. Sections 27 and 28 of the new Act have no application to the present case, but it is said that section 54 does apply, and requires this, and all reclaiming notes of the same class, to be lodged within ten days. It does not appear to me that section 54, or indeed any sections of that Act, except 27 and 28, alter in any way the time within which reclaiming notes are to be presented.

This 54th section provides that, "except in so far as provided for by the 28th section hereof, until the whole cause has been decided in the Outer-House, it shall not be competent to present a reclaiming note against any interlocutor of the Lord Ordinary, without his leave first had and obtained." Now, so far, this section has nothing to do with the time within which such reclaiming note must be presented. The condition

* Bannatine's Trustees *v.* Cunningham, May 25, 1869, *ante*, vol. vii. p. 813; 13 & 14 Vict. c. 36, sec. 11; 31 & 32 Vict. c. 101, sec. 54.

newly imported by this section is the leave of the Lord Ordinary, and it is needless to say that, if the section had stopped there, the time for reclaiming would be just exactly the same as under the former Act of 1850, except as regards reclaiming notes under section 28. But the section goes on to say:—"But where such leave has been obtained, a reclaiming note, presented before the whole cause has been decided in the Outer-House, may be lodged within ten days from the date of the interlocutor granting leave . . . and such note shall not have the effect of removing the cause or the process from the Outer-House, or of staying procedure before the Lord Ordinary," &c. Now, I do not think that this part of the section was intended to alter the time within which reclaiming notes are to be lodged, even in those cases to which it applies. The language is peculiar. It says a reclaiming note "may be lodged." It does not say "must"; nor does it say that the reclaiming note will be competent if presented within ten days from the date of the leave being granted. It merely says "may be lodged"; and I think there was a reason for this. It then goes on to speak very particularly with regard to the effect which such reclaiming note is to have upon the conduct of the process during the dependence of the reclaiming note. I do not mean to say that the expression used is not intended to imply that the reclaiming note, where leave has been granted, shall be presented within ten days of the date of the interlocutor granting leave. But that is all the limitation as to time that it establishes.

Now, this reclaiming note has been presented within ten days of the interlocutor granting leave, and I can see nothing to justify us in saying that this interlocutor would have been incompetent before the passing of this 54th sec-[422]-tion; and as it complies with the provisions of that section, there is no objection to it whatever.

The other Judges concurred.

Objection repelled.

MACBEAN & MALLOCH, W.S.—GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—Agents.

No. 80. X. MACPHERSON, 422. 30 Jan. 1872. 2d Div.—Lord Mackenzie, R.

ROBERT BENNY AND OTHERS (Tod's Trustees), Complainers.—*M'Laren.*
JOHN FINLAY, Respondent.—*Gloag.*

Marriage-Contract — Heritable and Moveable. — A husband in his marriage-contract conveyed absolutely to his wife "the whole household furniture, bed and table linen, silver plate, books, pictures, prints, and other plenishing and effects, including heirship moveables, carriage and carriage horses, and other effects, now belonging to or that may hereafter be acquired by him, in so far as the same may form part of, or be situated, or used at, in, or in any way connected with his ordinary or principal residence or establishment." *Held* that this did not include greenhouses, iron fences, and an observatory containing a large telescope.

Opinion, that the greenhouses and fences were heritable, and that the observatory and telescope were moveable.

This was a note of suspension and interdict brought by the trustees of the late Mr. Tod of Ayton against John Finlay, who had married Mr. Tod's widow. The following narrative is taken from the Lord Ordinary's note:—"By the marriage-contract between the deceased Mr. William Tod of Ayton, in Perthshire, and his wife Mrs. Isabella Benny, who died before the suspension was brought, Mr. Tod conveyed to her 'absolutely the whole household furniture, bed and table linen, silver plate, books, pictures, prints, and other plenishing and effects, including heirship moveables, carriage and carriage horses, and other effects, now belonging to, or that may hereafter be acquired by him, in so far as the same may form part of, or be situated or used at, in, or in any way connected with his ordinary or principal residence or establishment.'

"Mr. Tod acquired the estate of Ayton in 1860, and he afterwards erected thereon, 1st, a large conservatory or greenhouse, two forcing-houses, and a vinery, with the necessary hot-water heating apparatus and other fittings; 2d, extensive iron fences in

the policy grounds attached to Ayton House; and 3d, an observatory, containing a large and expensive telescope. Mr. Tod died in 1867, survived by his said wife, and she married the respondent, Mr. Finlay, in 1870. In virtue of the before-recited clause in the marriage-contract, Mr. Finlay, as in right of his wife, maintains that he is entitled to the property of the foresaid subjects. Having advertised these subjects for sale, Mr. Tod's testamentary trustees raised the present note of suspension and interdict, to prevent him from selling or in any way interfering with them."

The complainers pleaded;—(1) The complainers, as proprietors of and vested in the estate of Ayton, and having right to the whole estate, heritable and moveable, which belonged to the late Mr. Tod, including the subjects proposed to be sold, are entitled to the suspension and interdict sought. (2) The respondents having no right to the said subjects, ought to be restrained from selling, disposing of, or in any way interfering with the same; and the respondent Finlay, in any event, and the other respondent in the event of his appearing to oppose the present application, should be found liable in expenses.

The respondent pleaded;—(1) On a sound construction of the said contract of marriage, the respondent, as legal assignee of his late wife, is en-[423]-titled to all articles of a moveable nature which are or were accessory to the occupation of the mansion-house of Ayton as a residence, as distinguished from farm-stock and implements, and is not limited to moveable articles contained in the said mansion-house. (2) On a sound construction of the said marriage-contract, and regard being had to the moveable nature of the subjects, the respondent is entitled to the property of the said iron fencing, telescope, conservatory, and others mentioned in the note of suspension.

The Lord Ordinary, before answer, remitted to Andrew Heiton, city architect, Perth, to inspect and report as to the nature, construction, and position of the subjects with reference to which interdict was sought, having regard to the statements of the parties on the record, and also to report upon such other matters in reference to the subjects in dispute as might be desired by either party.

Mr. Heiton's report contained, *inter alia*, the following statements:—

"I. Fences.—There are three descriptions of iron fencing erected to enclose the policies and approaches to the house; one of a permanent nature, and the two others of such a construction as to enable them, without injury, to be taken asunder and re-erected wherever found desirable. (1) Fences of a permanent nature.—Ayton House is approached by three separate avenues from the turnpike road. On both sides of these avenues wire-fencing of most substantial construction has been erected. The fencing is 4 feet high, and is entirely constructed of malleable iron, with seven longitudinal wires $\frac{5}{16}$ and $\frac{1}{4}$ of an inch diameter respectively, with iron standards $1\frac{1}{2}$ inch by $\frac{3}{8}$ inch, placed at 5 feet apart, each of these standards having a $\frac{3}{4}$ inch square curved stay bar rivetted to the top of the standard, and both inserted at bottom into large stone blocks, and run in with lead. (2) Fences of such a construction as to be capable of being removed with facility from place to place without injury to the fences, or the place they occupy.—The fencing in the immediate proximity of the mansion-house is of this nature. This fence is formed in separate hurdles, each complete in itself, measuring $6\frac{1}{2}$ feet long and 4 feet high, with end and central standards filled in with six horizontal rods, each $\frac{1}{2}$ inch diameter, rivetted to end standards, and passing through the centre one. (3) Fence enclosing part of policies.—There is another description of fence which encloses a portion of the policies. This fence is composed of five flat iron bars, each 1 inch broad and $\frac{1}{4}$ inch thick, applied in 15 feet lengths, and fastened with $2\frac{1}{2}$ inch kneed overlap at the end of each length, and it is so constructed that by removing the vertical standard beyond the longitudinal bar the fencing becomes detached.

"II. Observatory.—The observatory is a handsome circular stone building, covered with a moveable dome, and built at the eastern extremity of a strip of ground in a field situated at a distance of about 150 yards in a direct line from the mansion-house. The telescope is placed in the centre of the building, and rests on a solid foundation of masonry 10 feet in diameter and 4 feet deep, on which a cast-metal base-plate and pedestal, weighing about five tons, bedded solid in cement. This base-plate is 9 feet in diameter and 12 inches deep, terminating in a pedestal about 3 feet high, all cast in one piece, upon which rests an iron pillar 7 feet high, which is attached to it with bolts. The cast-metal base is not secured to the masonry with bolts, but the great diameter and

weight of the base renders these unnecessary, the whole being constructed in the most substantial and permanent manner.

"III. Greenhouse and Forcing-houses.—These erections are all of the most substantial description. The greenhouse has a polished freestone base. The other houses have brick walls, all resting on stone foundations, [424] and above this the requisite sole plate on which the sides are constructed, with wooden framing filled in with sashes, with cornice on top. The roofing is composed of couples and sliding ventilating sashes, all glazed and finished in the most complete manner, with furnace, boiler, and pipes for hot water."

The Lord Ordinary pronounced this interlocutor :—"Sustains the reasons of suspension: Suspends, prohibits, interdicts, and discharges, in terms of the note of suspension and interdict: Declares the interdict formerly granted perpetual, and decerns: Finds the complainers entitled to expenses, of which allows an account to be given in, and remits," &c.*

---

* "NOTE.— . . . The question raised is, as regards one of the subjects, attended with difficulty. But having regard to the fact that the whole subjects were erected upon and annexed to his estate by Mr. Tod, a fee-simple proprietor, for the more beneficial use, occupation, and enjoyment of that estate, the Lord Ordinary is of opinion that they are pertinents or accessories of the estate, and as such heritable, and therefore that they do not fall under the conveyance of moveable effects in favour of his wife contained in her marriage-contract.

"1. As regards the large conservatory or greenhouse erected within the garden and against the garden wall, and the two forcing-houses and vinery erected outside the garden, and forming one separate and independent structure, the Lord Ordinary has no doubt that, as in a question between the present parties, they fall under the legal maxim, *solo inædificatum solo cedit.*

"These erections are of the most substantial description. The conservatory or greenhouse has a polished freestone wall about two feet high, and the other houses have brick walls varying from one foot to five feet in height, resting on stone foundations. On these walls, sides and sloping roofs of the usual construction with the requisite glass sashes rest. One furnace, with a close boiler, in a building situated at a short distance from the houses, heats the whole of them by means of hot-water iron pipes conducted under ground to each of them. Such houses are the ordinary pertinents of a mansion-house; and a fee-simple proprietor, erecting them in or adjacent to his garden for the cultivation of flowers, plants, and fruit requiring care and heat, makes and intends these houses to become, the Lord Ordinary thinks, as completely pertinents of his estate as the fruit trees, bushes, and shrubs which he plants in his garden. The three elements of fixture, destination, and convenience for the use of the land seem to him to be conclusive in favour of the complainer's right to those subjects.

"2. The Lord Ordinary is of the same opinion in regard to the iron fences. They are all of a permanent character, and necessary for the beneficial use and occupation of the policy ground surrounding the mansion-house. One set of these iron fences (coloured blue on Mr. Heiton's plan) is upwards of 3000 yards in length, and separates the three avenues leading to the mansion-house from the adjoining fields. They are four feet high, with iron standard stays and straining posts, fastened by means of lead to blocks of stone inserted below the level of the ground. Another of these iron fences (coloured red on the plan) is about seventy yards in length, and separates part of the avenue near the mansion-house from the adjoining field. It is of an ornamental character, and admits of being taken to pieces, as it is constructed in lengths of six and a-half feet, which are fastened to each other with bolts and screws, and attached to the ground by double prongs twelve inches long at the end of the standards. A similar fence, but without the ornamental trellis-work of the last fence (coloured red on the plan), encloses the observatory, with the footpath leading to it and its small shrubbery, from the adjoining field. It is about 165 yards long. Some of its standards are fastened to blocks of wood, and others to blocks of stone, by means of lead. There is also another description of iron fence about 150 yards long (coloured yellow on plan) enclosing part of the policies in the immediate vicinity of the mansion-house. This is a very substantial fence, which is fastened to the ground by double prongs at the end of the iron standards, and by the sole-plates of the cast-iron corner posts being secured by spikes to wooden platforms.

[425] The respondent reclaimed.* At advising,—

LORD JUSTICE-CLERK.—I concur with the result at which the Lord Ordinary has arrived, and with most but not all of the views expressed in his note, if it were necessary to found our judgment upon them. No doubt, if these subjects [426] are heritable in their nature, they cannot be included in the provision in the marriage-contract, which entirely relates to moveable property. But I am inclined to think that their character as heritable or moveable is immaterial, as they are not within the category of the provision. That clause in the contract is not a general assignation of moveables, but a special assignation of a limited character and for a limited purpose. The widow is not assignee to the moveable estate, but, on the contrary, the complainers hold that character. The widow must make good her claim both against the heir and

---

"The whole of these fences appear to the Lord Ordinary to be of a permanent character, and to have been erected and to be necessary for the beneficial use and occupation of the policies surrounding the mansion-house. If any portion of them were removed another fence would require to be erected in its place. No doubt they could be taken down and put up elsewhere. But that may be said of an ordinary wire fence with wooden standards and straining posts driven into the ground, or of an ordinary wooden paling, or of a drystone dyke built on the surface of the ground, or of a gate in a fence, and of many other articles which are undoubtedly heritable.

"3. The question with regard to the large telescope in the observatory is attended with difficulty. After repeated consideration, the Lord Ordinary is of opinion that it forms no part of the moveable effects of Mr. Tod, but that it forms part of his estate of Ayton. The building of the observatory is undoubtedly *pars tenementi*. But the mere building does not of itself constitute an observatory. The large telescope is the most essential and expensive part of the erection. Its size required that it should be securely placed on the ground by means of a large and solid foundation of masonry, and of an iron base and base plate in one piece, of great size and weight, part of which is below the floor, and of a heavy iron pedestal strongly bolted to the base, the whole being of the most permanent and substantial character.

"Mr. Tod erected the building, base plate, base pedestal, and telescope, as a whole, for permanent use as a pertinent of his estate. The building and its contents together constitute an observatory. The telescope and pedestal could not be removed without injury to the building except by being taken separate. Mr. Heiton reports that the base plate 'could not be removed without destroying some parts of the building,' and that 'the observatory could not without very great alterations be applied to any other purpose.' The telescope was necessary and intended to adapt and complete the building for the purpose for which it was erected, and it was annexed to the soil and destined to that purpose. It is therefore, the Lord Ordinary thinks, in a question with Mr. Tod's widow, real and not personal estate.

"The Lord Ordinary has called the attention of the parties to the case with reference to the large telescope in Short's Observatory on the Calton Hill, referred to by Professor Bell (Com. i. 753, note 2), but not reported, which was held subject to poinding. But Short can only have been tenant under the town-council of the ground on the Calton Hill on which he erected his observatory, as a place of public amusement, for the purposes of profit; and if so, the telescope was truly one of the tools of his trade and remained his property, and it did not pass to the proprietors of the soil, and was therefore moveable. That case does not, it is thought, rule the present.

"The Lord Ordinary is quite aware that the clause in the marriage-contract must receive a liberal construction; but the claim of the respondent is founded upon the general conveyance in the marriage-contract of the effects situated or used at, in, or in any way connected with Mr. Tod's principal residence or establishment. These vague and general terms must, it is thought, receive, at all events to some extent, their construction from the preceding words in the clause,—household furniture, bed and table linen, silver plate, books, pictures, prints, and other plenishing, including heirship moveables, carriages, and carriage horses; and if so, it is difficult to hold that Mr. Tod's widow could, under such a conveyance of moveable effects, acquire right to the conservatory, forcing-houses, vinery, fences, and large telescope in the observatory, constructed, fixed, and destined as they were by Mr. Tod, who, during the marriage, was entitled to lay out his funds and manage his estate as he thought proper."

* Syme *v.* Harvey, Dec. 4, 1861, 24 D. 202.

the executor, as the trustees represent both; and I am of opinion, on the construction of this contract, that the respondent in her right has failed to do so.

I think the provision related solely to effects intended for domestic use and enjoyment, whether in the way of utility or of ornament, which should be attached to the principal residence of Mr. Tod, and which were provided for the ease and comfort of his widow after his decease. Their proximity in point of situation was clearly not the test of the class of moveable property conveyed. If Mr. Tod's house had been close at his foundry, or within 100 yards of his mill, the clause would hardly have covered the machinery in either. Nor do I think that it covered agricultural implements, thrashing-mill, reaping machine, or even the farm-houses or dairy cows. None of the articles now in question are within the category. They are not, as moveables, articles intended for domestic use. The greenhouse and the iron fences are of use as fixtures, not as moveables. The telescope is no more a part of the establishment at Ayton than the foundry or the mill would have been. Its proximity is an accident, not an essential of its character, nor does it alter its nature that it was used for recreation by the owner, and not for profit.

In this view it is unnecessary, and indeed might be improper, to decide absolutely on the character of these articles, for that question may arise between heir and executor in this case. In regard to the greenhouse and the iron fencing, the inclination of my opinion would be with that of the Lord Ordinary, on the simple ground that they were intended for the permanent benefit of the real estate to which they were attached, and were so attached by the owner of the land; and when this element concurs with sufficient physical attachment to keep the articles permanently in their place they become accessories to the land, *solo cedunt*. The telescope is a much more difficult question; for there the building was the accessory, and the fixture was for the better use of the moveable article so affixed. If this question had occurred purely between heir and executor by devolution of law, I should incline to think the telescope's character as moveable property not changed by its temporary resting-place.

The other Judges concurred.

THE COURT adhered, with additional expenses.

ANDREW & WILSON, W.S.—RONALD & RITCHIE, S.S.C.—Agents.

No. 81. X. MACPHERSON, 426. 30 Jan. 1872. 2d Div.—Lord Gifford, I.

BRITISH FISHERIES SOCIETY, Complainers.—*Watson—Black.*
MAGISTRATES AND TOWN-COUNCIL OF WICK, Respondents.—
Sol.-Gen. Clark—Asher.

Burgh-Magistrates—Assessment—Interdict—23 & 24 *Vict.* (*Loc. and Pers.*) *c. cci.*—The magistrates of a burgh, who were empowered by a Local Act to levy an annual assessment for maintaining, keeping in repair, and improving roads and bridges, imposed for several years a larger assessment than was required for the yearly expenses, in order to accumulate a fund for rebuilding a bridge which had become ruinous. *Held* (reversing judgment of Lord Gifford) that a ratepayer was not entitled to try the question of the legality of the assessment for the purpose of accumulation in a process of suspension and interdict.

Opinions, that the assessment was legal.

This was a note of suspension and interdict by the British Fisheries Society, incorporated by "The Pulteney Harbour Act, 1859," against the [427] Magistrates and Town-Council of Wick, as trustees under the "Caithness Roads Act, 1860" (which recited the Act 59 Geo. III. c. 135), and J. W. Mackay, collector of the road assessment imposed by the magistrates. The following narrative is taken from the note of the Lord Ordinary:—"The question in this case turns almost exclusively upon the terms of the statute 23 & 24 Vict. cap. 201 (Aug. 20, 1860), which is a local statute applicable to highways, roads, and bridges in the county of Caithness.

"By the 33d section of the statute the management of the roads and bridges within the boundaries of Wick (meaning thereby the Parliamentary boundaries as defined by

the Reform Act), are transferred from the road trustees to the Magistrates and Town-Council of Wick, who are to have the same powers as the trustees for the county roads, except the right of levying tolls.

"By section 26 the Magistrates and Town-Council of Wick are empowered to levy an annual assessment, not exceeding 6d. per pound, for the purposes expressed in the Act, and these purposes are defined in section 48 of the statute as follows:—'1. In maintaining, keeping in repair, and improving the roads and bridges within Wick' at the date of the Act 'maintained and kept in repair by the trustees and by the Commissioners for Highland Roads and Bridges, including as part thereof the main thoroughfare, road, or street through Wick, from the bridge of Wick to the parish church, and including a reasonable sum for the expenses of collecting the said assessment, and of management and other incidental expenses.' '2. In paying the proportion payable by Wick of the expenses of applying for, obtaining, and passing' the said Act, 'and incidental thereto.' '3. In paying to the trustees the proportion payable by Wick,' as provided in said Act, 'of the expense of completing' the 'Sybster and Rougie Road' mentioned in the said Act, and 'of the trust debt.'

"The question raised in the present case is whether the respondents, the Magistrates and Town-Council of Wick, are entitled to levy the assessment complained of and sought to be suspended, not for the purpose of defraying the current expenses of 'maintaining, keeping in repair, and improving' the roads and bridges within Wick, and the current expenses of the trust, but for the purpose of accumulating a large fund which at some future and undefined period they intend to apply in effecting either a renewal of the bridge of Wick, or some costly and extraordinary improvement thereof, the exact nature of which the respondents have not defined either on record or at the bar.

"It is admitted that the respondents have in hand an accumulated fund of upwards of £800, that the expenses of the current year will not exceed £300, and therefore the assessment in question can only be justified if the respondents have a right to accumulate."

The 4th clause of 59 Geo. III. c. 135, concludes as follows:—"Provided always that no bridge erected pursuant to the said recited Act and accidentally destroyed shall be again erected or rebuilt by virtue of this Act, unless the same shall have been included in the contract entered into for making the road of which such bridge forms a part, or unless the same shall be again erected or rebuilt with the consent of the said commissioners, and also of the heritors of the county or counties in which such bridge may be situated, such consent to be given at some annual meeting for the assessment of the land-tax, or at some Michaelmas head court, or at some special adjournment of such meeting or head court."

The complainers pleaded;—(1) The respondents having already in hand, from previous assessments under the said Act, funds sufficient to meet all expenditure thereunder for several years to come, are not entitled until said funds are exhausted to impose and levy any new assessment; and the [428] complainers are entitled to suspension and interdict as craved, without caution or consignation. (2) In any view, the respondents are not entitled to assess at such a rate as will produce a much larger sum than is required to meet the purposes of the Act.

The respondents pleaded;—(2) The note of suspension ought to be refused, in respect that the proceedings which the complainers seek to have the respondents interdicted from adopting are proceedings which the respondents may lawfully adopt by virtue of an assessment and warrant which were imposed and granted in accordance with law. (3) The note of suspension ought to be refused, in respect that in imposing the foresaid assessment the said magistrates and town-council did not exceed their powers under the said Act; and, *seperatim*, in respect that in imposing said assessment they did not act in violation of their duty.

The Lord Ordinary pronounced this interlocutor:—"Sustains the reasons of suspension, and declares the interdict already granted perpetual, and of new suspends, interdicts, prohibits, and discharges in terms of the prayer of the note of suspension and interdict, and decerns: Finds the suspenders entitled to expenses, and remits," &c.*

---

[428] * "NOTE.— . . . The Lord Ordinary is of opinion that under the statute the respondents are not entitled to assess for the purpose of accumulating a large and

[429] The respondents reclaimed.

After the case had been argued, the Court continued the case in order to allow the magistrates an opportunity of stating more distinctly what they proposed to do.

The magistrates produced a minute of their meeting on 6th January 1872, which

---

indefinite fund, to be expended at some future and undefined period on operations or improvements on the roads and bridges under their charge. He has therefore granted suspension and interdict as craved. The grounds of his opinion are shortly,—

"(1st) The power to make an annual assessment must be fairly limited by the probable annual expenditure. The magistrates are statutory trustees, and their powers to assess must be strictly construed so as not to exceed the limits of the statute. The statute limits the assessment to be 'for the purpose defined,' and as the assessment is annual, it is fair to read the statute as meaning that it shall be for 'the annual expense' of maintaining, keeping in repair, and improving the subjects of the trust.

"Hence it is thought the respondents could not make the assessment biennial or quinquennial, and levy two years' expenses, or five years' expenses in one year. Each year must bear its own burdens. Of course there must be a wide margin allowed for contingencies or estimates; and if it were merely this, the discretion of the trustees will not be lightly interfered with.

"Still the estimate must be made, and there must be no deliberate attempt to lay the expenses of one year upon the ratepayers of another.

"(2d) This is still more manifest when it is considered that one-half of the assessment is borne by the tenants, or merely temporary occupants of lands and heritages in the burgh. It would be unfair to tax a tenant of one year for an improvement which is not to begin for ten or fifteen years after he has left the town or the district. Exact adjustment is impossible, but there must be a reasonable attempt to give the benefits of the repairs and improvements to the ratepayers who actually pay for them.

"(3d) The respondents have power to borrow on the credit of the assessment two years' gross amount thereof. This seems intended to limit the extraordinary expenditure which the respondents may disburse. Practically they must not exceed three years' assessment at once. Two years' they may borrow, and a third year's they have in hand. This is quite fair, and the interest of the borrowed money will fall justly and equitably upon the ratepayers of subsequent years who have got the benefit of the expenditure.

"(4th) The magnitude of the proposed operation and the time required for accumulation is unreasonable. According to the statement of the respondents themselves they will require between £3000 and £4000, besides the expense of a temporary bridge. Admittedly it will take twelve or fifteen years to accumulate the amount, current expenses requiring to be provided for. Virtually the respondents propose to tax proprietors and tenants for fifteen years for the [429] benefit of those who may be proprietors and tenants fifteen years hence. The Lord Ordinary thinks this is *ultra vires*. Had the matter related to one or two years only, he might have hesitated to interfere, as there must be some discretion and latitude in such cases, but the present case is beyond all reasonable latitude. If the respondents can accumulate for fifteen years, it would be difficult to prevent them accumulating for forty years, or from creating a permanent sinking fund.

"(5th, and lastly) The contemplated operations of the respondents are themselves of very doubtful competency. The respondents are empowered to maintain, keep in repair, and improve existing roads and bridges. They are not authorised to make new roads or new bridges. If such are required further powers must be obtained.

"But substantially the respondents must be held as proposing a new bridge, or alterations so extensive as to be equivalent thereto. They say the present bridge, if meddled with (Ans. 6) would likely fall to pieces, and require in great part to be rebuilt; but they do propose to meddle with it to the tune of £4000. The very vagueness of their contemplated operations is against them. They do not, and probably cannot, say exactly what will be required.

"The Lord Ordinary thinks that the respondents are attempting to extend a limited trust into a trust of a different and more extensive kind. He does not doubt the entire *bona fides* of the respondents, but even, with the purest motives, and for the best of purposes, they must not act *ultra vires* of the statute."

contained the following passage:—"Find that, with the limited funds at their command, it will only be in their power to execute a bridge of the kind recommended by Mr. Doull, whose estimate of the expense amounts to . . . £2500 0 0

which, they think, will be provided as follows:—

"The sum which the trustees are now entitled to borrow (this year's rental being £21,480) will be	£1074	0	0
"The sum in bank	789	0	0
"The arrears of assessment, payable 1st March 1871 and previous years	494	0	0
"And out of the assessment, payable 1st March 1872, amounting to £358, there could be applied	200	0	0
	£2557	0	0

"The trustees therefore resolve to adopt the plan of Mr. Doull, and to take immediate measures for having the same executed."

At advising,—

LORD JUSTICE-CLERK.—The Lord Ordinary has very clearly explained the circumstances in his note, but I am unable to concur with him in this interlocutor. The assessment sought to be suspended was regularly imposed in point of form by the competent authority, and of an amount within the statutory limit. It was therefore *ex facie* legally imposed. The grounds of suspension relate not to the manner of its imposition, but to the object to which the produce of the assessment, when collected, is intended to be applied. It is said this object is illegal, and beyond the powers of the magistrates, inasmuch as (1) that the money is not required for expenditure within the year; and (2) that it is to be applied to the building of a new bridge, which is beyond the power of the magistrates.

[430] I doubt very much the relevancy of such grounds as these to stop the collection of a public assessment of such a character. That ratepayers may by action prevent the malappropriation of the produce of the rate I do not doubt; and the illegality of any special application of the funds once established, may affect the right to assess or recover for the future. But when the plea truly resolves into a question of due administration, the executive powers of the administrators must be upheld in the meantime, and their statutory action cannot be suspended or paralysed on such allegations.

On the grounds of suspension themselves I think it enough to say that they seem to me entirely insufficient for the success of the present application. The respondents here are the trustees of part of a great thoroughfare, which they are bound to maintain, and they hold a statutory power of assessment up to a fixed limit to enable them to defray the cost of maintenance. They are the proper judges of what is necessary for that purpose, and as long as they exercise that discretion reasonably, and do not exceed their limit in amount, we should certainly not interfere to prevent the annual assessment from being paid. I cannot affirm the proposition that all the funds raised within the year must be expended, or be intended to be expended, within the year. If works are required for the maintenance of the thoroughfare which require more than one year's assessment will yield, I see no illegality in applying the produce of two or more years' assessment to that purpose.

This is a question of fair and reasonable administration, and although cases may be supposed which would be unfair or unreasonable I see nothing in the proceedings of the respondents which bears that character. The assessment is laid upon the land—on its owners and its occupiers—and although the latter are a fluctuating body, more or less, the proposed operations are clearly for the benefit, and indeed are essential to the value of the adjacent property. As regards the powers of the magistrates to rebuild a bridge, if they have statutory funds sufficient for that purpose, that also seems to be a question of administration, depending partly on the necessity for such an operation, and partly on the cost to be incurred. There is clearly no such absolute illegality in the proceeding as would be necessary to induce us to sanction the non-payment of the rate. If the thoroughfare cannot be maintained without rebuilding the bridge, this operation, like all other operations necessary for that purpose, would seem to be a proper application of the funds. The clause in 59 Geo. III. related (1) to the application of a specific capital fund; and (2) to destruction by accident, and not

by natural decay. Without absolutely pronouncing on the legal character of the proceedings of the magistrates, I am very clearly of opinion that they are entitled to collect their money, and that no legal ground has been established under which the complainers can refuse to pay.

LORD COWAN.—The Lord Ordinary has, in my opinion, taken too narrow and restricted a view of the statutory provision under which the respondents have acted in the management of the roads and bridges within the Wick district. The object of this statutory local trust was to keep open those thoroughfares, as it was of the public trust which it superseded. This being so, the principle of construction to be applied to the case is one favourable to the powers conferred for the due fulfilment of the important public benefits contemplated by the statute.

By the Act mentioned in the record the respondents are empowered (section 26), for the purposes therein mentioned, to impose an annual assessment on the proprietors within the Burgh of Wick, not exceeding 6d. on each pound of yearly rent or value of lands and heritages. In exercise of this power an assessment has been imposed for the year 1869–70, at the rate of 4d. per pound on the rental. This assessment is complained of as beyond their powers, having regard to the circumstances in which it has been imposed by the suspenders, who are proprietors within the burgh, and liable to the assessment.

The statutory purposes, to accomplish which this power to assess has been conferred, are set forth in the 48th section of the statute, and are generally for the "maintaining, keeping in repair, and improving the roads and bridges within [431] Wick, at present maintained and kept in repair" by the Trustees and Commissioners for Highland Roads and Bridges. Forming part of one of these roads connecting Wick and Pulteneytown, is the bridge of Wick, which is alleged by the respondents to have been for a long time insufficient, and in such a defective state as to require to be renewed or rebuilt. Having in view this expenditure, the respondents have for a few years assessed to an extent somewhat in excess of what was required for the annual expenditure, which is about £300, and the surplus fund thus in their hands amounted in 1869 to about £800. The annual expenditure is not of such amount as to require an assessment of 4d. per pound, and it is not disputed that that rate of assessment, fixed for the years 1869 and 1870, will leave a surplus to be added to the sum already in the hands of the respondents from £100 to £150. Thence arise the grounds of the present suspension. The suspenders, however, are not content with resisting the assessment to the extent of the excess rate above the sum required for the annual expenditure, but ask for suspension of the rate imposed on them *in toto*. Their plea is, that until the amount now held by the respondents as the surplus of previous years' assessments shall be expended on the ordinary requirements for repairs and otherwise for years to come, the respondents are not entitled under the statute to levy anything whatever from the ratepayers. In other words, because in past years, without objection, the respondents have levied more than the ordinary annual cost of the roads and bridges (which the suspenders say was illegal), they are to be entitled to exemption from all assessment even for the year's ordinary expenditure.

The first question is, whether this is the proper process for trying the question of the legality of the past proceedings of the respondents, and whether the suspenders, as parties liable to be assessed for the year 1869–70, can be listened to in pleading exemption from all assessment on the ground stated.

The second question is, whether it was beyond the power of the respondents to act as they have done, and with a view to the prospective expenditure required for the maintenance of the bridge, to raise a somewhat larger sum annually, so as to provide for that expenditure,—the assessment being still kept within the maximum rate allowed to be imposed by the statute.

On the first of these grounds I am of opinion that in no view can the suspenders be permitted to plead exemption from the assessment, so far as regards the ordinary expenses required for the year 1869–70; and that,—as regards any excess that may arise from the rate actually imposed beyond that amount, in accordance with what had for years been done without objection,—they cannot in this form be permitted to object to the assessment even to that extent in this suspension.

And on the second ground it appears to me, in the first place, that the only competent mode of trying the question as to the £800 having been wrongously assessed for and accumulated for the past year is by declaratory action. And, in the second

place, supposisg this matter to be competently raised in the present suspension and interdict, no sufficient grounds have been stated to support the plea of illegality on which the suspenders rely.

That the respondents have been acting throughout in the *bona fide* administration of this burghal statute is not disputed; and the question is, whether they have the discretion for which they contend of looking forward prospectively to a large expenditure on the bridge, and provide for it to some extent by proportioning the amount over a series of years. I think this was fairly within their power, and that it was not necessary to apply to Parliament for additional powers, if they saw their way, as they do, of providing for the necessary expenditure out of the assessment, by borrowing on the credit of it within a reasonable time. Now, there is a power to borrow to the extent of two years' proceeds on the credit of the assessments. The effect of the exercise of that power must be to impose the amount so far on the ratepayers of future years. To pay the sum borrowed the maximum assessment of 6d. per pound may certainly be levied, and upon liquidation of the debt, in whole or in part, the respondents have power to reborrow, from time to time, to the full statutory amount. By following that course, it cannot be said that they would have acted [432] other than within the express powers of the Act, and this although it might require some time to pass before the full amount could be paid off. Now, if so, I cannot think it beyond the powers conferred, that in the exercise of a sound discretion there should prospectively be levied a somewhat larger amount than what is actually required for the year. It is vain to say that one set of ratepayers are thereby called on to pay what ought to be imposed on a different set. Every year has its own body of ratepayers within the burgh no doubt, and inequalities may occur, but keeping within a sound discretion in the exercise of their powers in maintaining the roads and bridges, and taking care not to exceed the maximum rate, there seems to me great expediency in the course which the respondents have followed. At all events I cannot think that, unless the actual assessment for the years complained of has been illegally imposed, its payment can be resisted by one of the ratepayers of 1869–70, because from the ratepayers of former years more money has been levied than the actual yearly expenditure of those years required.

The suspenders indeed say that as the money in the hands of the respondents is now admittedly to be expended in renewing the bridge, this is altogether *ultra vires*, and not within the only purpose for which they can assess, viz., the maintaining, repairing, and improving the roads and bridges. I am not of that opinion, inasmuch as it appears to me that under the word "maintenance" there must be fairly held to be included the renewal or rebuilding, in whole or in part, of a bridge, similar to what had existed, that has become ruinous and dangerous to the public, and which cannot be repaired. Unless this power existed the communication would be in danger of being entirely interrupted by parts of the roads, or by the bridges, or viaducts over streams or rivulets in its course, giving way. And such power is, I think, fairly to be inferred to have been possessed by the trustees and commissioners by whom the management of the roads has been transferred to the respondents in virtue of this statute. This, I think, must fairly be inferred, not less from the nature of the trust management committed to those parties,—which was to keep up the several lines of communication for the benefit of the public,—than from the terms of the proviso at the close of the 4th section of the Act 59 Geo. III. c. 135. And if so, then by section 33 of the existing statute all the powers, rights, and privileges in reference to the roads and bridges transferred to the respondents are declared to be thenceforth possessed and exercised by them.

I shall only add that the recent report of Mr. Doull, engineer, procured by the respondents for the information of the Court, is important as showing their actings to be consistent with the exercise of a sound discretion, assuming that the statute is not wholly adverse to the proceedings they have adopted.

Lord Benholme and Lord Neaves concurred.

The Court pronounced this interlocutor:—"Alter the judgment reclaimed against: Refuse the note of suspension, and decern: Find the respondents entitled to expenses, and remit," &c.

D. Curror, S.S.C.—Horne, Horne, & Lyell, W.S.—Agents.

No. 82. X. MACPHERSON, 432. 31 Jan. 1872. 1st Div.—B.

GEORGE YOUNG HENDRY AND OTHERS (Hendry's Trustees).—*J. A. Crichton.*
GEORGE YOUNG HENDRY, JAMES YOUNG, AND OTHERS.—*Sol.-Gen. Clark—Birnie.*

Succession—Vesting.—A truster destined the fee of a part of his estate at the death of certain annuitants, and, subject to these annuities and to a liferent, to the eldest son or other son in succession of the liferenter then alive, and failing sons at that period, to his eldest or other daughter in succession then alive; and in the event of the death of the liferenter before the last survivor of the annuitants, he appointed the trustees to convey and make over the fee and property in terms of the above destination. Farther, in the event of the liferenter having no [433] children, or in the event of the liferenter's intermediate death, leaving no children alive at the death of the last survivor of the annuitants, he appointed the trustees to sell the subjects, and "pay over and divide" the free proceeds, with any intermediate rents, to and among "his three nephews *nominatim*," in equal proportions; and "in the event of any or all of their deaths before a division, the share of a deceaser or deceasers shall go to and be equally divided amongst the children or other next of kin of such deceaser or deceasers." The liferenter died unmarried before the period of division. *Held* that under the conditional destination to the nephews, vesting took place on the purifying of the condition by the death of the liferenter without issue.

By trust-disposition and settlement, dated 27th September 1843, the late James Hendry of Cambridge Terrace, Hyde Park, London, conveyed to trustees two properties in Brunswick Street, Glasgow. With regard to the subjects in the second place conveyed he directed and appointed his trustees, "out of the first and readiest of the rents and proceeds of the same, to pay to Mrs. Barbara Roxburgh or M'Gavin, spouse of the said Robert M'Gavin, and sister of my deceased first spouse, Martha Roxburgh, a free annuity during all the days and years of her life, of £150 sterling, payable at two terms in the year, Martinmas and Whitsunday, by equal portions, or as soon after these respective terms as rents shall be collected, commencing at the first of these terms occurring after my decease, and continuing the proportion to the day of her decease; and after her decease I direct and appoint my said trustees to pay to each of her three unmarried daughters, Mary M'Gavin, Martha Roxburgh M'Gavin, and Barbara M'Gavin, out of said rents and proceeds, a free annuity of £50 sterling during all the days and years of their respective lifetimes, payable in manner above-mentioned, but commencing for a proportion thereof betwixt the time of their mother's decease and the first term; and on the decease of any two of them, I direct my said trustees to increase the annuity to the surviver to £100 sterling; and I leave and bequeath said respective annuities accordingly: And I appoint the remainder of the said rents and proceeds accruing after my decease as aforesaid, after deduction of all charges and expenses, and of the three annuities of £20 sterling each, after bequeathed, to be paid over to the said James M'Gavin, my trustee, yearly and termly, until the decease of his said mother and the whole of his said sisters, and failing him by decease to his eldest son; whom failing, to his next son or other sons in succession, the eldest alive being always preferred; whom failing, then to his eldest daughter or other daughters in succession, the eldest alive being always preferred for the time; and on the decease of the said Mistress Barbara Roxburgh or M'Gavin, and of her said three daughters, should the said James M'Gavin be then alive, I direct and appoint my said trustees to pay over to him during his lifetime the whole free rents and proceeds of said subjects, under deduction of said three small annuities, and should he, at the said period of the decease of the last survivor of his said mother and sisters, have a a son or sons, daughter or daughters, or should he at any subsequent period have a son or sons, daughter or daughters, then I direct and appoint my said trustees to convey and make over the full fee and property of the said subjects second described, under the burden always of the said James M'Gavin's own liferent and said small annuities, to and in favour of his the said James M'Gavin's eldest or other son in succession then alive, and failing sons at that period, then to his the said James M'Gavin's eldest or other daughter in succession then alive, . . . Farther, in the event of the death of the said James M'Gavin before

that of the last survivor of his said mother and sisters, I direct and appoint my said trustees upon the death of such last survivor, should the said James M'Gavin have left [434] a child or children, to convey and make over the full fee and property of the said subjects second above conveyed, under the burden always of said three small annuities after bequeathed if then subsisting, to and in favour of his eldest or other son in succession then alive, the eldest alive being always preferred, and failing sons, then to his eldest or other daughter in succession then alive, the eldest alive being always preferred. . . . Farther, in regard to the fee and property of the subjects second before conveyed, in the event of the said James M'Gavin having no children, or in the event of his own intermediate death, leaving no children alive at the death of the last survivor of his mother and sisters as aforesaid, I direct and appoint my said trustees on the death of such last survivor to sell and dispose of these subjects either by public roup or private bargain, for such price or prices as they can obtain for the same, and after deduction of all charges and expenses to pay over and divide the free proceeds, with any intermediate rents, to and among my said three nephews, Henry, George, and James Young, in equal proportions; and in the event of any or all of their deaths before a division, the share of the deceaser or deceasers shall go to and be equally divided amongst the children or other next of kin of such deceaser or deceasers, and should these or any of these be in minority, my trustees are authorised to lay out and invest their shares, or make advances out of the same for thsir behoof, in such way and manner as they may think fit, for which purpose they are hereby appointed their tutors and curators."

James M'Gavin died in March 1857 unmarried. Of the annuitants named in this part of the deed only two survived, Miss Mary M'Gavin and Mrs. Martha Roxburgh M'Gavin or Moir. The property in question was taken by the Glasgow Court-Houses Commissioners under their statutory powers, and the price fixed by arbitration was consigned by them in terms of the 67th section of the Lands Clauses Consolidation Act.

A petition was presented to the Court by Mr. Hendry's trustees, with consent of the said George and James Young, the truster's nephews, and of the representatives of the said Henry Young, who died unmarried and intestate, for authority to uplift and invest £2500 of the consigned sum to secure the subsisting annuities, and to divide the remainder among the said George and James Young, and the representatives of Henry Young. No objection to the prayer of this petition was raised by the annuitants; but as the question occurred whether the fee had vested, it was thought advisable to apply for the opinion and judgment of the Court on a special case.

The parties to the case were the trustees of the first part, and the said George Young (who, in conformity with his uncle's will, had taken the name of Hendry), James Young, and the said George and James Young and others, as representatives of the deceased Henry Young, of the second part.

The question on which the opinion and judgment of the Court was asked was, whether the fee of the property second conveyed by the trust-disposition vested in the parties of the second part? or whether vesting was suspended so long as either Miss Mary M'Gavin or Mrs. Muir was alive?

The trustees argued;—The fee did not vest in the nephews until the term of payment, the death of the annuitants. It was clear from the terms of the deed that there could have been no vesting in James M'Gavin's children until the term of payment; and there was no ground for assuming that the testator intended a different result in the event, which happened, of Mr. M'Gavin's predeceasing the annuitants without [435] leaving issue, and the alternative branch of the destination coming into operation.*

The second parties argued;—The fee having vested in them they were entitled to have the fund divided among them, after setting apart a sufficient sum to secure the annuities.† The period of payment was not to be presumed to be the period of vesting, and here the difference of the language used in the first and second parts of the destination clearly showed the intention of the testator, that if the second part took effect by the death of James M'Gavin, which it had done, his nephews should at once be vested with a fee.‡

---

* Donaldson's Trustees *v.* Richardson, Feb. 14, 1862, 4 Macq. 314; Aberdein's Trustees *v.* Aberdein, March 19, 1870, *ante*, vol. viii. 750.

† Pretty *v.* Newbigging, March 1, 1854, 16 D. 667.

‡ Carleton *v.* Thomson, July 30, 1867, H. L., *ante*, vol. v. 151, *per* Lord Colonsay; Wellwood's Trustees *v.* Johnson, Nov. 13, 1868, *ante*, vol. vii. 109.

At advising,—

LORD PRESIDENT.—The question raised in this special case is whether the fee of a certain fund settled by the trust-deed and settlement of the late Mr. James Hendry has vested in the parties to the special case of the second part, and that depends on the construction of that portion of the settlement relating to the fund in question. But we must take the whole settlement into our consideration.

The deed conveys to trustees two different properties both situate in Glasgow. With regard to the first of these properties it is necessary to remark that is is settled in the same form and for the same purposes as the second property. The direction to the trustees is to pay over to the testator's sister the whole free rents and proceeds of the first property during her lifetime, "and upon her decease I appoint the yearly sum of £50 sterling out of the first and readiest of said rents and proceeds to be paid to her eldest son, John Young, one of my trustees, during his life and the lives of his brothers and sisters, and the free remainder of said rents and proceeds to be paid over in equal shares to and among his said brothers and sisters, namely, Henry, George, James, Janet, Isabella, and Margaret Young, during their respective lifetimes, the share of any deceasing to go to and be equally divided among the survivors, including the said John Young," and on the death of all of these the testator appoints the fee "to go and be conveyed to and in favour of the said John Young," his nephew and various other parties in succession; but all are to take only on the condition of their being "then alive,"—that is to say, alive at the time when the property is to be conveyed; and failing all these appointments, the subjects are to be sold and the proceeds "divided amongst the whole of the then next of kin to me, share and share alike,"—that is, among those who should be next of kin at the date of the sale. So that, with regard to the first property, the testator's intention was that the parties to whom the property was to be conveyed were to be ascertained only when the time for the conveyance or division arrived. Under such provisions it is needless to say that no vesting could take place till the time of the conveyance.

Here the question is whether the same result follows in the case of the second property. There is a remarkable similarity in the testator's provisions with regard to the two properties. He directs his trustees to pay out of the rents and proceeds of the second property an annuity of £150 to his sister-in-law, Mrs. M'Gavin, and after her death a free annuity of £50 to each of her daughters, Mary, Barbara, and Martha. The remainder of the said rents and proceeds was to be paid to their brother, James M'Gavin, subject to certain legacies and expenses, until the death of the annuitants, when (if at that date alive) he was to be entitled to a liferent of the whole rents and proceeds of the subjects. Then follows a provision that should Mr. M'Gavin, at the date of the decease of the last survivor of the annuitants "have a son or sons, daughter or daughters, or [436] should he at any subsequent period have a son or sons, daughter or daughters, then I direct and appoint my said trustees to convey and make over the full fee and property of the said subjects second described, under the burden always of the said James M'Gavin's own liferent," and other legacies, "to and in favour of his the said James M'Gavin's eldest or other son in succession then alive; and failing sons at that period, then to his the said James M'Gavin's eldest or other daughter in succession then alive."

Now, as regards the event contemplated here, it is plain enough that till the death of all the annuitants (not only of Mrs. M'Gavin but also of her daughters) there can be no vesting of the fee of the estate,—for the fee is contingent on the party to whom it is to be conveyed being alive at the date of the falling in of the annuities. There is also a provision that in case of Mr. M'Gavin predeceasing the annuitants the property should, at the death of the last surviving annuitant, be conveyed to Mr. M'Gavin's "eldest or other son in succession then alive," and failing sons, similarly to the eldest daughter.

In both the events above contemplated, that of Mr. M'Gavin surviving the annuitants and having issue and that of his predeceasing them leaving issue, the directions are the same as in the case of the first property conveyed. Surviving the annuitants is the condition of the party entitled taking the estate in fee.

But neither of these two events happened, for Mr. M'Gavin died unmarried in 1857, while both annuitants were in life. For this state of matters the testator has provided by a clause directing that, in the event of Mr. M'Gavin having no children, or leaving no children who should survive his mother and sisters, the trustees were to sell

the property and pay over the proceeds, with any intermediate rents, to the testator's three nephews, Henry, George, and James Young, in equal proportions, and in the event of the death of any of them before a division the share of such predeceaser to be equally divided among his issue or next of kin.

The condition of surviving the last survivor of the annuitants is not here expressed. The language of this clause is quite different from any other in the deed. The parties who are to take the free proceeds are all named, viz., Henry, George, and James Young. These are to take the fee in succession, but there is no clause as to the last survivor taking the whole. Each of these nephews is entitled to a third part. In the event of the succession opening to them the estate is to be divided into three parts, and should any of them die before then the share of such predeceaser is to go not to his children only but also to his next of kin.

Now, it is impossible to read this clause without giving the character of a simple legacy to the provision for those persons and their heirs; for the effect of giving a legacy to A B and his next of kin is simply to give to him and his heirs *in mobilibus*. There is thus no destination over, no provision to any one beyond these three persons and their heirs. We must read this provision as one giving a legacy to a man and his heirs. It therefore necessarily vests from the time when the succession opens, though the time of payment is postponed. Hence I come to the conclusion that this fee has vested in these three persons, Henry, George, and James Young. I am therefore for answering the question in the affirmative.

LORD DEAS and LORD ARDMILLAN concurred.

LORD KINLOCH.—Under the trust-settlement of the late James Hendry he dispones to trustees certain subjects, described as those conveyed in the second place, with instructions to pay certain annuities out of their proceeds, and *quoad ultra* to hold the subjects for behoof of James M'Gavin and any children he may have, according to certain prescribed rules of succession. And he further declares—"In the event of the said James M'Gavin having no children, or in the event of his own intermediate death, leaving no children alive at the death of the last survivor of his mother and sisters, as aforesaid, I direct and appoint my said trustees, on the death of such last survivor, to sell and dispose of these subjects, either by public roup or private bargain, for such price or prices as they can obtain for the same, and after deduction of all charges and expenses to pay over and [437] divide the free proceeds, with any intermediate rents, to and among my said three nephews, Henry, George, and James Young, in equal proportions; and in the event of any or all of their deaths before a division, the share of the deceaser or deceasers shall go to and be equally divided among all the children or other next of kin of such deceaser or deceasers."

James M'Gavin has died without children. Two of the annuitants still survive, and under the settlement the property is not to be sold till the death of the survivor. The question put to us is, whether the fee of the subjects, or their proceeds—they having been, in point of fact, compulsorily sold to the Glasgow Court-House Commissioners—has vested in the disponees appointed on failure of James M'Gavin without issue.

I am of opinion in the affirmative. The right being given to the parties named, and failing them "their children or other next of kin," is, I think, simply given to these parties, their heirs and successors. I can give the clause no other legal construction. Such a clause has always been held to vest a fee so soon as the deed giving it comes into operation. It is true that the period of payment has been postponed till the death of the last annuitant. But it is trite that vesting is not necessarily simultaneous with payment. There is no suspension of vesting till the death of the last surviving annuitant. The deed gives no warrant for holding that the granter intended that the right should remain unsettled till the death of the last annuitant, and should attach to the party then in existence to claim it. This occurs in regard to several other rights conferred by the deed. It might possibly have held here also had there been any substitution or destination over in the proper legal sense. It might then have reasonably been argued that vesting was suspended, in order that it might be seen who was in life at the death of the last annuitant. But the devolution on heirs and successors is not a destination over in any correct legal sense. It is just the primary destination prolonged. It is the man himself in the person of his heir. It was never heard of, so far as I am aware, that a man's right stood suspended, in order to operate a contingent fee to his heir-at-law. A disposition to a man and his heirs operates a complete present fee to

the disponee. It gives the fee to the heirs, failing the disponee, but the disponee, if himself in life, is absolute fiar.

A different question might have arisen if the persons called, failing the primary disponees, had not been their heirs-at-law, but their children simply. It is unnecessary to consider that case. Even then it would have required a careful consideration of the deed in order to see whether it was the intention of the granter to suspend vesting in the father in favour of the children, and, as it were, to run the life of the father against the lives of the children. But as things are the question does not occur.

The object in postponing payment, whatever it might be in the case of other parties whose rights have now vanished by death, is not, as I think, in the case of the parties now before the Court, to postpone vesting. It can be held only to be to secure the annuitants, by preserving the estate for their behoof in the hands of the trustees, so long as the annuities run. How this interest may be satisfied is not in the question put to us. To the question, as put, I think an affirmative answer is to be given.

This interlocutor was pronounced:—"Find and declare that the fee of the fund arising from the sale of the property second conveyed by the trust-disposition and settlement of the deceased James Hendry has vested in the persons who are parties to this case of the second part, but reserving the question whether the said parties are entitled, with or without the consent of the annuitants whose annuities are directed to be paid out of the said fund, to require the parties of the first part, as trustees, immediately to pay over or divide the said fund, after providing for or securing the said annuities, and decern; and of consent of parties appoint the expenses of both parties to be paid out of the fund."

G. & J. BINNY, W.S.—WEBSTER & WILL, S.S.C.—Agents.

No. 83. X. MACPHERSON, 438. 1 Feb. 1872. 2d Div.—Lord Jerviswoode, I.

MARIA ROBERTSON OR WEIR AND OTHERS, Pursuers.—*Watson—M'Laren.*
WILLIAM ROBERTSON, Defender.—*Scott—Dundas Grant.*

Writ—Holograph—Contract regarding heritage.—Held that an unsubscribed holograph offer regarding heritage, containing the writer's name as granter *in gremio*, delivered for the purpose of being acted on, was binding on the writer when accepted.

Contract—Locus pœnitentiæ—Writ—Holograph.—Four sisters, interested along with their brother in a testamentary succession which included heritage, proposed by letters, passing *inter se*, to give their brother £50 in full of his claim to a house, reserving his other claims under the settlement. The brother sent to his sisters an unsigned holograph proposal to the same effect, bearing "I, A B, make this proposal," &c., and requesting his sisters to sign a docquet agreeing to the proposal. The docquet was not signed by his sisters, but they delivered to him the letters which had previously passed between themselves. These letters and the holograph offer were subsequently delivered to the sisters' agent, who prepared a draft of a formal deed. The draft had this docquet attached to it—"We approve of the written proposal and draft," and this was signed by the four sisters. The brother's law-agent made some immaterial alterations upon the draft at revisal, and it was never extended. *Held* that a contract which was binding as to heritage had been concluded, and that there was no *locus pœnitentiæ*.

This was an action of declarator, constitution, and adjudication at the instance of Mrs. Isabella Robertson or M'Laren, wife of John M'Laren, Mrs. Maria Robertson or Weir, wife of James Weir (with concurrence of their husbands), and Margaret Robertson, daughters of the deceased William Robertson, sometime grocer and spirit-dealer, No. 8 Rose Street, Edinburgh, against William Robertson, only surviving son and heir of the said deceased William Robertson, and Mrs. Marion Robertson or Kilgour, spouse of Thomas Kilgour, and the said Thomas Kilgour, for their interest. The conclusions of the action were for declarator that the late Mr. Robertson had by his trust disposition disponed a property in Rose Street, Edinburgh, to his children,

and had afterwards revoked this deed by a codicil of date 15th May 1867, under which the pursuers and the defender, Mrs. Kilgour, had right to the property.

Defences were lodged for William Robertson, who averred—(Stat. 16) "The defender's sisters being aware that the defender had always acted properly towards his father, and being also aware of the serious objections to the validity of said alleged testamentary writing, it was agreed between them and the defender, in order to obviate any questions as to the right of succession to the flat No. 16 Rose Street, and the defender's rights under said disposition and settlement, that the defender, on the one hand, should give up all right to the said flat, and complete a title thereto as heir-at-law of his father, and convey the same to his said sisters, at their expense, and also be entitled to his full rights under the said disposition and settlement, unaffected by the said writing; his said sisters, on the other hand, making payment to him of the sum of £50 sterling, and renouncing all objections to his rights under said disposition and settlement, in respect of said writing." (Stat. 17) "The pursuer Mrs. Weir, in connection with such arrangement, wrote a letter in the following terms:—'Glasgow, 91 North Hanover Street, 22d December 1869.—Dear Sisters,—I agree to give my brother £50 sterling from 16 Rose Street, combined with his shares on No. 8 Rose Street, and any other claim that is contained in father's settlement,' &c. 'MARIA G. WEIR.' The pursuer Margaret Robertson also wrote a letter in almost the same terms, and to precisely the same effect. The other sisters also agreed to this arrangement. Said letters were delivered to the defender; [439] and it was then further arranged that an agreement embodying and carrying out their terms should be entered into between the defender and his sisters, but on said agreement being prepared by the pursuer's agents it was found, on its being sent for revisal to the defender's agent, that it deviated from the terms of said arrangement. It was therefore revised in accordance therewith, and returned for execution, but the pursuers have never executed the same. Action for implement of said arrangement is reserved. Said letters are herewith produced. The pursuers are called on to produce said revised agreement." (Stat. 18) "Mrs. M'Laren and her husband, who were alleged to be pursuers of this action, have disclaimed the same, and have expressed their readiness to carry out said agreement conform to letter produced."

The defender pleaded;—The pursuers having entered with the defender into the arrangement referred to in articles 16 and 17 of the defender's statement of facts, they are barred from proceeding with the present action.

A proof was allowed of articles 16, 17, and 18 of the defences.

The following writings were produced:—

1. The letter by Mrs. Weir to her sisters above quoted (No. 13 of pro.).

2. The letter by Margaret Robertson to her sisters, in similar terms (No. 12 of pro.).

3. A writing (No. 25 of pro.) holograph of William Robertson, the defender, in the following terms,—"22 Thistle Street, February 1st, 1870.—I, William Robertson, make this proposal to my sisters Isabella, Marion, Maria, and Margaret, for settling up the affairs of our late father, to which I hope you will favour me with your signatures. I agree to accept of £50 sterling from the house No. 16 Rose Street, two shares in No. 8 Rose Street, one-fifth of our late brother Walter's eight shares, and anything else I can legally claim. I also am agreeable that any of my sisters (or myself) should be allowed to sell their shares one to another should they think fit, on the understanding that one or either of the afore-mentioned parties become the purchaser. We the undersigned agree to the above." The writing bore no signature.

4. A draft agreement in terms of the above writings bearing the following docquet,—"We approve of the written proposal and draft." (Signed) "MARGARET ROBERTSON, 22d February 1870." Here followed the signatures of the other three sisters, with the dates attached.

William Robertson, the defender, deponed—"I have seen the letters Nos. 12 and 13 of process, No. 12 being a letter from my sister Margaret, and No. 13 one from my sister Maria Weir. I think they were delivered to me by Mrs. M'Laren. There was an agreement come to for a settlement of my claims upon my father's succession; and my sisters were to write me these letters, and I was to go to an agent and get the matter put into a legal form. I understood there was then a finished agreement, and that the matter only required to be put into a legal form by Mr. Fyfe. (*Q.*) Do you mean that the letters contained a finished agreement upon your acceptance being intimated? (*A.*). Yes; and I accepted them, of course. I did so, by agreeing to get

the deed written out by Mr. Fyfe in a legal form. I agreed to do that verbally. (*Q.*) After you got these documents, what did you do with the view of giving them effect? (*A.*) I authorised Mrs. M'Laren to go to Mr. Fyfe with them, and get them written out in the shape of a minute of agreement. She got them away from me for that purpose. The next proceeding was, that I got the draft minute which Mr. Fyfe had written out. I think the letters were sent to me along with the draft, for the purpose of its being seen that the draft was in terms of the letters. On getting the draft and the letters I took them to Mr. Barton, who acted as my agent. I did not myself consider the draft [440] to agree with the letters, and I asked Mr. Barton to look it over and see whether it did so or not. He did so, and then Mrs. M'Laren called on Mr. Barton and got the draft for the purpose of taking it to Mr. Fyfe. It was with my consent that she got it for that purpose. There was a clause introduced by Mr. Barton about the payment of my share of the expense of the minute. I know that that clause formed the subject of discussion and objection. Mrs. M'Laren objected to it, and it was agreed there and then to get it taken out. (Shown No. 25)—That is in my handwriting. I don't recollect the exact date when it was written, but I have no reason to doubt it was on the date it bears—1st February 1870. My reason for writing it was to get them to come to a settlement according to the terms expressed in the draft. It was written previous to my receiving the letters Nos. 12 and 13. I think I sent the paper No. 25 for them to put their names to it; and instead of putting their names to it they sent me those letters. I considered the letters to be as good for my purpose as though they had put their names to the paper No. 25. (*Q.*) Then, although the letters are dated in December, you did not receive them until the beginning of February? (*A.*) I cannot state the date when they were received. (*Q.*) But you did not mean the letter No. 25 to affect the arrangement in the other letters? (*A.*) No; I say that it was written previously to the letters. (*Q.*) Was it written previous to your making the arrangement? (*A.*) We came to a verbal arrangement, and I was to write something down on paper so that they might put their names to it. Of course I did so, and I got this returned; but instead of putting their names to it they sent me these letters; and after getting these letters I agreed to them, and got Mrs. M'Laren to have the thing made out in its proper form. Cross-examined.—The letters Nos. 12 and 13 could not have been handed to me before 1st February. (*Q.*) Then at the time when you wrote the form of letter No. 25 you had not got any writing or assents from your sisters to the terms of it? (*A.*) No; there were some more letters before these, but they were thrown aside, because the one did not agree with the other. (*Q.*) Was that form No. 25 given by you to Mrs. M'Laren to be put into the hands of a solicitor, in order to form the basis of an agreement? (*A.*) It was understood that the agreement was finished; and I understood there was no more to do with it than to go to Mr. Fyfe and get it put into a legal form. (*Q.*) But was the letter given by you to Mrs. M'Laren as the basis of an agreement to be drawn up by Mr. Fyfe? (*A.*) Yes, as the finishing of the agreement. . . . The agreement which Mr. Fyfe was employed to make out was to be according to the letters. (*Q.*) I thought you said he was to make it out according to the form of letter which you dictated? (*A.*) I wrote out this for them to put their names to; but instead of doing so, each of them gave me a letter through Mrs. M'Laren. I gave these to her to take to Mr. Fyfe at once, in order to get them drawn out in a legal form. (*Q.*) Then if Mrs. M'Laren says that the form of letter which you wrote was given by you to her, in order that Messrs. Fyfe might prepare an agreement from it, is that an erroneous statement? (*A.*) I think so. I gave it to her in order that my sisters might put their names to it, and instead of that she handed me the letters from them. (*Q.*) Did you, or did you not, give that form to your sister in order that it might be given to Mr. Fyfe? (*A.*) I did not. I gave it to her for the purpose of having my sisters' names put to it."

Mrs. M'Laren gave evidence to the same effect.

James Barton, S.S.C., the defender's agent, deponed that the clause about expenses, objected to by Mrs. M'Laren, was struck out in Mr. Robertson's presence, and that Mrs. M'Laren afterwards got the draft to take to Mr. Fyfe for execution.

[441] The Lord Ordinary pronounced these interlocutors:—

"27th July 1871.—Finds as matter of fact, with reference to the averments in articles 16, 17, and 18 of the statement of facts for the defender, William Robertson, as to which averments a proof was allowed to the defenders, that certain negotiations took place between him and his sisters, including the female pursuers, with a view to an

arrangement of all questions as to the validity of the said testamentary writing, and his right as heir-at-law of his father, the said deceased William Robertson, to the house or flat in No. 16 Rose Street, Edinburgh, which belonged to his said father, and as to his rights under the disposition and settlement of his said father; that in the course of said negotiations the pursuers, Margaret Robertson and Mrs. Weir, wrote to their sisters, and despatched to their sister Mrs. M'Laren, for the purpose of being communicated to their brother, the said William Robertson, defender, the letters referred to in article 17th of the said statement of facts, and that said letters were delivered to him by his said sister Mrs. M'Laren; that the said letters were re-delivered to her by the said William Robertson, and that thereafter, with his sanction, a draft minute of agreement was prepared by the law-agent of the pursuers, for the purpose of giving effect to the arrangement as proposed in said letters; that said draft minute of agreement as so prepared was approved of by the pursuers, Mrs. Weir and Margaret Robertson, and by their sisters, and was afterwards revised, on behalf of the defender, by his law-agent; but that the said pursuers subsequently declined to execute the said agreement, and that it has not been executed by the parties."

"8th November 1871.—Finds as matter of law—(1st) That the arrangement or agreement referred to in articles 16 and 17 of the statement of facts for the defender, William Robertson, and which was entered into between him and his sisters, including the female pursuers, Mrs. Weir and Margaret Robertson, with a view to the settlement of the questions out of which the present action has arisen, was a concluded arrangement between the said parties, and that the pursuers have failed to establish facts relevant and sufficient to entitle them to resile from said arrangement, and to refuse to execute a formal deed of agreement embodying the terms thereof: Therefore sustains the second plea in law for the defender, William Robertson; assoilzies the said defender from the conclusions of the summons, and decerns: Finds the pursuers liable to the said defender, William Robertson, in the expenses of process, of which allows an account to be lodged, and remits," &c.

The pursuers reclaimed, and argued;—No concluded agreement had been made. The written proposal by William Robertson could not bind him, as it was not signed. Until he was bound there was *locus pœnitentiæ*, and either of the parties might resile.*

Lord Justice-Clerk.—(After stating the facts)—I think there was here a concluded agreement which was expressed in writing. If the proposal contained in the letters of Margaret and Mrs. Weir on the one hand, and the proposal of the defender on 1st February on the other, are identical, I can have no doubt that, when the first were delivered to Mr. Robertson and the last was delivered to Mrs. M'Laren, the agreement was concluded, and neither party could resile. But it seems to be substantially admitted that the two proposals are identical, and if so, the agreement must stand. But it is said that the proposal of the 1st February was, although holograph, not subscribed. It is true that, as a general rule, a holograph writing unsubscribed is only to be considered as inchoate or incomplete. But if a holograph writing, especially if the granter's [442] name is contained in the body of the writing, even though unsubscribed, be delivered for the purpose of being acted on, there can be no question that it is binding. But the transaction did not stop there, for Mrs. M'Laren took the proposal to Mr. Fyfe, who prepared a draft, and this was sent to the sisters, who returned it with a docquet holograph of Margaret approving of the written proposal and draft, and signed by them all. This was transmitted to William's agent as an indication of their acceptance of William's proposal. I think after this it was too late to resile, and that the agreement was complete. The alterations on the draft by the defender's agent were entirely immaterial.

Lord Cowan.—I do not in any way dispute the legal propositions so ably argued by Mr. M'Laren, but the question is not whether these legal propositions are well founded; it is rather this,—do they apply to the circumstances of the case before us?

I agree with your Lordship that although parties have arranged a transaction among themselves, still if there is embodied in their agreement the common understanding that it is to be reduced to writing, then there is *locus pœnitentiæ* until that is done. But in this case too much stress has, I think, been laid upon the fact that the draft embodying the agreement was sent by the parties' agent who prepared it to the agent of the other party for revisal. That does not necessarily imply that the arrange-

* 1 Bell's Com. (5th ed.) 327; Goldston *v.* Young, Dec. 8, 1868, *ante*, vii. 188.

ment was incomplete before the formal completion of this draft deed. Nor was it so in this case. It is true also that the interchange of unsigned missives is insufficient, and leaves the parties perfectly at liberty to resile. But neither is that the case here. I am perfectly satisfied that there was a written agreement constituted and concluded before that draft was prepared, or which, at any rate, became such after the signature of the draft by the pursuers and their two sisters. There is a great deal of truth in the view explained by your Lordship, to the effect that independently of this signed draft there was sufficient to constitute a valid binding agreement between the parties. Mrs. M'Laren was acting for her sisters, and it was most natural that she should so act. She held in her hands her sisters' letters, she went with them to her brother, and got from him a corresponding writing under his hand. These writings effectually constitute an agreement between him and them. She then went to Mr. Fyfe and got a draft of a formal deed framed on the basis of these informal writings, and that draft was sent to the brother's agent for revisal. He made a good many alterations on the draft, but they really made little or no substantial difference. However, the matter does not stand there, for we must look at the somewhat remarkable clause of approval at the end of the draft signed by the four sisters, "We approve of the written proposal and draft." What written proposal could they allude to but that contained in the writing got from the brother? And what draft but that prepared on the basis of this proposal and their own letters? Is not that then a written approval of the proposition made in writing by the brother, even if we throw their previous letters out of sight?

But it is said that the brother's written proposal, though holograph, was not signed. In many cases that has been found fatal to a deed, as in the well known case of Dunlop.* But when holograph writings, not being of a testamentary nature, are interchanged and intended to be acted on, and are in fact acted on, they are effectually binding even though not signed by the writers, and I see no reason why they should not be held so. I am therefore of opinion that the Lord Ordinary was right in holding that there was here an effectual concluded agreement which the parties intended should be put into a formal shape by their agents; and it is important to observe that the draft which was prepared and revised is treated by the parties in their evidence as just following out their already concluded agreement.

While, however, I agree with the Lord Ordinary in this, I do not think that his interlocutor of the 27th July, containing his findings in fact, goes quite far enough. I go upon the whole case, not upon the limited view taken by him.

LORD BENHOLME.—This case, for some time at an early stage of the proceed-[443]-ings presented an appearance of obscurity which was happily removed when we came to a careful consideration of the facts. One cause of this difficulty and obscurity was the mention of that draft prepared by Mr. Fyfe; because in the ordinary case a draft is but the commencement of a written agreement, and until approved of by both parties and authenticated it does not constitute a completed agreement. Until we ascertained, therefore, what was the true character of this draft it was impossible to say how far it might or might not constitute a completed agreement.

Another cause of obscurity was that this draft was followed by a revisal, and certainly the alterations embraced a considerable extent of the draft deed. And it was said that important changes were introduced. Altogether a sort of ambiguous character was thus given to the proceedings. But on careful consideration I do not think that this was a proper draft which required approval to constitute the agreement binding, nor do I think that the party to whom it was sent had any business to cut and carve on it as he did. For I agree with your Lordships that the letters sent by the sisters, and the holograph proposal made by the brother, having been welded together by Mr. Fyfe and approved of by the parties, there was from that point a written concluded agreement.

But I think this view is made stronger by the fact that the draft, which was prepared upon the basis of the sisters' letters and the brother's proposal, which was his part of the agreement, was distinctly approved of by the ladies in the signed minute appended to the end of it. The ladies, however, at least two of them, now deny the conclusiveness of the agreement, because they say their brother was not bound by any signed deed, and consequently they could not be bound either. If the facts justified this statement the law would be perfectly good. But they do not. It was in con-

* Dunlop v. Dunlop, June 11, 1839, 1 D. 912.

sequence of a very distinct holograph offer made by him that his sisters' letters were handed to him. That holograph offer, though not signed, was quite sufficient to bind him and form his part of the agreement.

In short, in this case it is perfectly clear that the Lord Ordinary was right in holding that there was a concluded agreement. As to the revisal and alteration of the draft, it is true that Mr. Robertson's agent took in hand and proposed some changes, but these were in substance only verbal differences, and might all have been repudiated by the parties, and in fact were so, for they fell back upon the original draft, and did not lose much by doing so, for the alterations cannot be said to have effected any improvement. If then, we hold that an agreement was concluded, we may safely disregard this question of revisal. I think, therefore, that we should adhere to the Lord Ordinary's interlocutor.

LORD NEAVES.—This case is one of importance, and it should be clearly understood that in our decision we do not depart from the general principles applicable to contract. The succession in question is not a large one, but the same principles apply to it as to the largest. I had at first some doubt as to there being here a concluded agreement between the parties, and the more so as the document upon which I chiefly go was not properly libelled or founded on at the outset,—the holograph writing, namely, of William Robertson. Without that document there is nothing under William Robertson's hand left; he was entirely free from any written obligation. But we now have the case put on a proper footing. That document is founded on and establishes the case, for I think that the rules of law as to the constitution of contracts are thereby complied with. This action is raised at the instance of Mrs. Weir and Margaret Robertson, two of the sisters of William Robertson, the two others acceding to the agreement and repudiating the action. I think the latter were right, for I consider that the whole parties were committed to the action by adequate writing. Mrs. M'Laren acted as a plenipotentiary or medium of communication among them all, the object being to bring them to a mutual understanding. She proceeded in this way:—She got from her sisters letters stating the terms they were ready to agree to. If these letters had merely passed among the parties themselves no binding effect would have followed. But Mrs. M'Laren was empowered to make a certain use of them, namely, to hand them to her brother as in answer to a proposal which it was arranged he was to make. They were in fact written for this purpose; and when she produced and delivered them to her brother she did so with the **[444]** consent and approbation of all concerned. She then took her brother's offer, and receiving back from him the letters from her sisters, which were its counterpart, handed them all to Mr. Fyfe as a concluded agreement which he was to put into a formal shape. That is, I think, sufficient in law to make a completed agreement. I can see no reason that should prevent a writing not of a testamentary nature, holograph though not signed, from being effectually binding and making a concluded agreement. It is to be regretted that Mr. Robertson's agent, when he got the draft from Mr. Fyfe, attempted any regular revisal of it, as this has introduced much of the doubt into the case. But if there is an agreement validly concluded, as I think there was here, the mere attempt to go through a formal adjustment of the deed embodying it does not in my opinion prevent its being final.

THE COURT pronounced this interlocutor:—"Recall the interlocutor complained of: Find that there was a concluded agreement between the pursuers, and the defender, William Robertson, to the effect that the pursuers and their sisters should take the subjects included in the summons under the codicil libelled, on the condition that they should pay to the defender the sum of £50, and that the defender should retain all his other rights under his father's will and in respect of his brother Walter's death: Find that the pursuers, along with their sisters and the said defender, are bound to implement this agreement: *Quoad ultra* continue the cause: Find the defender entitled to expenses, and remit to the Auditor to tax the same and to report, and modify the expenses in the Outer-House to two-thirds of the taxed amount."

FYFE, MILLER, & FYFE, S.S.C.—JAMES BARTON, S.S.C.—Agents.

[*Principle applied*, Gavine's Tr. *v.* Lee, 1883, 10 R. 448.]

No. 84. X. MACPHERSON, 444. 2 Feb. 1872. High Court of Justiciary.—Justiciary Clerk.

ARCHIBALD WILSON, Complainer.—*Watson—Lang.*
JAMES ALSTON DYKES, Respondent.—*Sol.-Gen. Clark—Balfour.*

Property—Occupatio—Wild Animals—Summary Conviction.—A conviction under a summary complaint, charging the theft from a public road of a pheasant, the property or in the lawful possession of A B, but not specifying how it was his property or in his possession, *suspended*, the Court holding that, where theft of an animal *feræ naturæ* is charged, the complaint must specify how the animal became property.

This was a suspension of a conviction obtained before one of the Sheriff-substitutes of Lanarkshire (Spens) at Hamilton, on 12th December 1871, by which Archibald Wilson, a miner, was sentenced to twenty-four hours' imprisonment for the alleged theft of a pheasant, which had been picked up on the high road between Bothwell and Hamilton by Wilson, as he was returning from his work.

The complaint against Wilson set forth that he had been guilty of the crime of theft on the date mentioned, in so far that he had, on the turnpike road between Hamilton and Bothwell, wickedly and feloniously stolen, and theftuously taken away, a dead pheasant, or a pheasant totally disabled by a shot, the same being the property or in the lawful possession of His Grace the Duke of Hamilton and Brandon. The Sheriff-substitute, in respect of the judicial confession of the accused, found him guilty, and sentenced him to be imprisoned for twenty-four hours. The conviction took place on the afternoon of the day on which the offence was committed, and it was alleged in the suspender's statement of facts that he at that diet applied for a continuation in order that he might have the benefit of legal advice, but was refused.

Argued for the suspender;—In charging the theft of an animal which in its normal state was incapable of being stolen, the prosecutor was bound to state how it had become an article of property. The theft here charged [445] was alternative, either of a pheasant which had been shot dead, or of one which had only been disabled by a shot. It was not sufficient to have merely killed a bird to make it the killer's property, to such an extent that the picking it up by another was theft. The possession must have been complete, or, at all events, the pursuit must have been continuous. If, again, the pheasant was only disabled, it was a bird naturally incapable of being stolen at large and on the public highway, so that one taking it was neither guilty of theft nor of trespass. More particularly, it was not stated how it became the property of the Duke of Hamilton. It was not even said that it was shot by him, and a bird on a public road passing through his property was certainly not his property.*

Argued for the respondent;—There were two things which could make a man innocent of such a charge. One was, that the property was in such a situation that it could be made the complainer's own by finding; but that was negatived by the allegation in the complaint, that it belonged to the Duke of Hamilton. The second defence which would avail him was, that this pheasant was the Duke of Hamilton's property, and was in such a situation that a man might innocently believe it to be his own; but the allegations showed that this was not the complainer's belief. The prosecutor undertook to prove that at the time Wilson took the pheasant he stole it. It is set forth in the libel that he wickedly and feloniously stole the pheasant, and that he theftuously away took it; that was enough, because by this statement they negatived the idea that the complainer found the pheasant under such circumstances that he would acquire property by finding it. The Court should not criticise a summary complaint as they would do an indictment in the High Court of Justiciary.†

LORD JUSTICE-CLERK.—The point involved in this suspension is of importance, and of some difficulty; but I have formed the opinion that the complaint is imperfect, and that the conviction must be set aside. The complaint fails not so much for want of abstract relevancy as from want of sufficient specification.

---

* Huie, Sept. 10, 1842, 1 Brown, 383; Justinian's In. ii. 1, 12.

† Douglas, Jan. 25, 1865, 5 Irvine, 55; Spalding, April 25, 1854, 1 Irv. 463.

It is a charge at common law of stealing an article which from its nature is not, generally, private property; and therefore not generally the subject of theft, viz., a pheasant—a wild animal, said in this complaint to have been either dead or disabled. It is further said that this animal was stolen on the high-road; which is not in the general case a receptacle for private property. These peculiarities render it necessary to attend with care to the description of the *species facti* libelled.

It is said, and quite accurately, that in charging the minor offences of which the Sheriff can take cognisance under the forms of the Summary Procedure Act, the same amount of detail is not required as would be necessary to support an indictment for the more serious offences prosecuted in this Court. But under the form adopted there can be no review on the facts; and when a case is presented of the unusual nature disclosed by this complaint it is right to see that it is accurately framed, so as to amount in substance to a sufficient charge to bring it within the category of theft. Offences against the game laws stand quite clear of the common law crime of theft. Our legislation on that subject is sufficiently stringent, but it is in every view expedient that the broad boundary line between these offences and theft at common law should be kept clear and distinct.

That a wild animal, living or dead, may become private property, and may therefore be the subject of the crime of theft, is certain. "*Fit occupantis*," is the brocard of the common law, and therefore an animal *ferœ naturæ* may be appropriated. But without specific appropriation a wild animal, although protected and preserved on private land, is not the property of any one. The question is whether this complaint, in its description of the *species facti*, alleges a case which is beyond the general rule, and within the exception.

The only facts alleged are, first, that the pheasant was dead or disabled; [446] secondly, that it was on the high-road; and thirdly, that the accused took it. But the legal inference from these facts would be that the pheasant was the property of the accused. It is thought that this result is excluded by the use of the words "wickedly and feloniously," as applied to the act of taking, and by the statement that the pheasant was the property or in the lawful possession of the Duke of Hamilton. Both these elements of allegation, however, are legal results of facts which are not alleged.

As regards the use of the terms "wickedly and feloniously," I may remark that when general words implying criminal *animus* or intention are used in a libel to characterise acts in themselves indifferent or innocent, something must be stated beyond the general words to indicate the *species facti* which rendered the act criminal. If the particular act libelled be one to which the general words may reasonably apply, no further specification may be necessary. If this complaint had charged the accused with stealing a pheasant from a poulterer's shop, it would not have been necessary to have libelled the facts in detail. But if, as here, the legal result of the specific facts alleged is to leave the act innocent, the general words will not be sufficient as an allegation of crime. In this case what the accused is said to have done might be either innocent or criminal according as the animal was or was not previously appropriated, which is thus the essence of the charge.

Neither, in my opinion, does the prosecutor make his charge sufficient by simply saying that the pheasant was the property of the Duke of Hamilton, for his libel raises a contrary inference, which required to be excluded by specification. If the prosecutor meant to say that before this wild animal was appropriated by the accused it had been previously appropriated by the Duke of Hamilton the *species facti* should have been disclosed.

This is all the stronger from the exceptional character of the *locus* libelled. This pheasant was on the high-road—presumably not in the possession of any one. It is not meant to be inferred that the Duke of Hamilton was on the high-road. The prosecutor was bound to have stated how this dead pheasant, lying on a public thoroughfare, was in such a state of ostensible possession as private property as to raise the presumption of felonious intent. The presumption he does raise is the reverse, as far as the proper allegation of fact is concerned. If the libel had set out, what probably was the kind of fact intended, that the Duke of Hamilton, or some one on his behalf, wounded the pheasant, which fell, dead or disabled, on the high-road, and was there taken by the accused, the prosecutor would have raised a question of relevancy on the face of his complaint. I think he was bound to have done so. Whether this allega-

tion would have supported a charge of theft we are not called on to decide. It would have raised a narrow and difficult question. All I shall say is, that it is not necessarily theft to appropriate, in a place where the taker has a right to be, a wild animal, although dead or disabled, because it has been killed or disabled by another. But this complaint discloses no fact amounting to crime, and I think we must suspend the sentence.

LORD COWAN.—This is a complaint brought in terms of the Summary Procedure Act, and it charges the suspender with the crime of theft. The very fact of the proceedings being taken under the provisions of that Act renders it the more necessary that we should see that the crime is thoroughly and relevantly set forth. It is only upon the relevancy that we have any power of review; we cannot entertain any question as to what was done by the Sheriff upon the evidence. What we have to consider in the case is, whether the crime of theft is sufficiently stated. Now, while I feel great indulgence is due to procurators-fiscal and other prosecutors in inferior Courts in libelling summary cases, and would not interfere on account of a mere want of due form, or because of defect in expression, yet where a crime such as theft is charged care must be taken that there is a relevant charge set forth in the libel, seeing that, if convicted, there is fixed on the person charged the character of thief, and the effects and stigma of previous conviction.

I concur in the views stated generally by your Lordship, but I am inclined to go further. I think that there is not merely a want of specification in the com-[447]-plaint, but that there is not a proper or relevant charge of theft at all, and that the suspender should not have been called on to plead to the charge contained in it. Stripped of the adverbs feloniously and theftuously, what is charged is the away taking from the public road of a dead pheasant, the property of an individual named. I think that is not a good charge of theft. In the first place, we are dealing with an animal which does not belong to any one, and the taking of it does not necessarily imply knowledge that it was the property of another. It was necessary, therefore, in order to be relevant, that the complaint should bring home guilty knowledge to the man's mind—that at the time when he took the pheasant he knew that it was the property of another. In the second place, the complaint assumes that what is naturally the property of no one has in some unspecified manner become the property of some one. It does not in any way appear on the face of it that the suspender knew that the pheasant was the property of any one. It does not appear how or in what manner it came to be property at all.

It was contended that the words "feloniously and theftuously" make the charge relevant, although it was not so otherwise. But mere general phraseology descriptive of the act done will not compensate for the want of such statement of facts as is essential to make the charge relevant. In a recent case it was held by the Lord Justice-Clerk (Inglis), that as "sending threatening letters was not in itself a *nomen juris*, specifying any crime, and did not of itself amount to a criminal act, the adjection of these words 'wicked and feloniously' did not rear it into a crime"; and more recently a similar judgment was pronounced on circuit by me, concurred in by Lord Ardmillan, in the case of Peter Milne and John Barry, Dundee, April 8 and 9, 1868, Couper, i. p. 28. There the charge was "the wickedly and feloniously administering, or causing to be administered to, or taken by any of the lieges, jalap or other purgative or other noxious substance or thing, whereby they are put in danger of their lives, or are injuriously affected in their health or persons"; and there it was similarly contended by the advocate-depute that the alleged defect in the libel was cured by the words wickedly and feloniously. But the act there libelled, apart from these words, might, it was clear, have been innocently done, and we were therefore of opinion that the addition of these words did not make it criminal. If the mere general words of style, then, be taken out of the present complaint, we have, as already noticed, remaining the bare allegation that a dead pheasant was taken upon the public road. I cannot but hold that it was necessary, in order to render this complaint relevant, that some account should have been given as to how the pheasant became property, and also a statement that the panel took it knowing it to be the property of another. Such being the peculiar nature of the alleged criminal act here libelled, the complaint ought not to have been held by the Sheriff as relevantly or sufficiently setting forth a crime, and the present suspender, the person charged, ought not to have been called on to plead to it in its present form.

It was very properly not contended on behalf of the respondent, that the accused had, by pleading guilty to the complaint, barred himself from objecting now to the relevancy. The peculiarity of the circumstances would have formed a sufficient reply to any such contention. It appears that the suspender was taken hold of by a police-officer immediately after picking up the pheasant, and that he was tried within an hour or two of the occurrence; that this complaint was read over to him, and that these hurried proceedings were concluded by his pleading guilty without having the benefit of legal advice, to which he was undoubtedly entitled. I cannot, in these circumstances, hold that he is foreclosed from now contending that the matter in the complaint did not amount to a crime.

LORD NEAVES.—I concur with your Lordships in thinking that this suspension should be sustained, and I should not think it necessary to add anything to what you have said were it not that the case is one of novelty and importance. The ground of my opinion is briefly this,—that there is a want of reasonable specification of the offence charged. A case of this kind does not fall under the same category as ordinary violations of the right of property. In ordinary cases of theft the things said to have been stolen are notoriously the property of some one, either of a private individual or of the sovereign. In libelling such cases [448] the prosecutor commences by referring to an article capable of being appropriated, and states that it has been taken by the panel theftuously, thus excluding the idea that it was his own property, and then the charge proceeds to state whose property it was. This is quite sufficient to meet all the exigencies of an ordinary case. The *modus* is sufficiently described by the term "theftuously," and there is no necessity for stating how the proprietor acquired the thing stolen from him, as it is necessarily the property of some one. But the case is materially different when we have to deal with subjects which are not in the ordinary case the property of any one, not even of the sovereign. The question then comes to be, whether we must not in such cases give some further specification to show how that which is not necessarily or naturally property at all became in some mode recognised by law the property of some one. Now, this criminal libel is curiously framed. It sets forth that the panel is guilty of the crime of theft, "in so far as, on the said 12th December last, he did, on the turnpike road between Hamilton and Bothwell, steal a dead pheasant, or a pheasant totally disabled by a shot, the property or in the lawful possession of His Grace the Duke of Hamilton." In this statement there are two points on which alternative statements are made. In the first place, it is stated that the pheasant was either dead or totally disabled. The statement is not relevant, unless each alternative is relevant; and as a chain can never be stronger than its weakest link, let us look at the weaker of the alternatives. If we sustain this complaint we must hold it a good charge of theft to state that a man took on the public road a living pheasant, disabled by a shot, but not necessarily at the point of death. The second alternative statement is, that the pheasant was either the property or in the lawful possession of the Duke of Hamilton. It may not have been his property, but merely in his lawful possession. If, then, it was not his property, it may not have been the property of any one, and thus an essential element of the crime of theft would be wanting. I cannot but think that when the subject of a charge of theft is an animal *ferœ naturœ* the libel ought to show that it was taken out of that category and became the property of some one. However much protected by the game-laws, by preventing trespasses and otherwise, a pheasant is in the same position as a sparrow or other wild bird when viewed as the subject of property. A sparrow may be tamed and become the property of a lady, but I should hesitate before sustaining the relevancy of a libel in which the panel was stated to have theftuously away taken a sparrow from a hedgerow, even though it was said to be the property or in the lawful possession of Lady Lesbia. I am not aware of any instance of animals *ferœ naturœ* having been made the subject of a charge of theft, except perhaps one case in which the panel had taken herring from nets set by fishermen. That was a nice or perhaps a narrow case, but there was a reasonable and careful specification of the mode in which the herring had become the fishermen's property, by having been taken and inclosed in their nets. In the present case there is no specification at all, and from the alternative mode in which the libel is framed the pheasant may not have been the property of any one. It is not necessary to consider what circumstances, if stated, might be sufficient to show that the animal had become the property of some one from whom it could be stolen. But I may say that if an animal was said to have been domesticated, or to have been taken from a game bag or from a

poulterer's shop, that would probably be a sufficient indication of its history, and I should think it unreasonable to require the prosecutor to trace the progress of titles by which it was transferred to the poulterer's or sportsman's possession.

On the whole matter I have no hesitation in saying that the ordinary principles of law and plain rules of justice require us to sustain these reasons of suspension.

This interlocutor was pronounced:—"In respect that the complaint in the inferior Court contains no sufficient charge of theft, pass the bill: Suspend the conviction and sentence complained of *simpliciter*: Find the suspender entitled to expenses, of which allow an account to be given in, and remit the same, when lodged, to the clerk of Court to tax and report."

MUIR & FLEMING, S.S.C.—MORTON, NEILSON, & SMART, W.S.—Agents.

No. 85. X. MACPHERSON, 449. 3 Feb. 1872. 1st Div.—B.

SIR WILLIAM STUART FORBES, Pursuer.—*Fraser.*
THE RIGHT HONOURABLE C. H. ROLLE HEPBURN STUART FORBES TREFUSIS, BARON CLINTON AND SAYE, Compearer.—*Sol.-Gen. Clark—Lee.*

Process—Transference—31 & 32 *Vict. c.* 100, *secs.* 96, 98.—After decree had been pronounced in an action assoilzieing the defender, with expenses, but before the amount had been decerned for, the defender died. *Held* that the pursuer, who intended to appeal to the House of Lords, was entitled to have the cause transferred in the Court of Session against the defender's heir.

This action was raised in 1867 by Sir William Forbes of Pitsligo, Bart., against Baroness Clinton and Saye, and her husband, Baron Clinton, concluding for reduction of Lady Clinton's title to the entailed estate of Fettercairn, as being inconsistent with the destination in the entail.

On 6th June 1868 the First Division pronounced an interlocutor (*ante*, vol. vi. p. 900) assoilzieing the defenders, Lady Clinton and her husband, from the conclusions of the action raised, and finding them entitled to expenses. No further step was taken in the action, and the amount of expenses was not decerned for.

Lady Clinton died, and was succeeded in the entailed estates of Fettercairn, the subject of the action, by her son, the Honourable Charles Trefusis.

The pursuer lodged a minute, under sections 96 and 98 of the Court of Session Act, 1868, craving a transference of the cause against the said Honourable Charles Trefusis, and against his father, Lord Clinton, as his administrator-in-law.

Lord Clinton appeared by counsel, and objected to the granting of the warrant for service of the summons. It was argued for him that the merits of the cause were decided by the interlocutor of the 6th June 1868, and that he for himself and as administrator-in-law for his wife was the only person who had any interest to proceed further in the action, for the purpose of getting decree for expenses. The person against whom transference was sought had no interest in that question, and could not properly be made a party to the action in this Court, where it was the only matter remaining to be disposed of. A transference was competent only while the action was still in dependence. But this action had been exhausted by the interlocutor of 11th June 1868. No doubt, in one sense, a cause was a depending cause so long as decree had not been extracted, for the process was still in the custody of the clerks of Court. But in regard to a transference a cause was not in dependence unless the party seeking the transference was in a position to do something in that cause. This could be seen from the form of the old summons of transference, where the cause was asked to be transferred "to the effect the pursuer may have such action and execution against the said C as he would have had against his said deceased father in his lifetime, or as he might have against him were he in life." *

It was argued for the pursuer;—No decree for expenses had been pronounced, the process was not at an end, and it could not be extracted. In these circumstances the

* Jur. Styles, iii. 261; Stair iv. 34, 1; Ersk. iv. 1, 60.

pursuer was entitled, as a matter of course, to have it transferred against the heir of the defender who had died.* The pursuer had an interest in ascertaining the amount of the defender's expenses, and especially where he was about to appeal to the House of [450] Lords. A transference, though competent in the House of Lords, was attended with much greater expense than in this Court.

At advising,—

LORD DEAS.—This was an action of reduction and declarator at the instance of Sir William Forbes against Lady Clinton, and her husband for his interest, the object being to reduce the titles made up by Lady Clinton under a certain entail. It is not necessary to follow the course of the cause. It is sufficient to say that it ended in a judgment of the Inner-House assoilzieing the defenders, and finding them entitled to expenses, which were remitted to the Auditor to tax and report in the usual way. Before this was done, however, Lady Clinton died, leaving a son, who has now the substantial interest in the property which was at stake in the action. The question now is, whether the process is in such a state that it can be transferred against her son. I am humbly of opinion that the cause is a depending cause. There is more still to be done in it, and it is not material that one party only has an apparent interest to move in it. I am not able to doubt that the pursuer is entitled to insist on obtaining the Auditor's report upon the defender's account of expenses, and bringing the case to an end. The pursuer has a legitimate interest to know how much these expenses are, and to object to have such an account of expenses kept hanging over his head for an indefinite time. The whole question we have to do with here is, whether there is a depending cause or not. I think that, independently of the question of appeal to the House of Lords, either party is entitled to move in it. There may be, and no doubt is, a *bona fide* intention to appeal; and though it may be quite possible to get the case transferred in the House of Lords for that purpose, yet that is no reason why it should not be done here if the cause is still depending before us, and it certainly will be a saving of expense to the parties.

LORD ARDMILLAN concurred.

LORD KINLOCH.—I am of opinion that the objections to the proposed transference should be repelled. The action is very clearly a depending action. A finding of expenses has been pronounced, but the Auditor's report has not been returned, and in consequence no decree for expenses has been pronounced, and the process is not extractable. In this position of things Lady Clinton has died. I consider that, as a matter of course, the opposite party is entitled to have the action transferred against her heir in the estate now in question. I think the Court cannot inquire into the probable or possible judgments which may be afterwards pronounced. It would be, as I consider, most perilous to make the competency of the transference turn on a speculation as to these. The transference, I think, must follow on the fact of the dependence of the process. What may afterwards happen cannot anticipatively affect its competency.

LORD PRESIDENT.—I have had some difficulty in deciding this question, arising from a technical objection, which presented itself with some force to my mind. But, on the whole, as your Lordships are agreed, I am not disposed to dissent.

I think it right, however, to explain the difficulty which I did feel. So far as the merits are concerned the case has been exhausted in this Court. The question of expenses also has been determined up to a certain point,—that is to say, the original defender has been found entitled to them, and the pursuer liable in them. The effect of that is, I think to give Lord Clinton a right, and the only right, to ask decree for them when taxed against the pursuer or his representatives. The person against whom it is sought to transfer this cause has no interest whatever in the expenses, and no interest in any discussion that could now take place in this Court. The technical objection thus arises, that though he is a proper party in any appeal case that may be taken to the House of Lords, and must be made respondent there, he is not and cannot be made a proper party so far as any interest goes to the case while it remains in this Court [451]. While I feel the force of this difficulty, I am not, however, disposed to differ from your Lordships.

THE COURT granted warrant to serve the summons in terms of section 96 of the Court of Session Act, 1868, &c.

ADAM & SANG, W.S.—MACKENZIE & KERMACK, W.S.—Agents.

---

* Shand's Practice, 540; Moore's Notes on Stair, 388; Ivory's Forms of Process, ii. 27.

No. 86. X. MACPHERSON, 451. 3 Feb. 1872. 2d Div.—Lord Gifford, R.

HON. ARTHUR DRUMMOND, Pursuer.—*Sol.-Gen. Clark—Keir.*
HON. CHARLES ROWLEY HAY, AND OTHERS, Defenders.—*Adam—Rutherfurd.*

Entail—Prohibitory, Irritant, and Resolutive Clauses—Facts and Deeds.—A deed of entail, after a prohibitory clause declaring it to be unlawful for the heirs of entail to alter the order of succession, to alienate, or to contract debt, "or do any facts or deeds" whereby the lands should be adjudged, or the tailzie and the order of succession frustrated, proceeded thus—"And in case any of the heirs of taillie and provision foresaid shall contravene the premises, then and in that case not only shall all such facts and deeds be null and void in themselves," &c.

Held that the words "all such facts and deeds" in the latter clause were applicable to any contravention of the premises, and covered all the cardinal prohibitions.

In this action the Hon. Arthur Drummond, of Cromlix and Innerpeffray, sought to have it declared that a deed of entail of the lands of Innerpeffray and others, dated 18th August 1773, and recorded in the Register of Entails 9th and 29th March 1774, executed by the deceased Robert Drummond, Lord Archbishop of York, was invalid as regarded the prohibitions, and that the pursuer held the lands free from the fetters of the entail.

The prohibitory, irritant, and resolutive clauses were as follows:—"And sicklike it is hereby provided and declared that it shall not be lawful to any of the heirs of taillie and provision foresaid to break, infringe, or alter this nomination, and the order and course of succession before specified, nor to sell nor dispone the lands and others above rehearsed, or any part thereof, or any annualrents furth of the same, or to sett tacks thereof for longer space than the lifetime of the granters, or to contract debts or sums of money, or grant any bonds or other obligements, or do any facts or deeds whereby the same, or any part thereof, may be apprised, adjudged, or any ways evicted, or the said taillie and the order and course of succession frustrated or prejudged; and in case any of the heirs of taillie and provision foresaid shall contravene the premises, then and in that case not only shall all such facts and deeds be null and void in themselves, in so far as the same, or any of them, may any ways affect or burden the lands and estate before written, or prejudge or hurt the heirs of provision foresaid; but also the person or persons so contravening shall *ipso facto* amit, lose, and forfeit all right, title, and interest which they had in virtue hereof to the said lands and estate, and the same shall become void and extinct, and the said lands and estate shall fall, accresce, and belong to the next heir of taillie hereby appointed to succeed, in the same manner as if the contravener was naturally dead; and it shall be lawful to the next heir of provision having right to succeed to the lands and estate before mentioned, after the decease of the contravener, to obtain themselves served and retoured heirs of provision to the foresaid contraveners, with this declaration and provision to be contained in their services and retours, that they, their lands and estate above expressed, shall be free and liberate of the foresaid debts, bonds, and obligements, and other facts and deeds above written, and their serving themselves heirs of provision to the said contraveners shall not make them liable to the same debts, or to perform these bonds and obligements or other facts and deeds above mentioned; or otherways, [452] it shall be in the option of the foresaid heirs of provision who shall have right to succeed after the decease of the contraveners, to obtain the lands and estate before written adjudged to pertain to them through and by reason of contravening the provision and condition before mentioned; and likeways it is hereby provided and declared that it shall not be lawful to any of the heirs of taillie and provision foresaid to suffer the lands and estate before written, or any part thereof, to be evicted from them by apprising, adjudication, or otherways; and if the same, or any part thereof, shall happen to be apprised or adjudged, and the person from whom the same shall happen to be apprised or adjudged shall be negligent in the not redeeming the same *debito tempore*, then and in that case, and two years before the legal reversion shall expire, it shall be lawful to the next heir of taillie having right to succeed for the time to interrupt the expiring of all such legal reversions for their own use and behoof, and this without prejudice of the former clause and condition immediately before written."

The pursuer pleaded ;—(1) According to the sound construction of the foresaid deed of entail the irritant and resolutive clauses are not directed against or applicable to the prohibitions against altering the order of succession, or selling or disponing the lands, and these prohibitions are therefore invalid and ineffectual.

The defenders pleaded ;—The deed of entail in question constitutes a valid and effectual entail of the lands embraced therein, in respect that the prohibitory clauses thereof are in themselves complete, and are duly fenced by complete and effectual irritant and resolutive clauses.

The Lord Ordinary (Gifford) pronounced this interlocutor :—"Repels the objections stated by the pursuer to the validity of the deed of entail or bond of tailzie libelled, assoilzies the defender from the whole conclusions of the action, and decerns : Finds the defender entitled to expenses," &c. *

---

* "NOTE.—The ground of the present action is an alleged defect in the irritant clause of the entail. It was admitted, and indeed is pretty obvious, that the prohibitory clause is complete and sufficient, the heirs of tailzie being in apt enough terms prohibited, first, from altering the order of succession, second, from selling or disponing the lands, and third, from contracting debt.

"But the pursuer maintains that the irritant and resolutive clauses of the entail are so expressed that they only apply to the third of these prohibitions, that against contracting debt, and that, according to the strict construction of the words, they are not directed against, and are not applicable to the two first prohibitions. Of course, if this be so, then under the statute 11 & 12 Vict. cap. 36, the entail would be invalid as to all its prohibitions.

"The Lord Ordinary had the benefit of a very subtle and able argument analysing the clauses in question ; but after every consideration, and admitting that he is bound to apply the very strictest construction to such clauses, he has found himself unable to give effect to the contention of the pursuer.

"The turning-point of the pursuer's argument was the alleged limited meaning which he contended the words 'facts and deeds' must receive both in the prohibitory and in the irritant and resolutive clauses. The argument started by endeavouring to shew that these words in the prohibitory clause only applied to the contraction of debt, and then it was contended that the same limited meaning must be given to the same words in the irritant and resolutive clauses, and consequently that alterations of the order of succession and sales are not irritated, nor the right of the contravener of these two prohibitions effectually resolved.

"Without disputing that there is force as well as ingenuity in the pursuer's argument, the Lord Ordinary thinks it is not well founded.

"In the first place, it is not by any means clear that the words 'facts and deeds' in the prohibitory clause are to be limited to debts. The words are not debts and deeds, which in many of the reported cases have received the narrow [453] interpretation ; and although the words facts and deeds in the prohibitory clause occur very awkwardly after the reference to debts, bonds, and other obligements, they are not necessarily coupled therewith. And then the effect of these 'facts and deeds' is not limited to apprising and adjudication, although these are mentioned first, but all 'facts and deeds' are prohibited whereby the lands or any part thereof may be first adjudged, second, evicted, third, whereby the tailzie may be frustrated, or fourth, whereby the order of succession may be prejudged,—that is, prejudiced. It is thought that these words must necessarily refer to more than the mere contraction of debt, and indeed the natural reading is that they apply to the whole three prohibitions, although the order of these prohibitions is very unskilfully inverted in describing the effect of the facts and deeds prohibited.

"But even supposing that the words 'facts and deeds' in the prohibitory clause have a somewhat limited meaning, the Lord Ordinary does not think that, even according to the strictest rules of interpretation, he is bound to give the same limited meaning to these words in the irritant and resolutive clause. For in the irritant and resolutive clause there is no reference to the facts and deeds as already described. The expression is not that the said 'facts and deeds' shall be null and void, or that the 'facts and deeds' foresaid or above mentioned shall be null and void, or any similar expression. On the contrary, the words 'facts and deeds' occur in a wider connection. The clause runs thus, and the whole of it must be carefully looked to : 'And in case

[453] The pursuer reclaimed.

He argued;—"Facts and deeds," in the prohibitory clause, are of [454] limited import, referring only to deeds such as the contraction of debt on account of which the lands could be adjudged.* "Such facts and deeds" in the irritant clause refer only to the facts and deeds mentioned in the prohibitory. The entail is therefore defective in the prohibitions against altering the succession, or selling or disponing the lands.

The defenders argued;—"Facts and deeds" in the prohibitory clause were not limited in their import, but even assuming that they had a limited meaning, the words "such facts and deeds" in the irritant clause referred to the opening words of the clause, "contravene the premises," and were, therefore, applicable to all the prohibitions.

At advising,—

LORD COWAN.—That this deed of tailzie contains an effectual prohibitory clause is not disputed. The heirs of tailzie are prohibited to alter the order of succession, to sell the lands or any part thereof, and to contract debt—the three cardinal prohibitions required to render every such deed effectual; but the phraseology of the clause requires

---

any of the heirs of taillie and provision foresaid shall contravene the premises, then and in that case not only shall all such facts and deeds be null and void in themselves,' &c. Now, the Lord Ordinary thinks that the true question here is, what is the antecedent to the relative expression 'such'? The answer to this is, that the antecedent is 'contravene the premises.' The facts and deeds which are to be null are the facts and deeds which 'contravene the premises.' This is the only meaning which can be fairly given to the word 'such.' It is as if the clause had run, 'if any heir,' &c., 'shall do any fact or deed contravening the premises, then such fact or deed shall be null.' The Lord Ordinary cannot read the word 'such' in any other way.

"If this be so, it was admitted in argument that the words 'contravene the premises' apply not to the last prohibition only, but to all the prohibitions in the prohibitory clause, and thus the conclusion is necessarily reached that the irritant and resolutive clause is as broad and comprehensive as the prohibitory clause, and that therefore the entail is not defective in either clause under the statutes.

"The reported case which comes nearest the present is that regarding the Craigmillar entail—Gilmour *v.* Gordon, 24th March 1853, 15 D. 587. In this case there was almost the same specialty as here,—with this difference, that the words 'facts and deeds' occurred several times in the prohibitory clause; but the judgment of the Court did not go upon this specialty, but upon the rule of construction that the antecedent to the relative 'such' was not the last member of the prohibitory clause, but the introductory words of the irritant clause, 'act or do in the contrary.' The present case is quite parallel, the irritant clause being introduced by the words 'contravene the premises.'

"The case chiefly relied on by the pursuer was the case of the Overton entail, Lang *v.* Lang, 23d Nov. 1838, 1 D. 98, H. L., M'Lean and Robinson, 871; but that was a very special case, and in the judgment in Gilmour *v.* Gordon it was expressly distinguished from such a case as the present. It appears to the Lord Ordinary that the present case is much nearer that of Craigmillar than that of Overton.

"Reference may also be made to the following cases:—Barclay *v.* Adam (Blairadam Entail), 1 Shaw's Appeals, 24, and 3 Bligh, 275; Rennie *v.* Horn, 3 Shaw and M'Lean, 142; Hay *v.* Hay, 11th March 1851, 13 D. 945; Earl of Airlie *v.* Ogilvie, 16th Dec. 1852, 15 D. 252; Udny *v.* Udny, 16th March [454] 1858, 20 D. 796; Kintore *v.* Lord Inverury, 23 D. 1105, H. L., 6th April 1863, 4 Macqueen, 520.

"At the same time, in referring to decided cases, the remark in the Balgowan case, in the House of Lords (6 Bell, 441), must be kept in mind, that in these entail cases, precedents, while they may establish rules of principle, are not of very strong authority where the words are not identical. A very slight variation in expression may, under the strict rules, which must be applied, alter the whole effect of the clauses.

"In the present case, accordingly, the Lord Ordinary rests his judgment on the fair though strict construction of the words of the present entail."

* Murray *v.* Graham (Balgowan Entail), May 3, 1849, 6 Bell, 441; Lang *v.* Lang (Overton Entail), Nov. 23, 1838, 1 D. 98—H. L., Aug. 16, 1839, M'L. and Rob. 871; Ogilvie *v.* Earl of Airlie, March 27, 1855, 2 Macq. 260; Udny *v.* Udny, March 16, 1858, 20 D. 796.

to be carefully considered, because of its connection with the irritant clause which immediately follows it, and which is alleged to be defective—"and sicklike it is hereby provided and declared that it shall not be lawful to any of the heirs of tailzie" to alter the order and course of succession, "nor to sell nor dispone the lands and others," or any part thereof, &c., "or to contract debts or sums of money, or grant any bonds or other obligements, or to do any facts or deeds whereby the same or any part thereof may be apprised, adjudged, or any ways evicted, or the said tailzie and the order and course of succession frustrated or prejudged." There cannot be a doubt therefore that, as regards the prohibitory clause, this tailzie is not open to objection.

There follows the irritant clause, in these words—"And in case any of the heirs of tailzie and provision foresaid shall contravene the premises, then and in that case not only shall all such facts and deeds be null and void in themselves in so far as the same or any of them may in any ways affect or burden the lands and estate before written, or prejudge or hurt the heirs of provision foresaid"; so far, the irritant clause. There follows the resolutive clause, in these words—"But also the person or persons so contravening shall *ipso facto* amit, lose, and forfeit all right, title, and interest" to the said lands and estate, which are declared to accresce and belong to the next heir of tailzie, "in the same manner as if the contravener were naturally dead." The objection taken by the pursuer is that the irritancy applies to "all such facts and deeds," and that these words are of limited import, because of the relative "such," referring back for its antecedent to the "facts and deeds," which occur at the close of the prohibitory clause, and there the words, it is contended, are of limited import, applying only to facts and deeds whereby the lands may be adjudged or evicted, and the order of succession frustrated.

The Lord Ordinary, who holds the deed of entail to be valid, has, in the note to his interlocutor, stated that it is not by any means clear that the words "facts and deeds" in the prohibitory clause are of limited meaning, but, on the contrary [455] that they must be held to refer, according to their natural reading, to the whole three prohibitions. If this view could be taken, there would be an end of the objection to the irritant clause. There would be no room for it, because the antecedent—assuming it to be the words "facts and deeds" in the prohibitory clause—would necessarily control the meaning of these words in the irritant clause, and fix upon them such generality of meaning as to make them applicable to the whole three prohibitions. I cannot, however, adopt this view of the words in the prohibitory clause. They seem to me of limited import, and to apply only to facts and deeds whereby, as in the case of contraction of debt, the lands may be adjudged, or any ways evicted. Apart from this view the real question is, whether, in the hypothesis at the commencement of the irritant clause, there is not to be found a satisfactory antecedent to the word "such," by which the facts and deeds irritated are qualified, so as to make the irritancy applicable to the whole prohibited acts.

It will be observed that the irritant clause of this entail is not brought into that immediate proximity or juxtaposition with the prohibitory which occurred in the case of Balgowan. Both this Court and the House of Lords held such proximity—the expression being the same in both clauses—to be fatal to the irritancy, as one generally applicable to all the prohibitions. The prohibitory clause in that entail, and the irritancy connected with it, was thus expressed, that it should not be lawful to the heirs of entail "to dispone," &c., "the said lands, or any part thereof, nor to contract debts, commit treason, or to alter, innovate, or infringe the course of succession by any fact or deed, civil or criminal, omission or commission, whereby the said lands and estate may be adjudged, forfeited, evicted, or any ways lessened or impaired; declaring all such facts and deeds, omissions and commissions, to be void and null." I refer to this instance, as showing how inevitable the limited construction was which the Court held the words "all such facts and deeds" to be subject to. The two clauses were brought into direct proximity, and the facts and deeds in the one could not but be held to be precisely those referred to in the other. The present deed does not bring the two clauses into any such proximity. On the contrary, after the close of the prohibitory clause, there occur these important words, as introductory to the irritancy that follows —"And in case any of the heirs of tailzie and provision foresaid shall contravene the premises, then and in that case not only shall all such facts and deeds be null and void in themselves, in so far as the same, or any of them, may anyways affect or burden the lands and estate," and so forth. There is thus a distinct separation made between the prohibitory clause and what follows, and in the words, in case any of the heirs "shall

contravene the premises," there is found what will satisfy the referential terms which follow, "all such facts and deeds." This is the view on which the Lord Ordinary has proceeded in sustaining the entail.

To estimate aright the ground upon which the judgment under review proceeds it is proper to advert to the decision in Lang *v.* Lang (Overton), decided in the House of Lords 16th August 1839, which is maintained by the pursuer to be an adverse authority. The prohibitory clause in that case was defective, inasmuch as it did not effectually debar alterations in the order of succession; but in other respects it was unobjectionable, sales being prohibited, and the following words occurring as regards contraction of debt—"Nor to contract debt or do any other deed whereby the said lands and subjects may be adjudged or evicted from the succeeding members of entail, or their hopes of succession thereto in any measure evaded"; and there followed these words of irritancy, "and if they do in the contrary, it is declared, in the first place, that all such debts and deeds shall be intrinsically void and null, and of no force, strength, or effect." This Court, altering the interlocutor of the Lord Ordinary, held that the entail was good; but the House of Lords reversed the judgment, being of opinion that the words "such debts and deeds" could only be referred back for their antecedent to the "debts and deeds" at the close of the prohibitory clause, whereby the lands may be adjudged or evicted. And it is important to observe that in the opinions delivered by the learned Lords great stress is laid upon the word "debts" occurring along with the "deeds" in the irritant clause,—the [456] generality of the term "deeds" being held controlled by the term "debts," so that "such debts and deeds" could be viewed only as those acts whereby the lands might be adjudged or evicted; and Lord Brougham, in especial, stating that, if "it had been all 'deeds,' that would have included (as well as 'debts') deeds alienating, disponing, and otherwise altering the order of succession." The Judges in this Court felt this to be the difficulty of the case, but they got over it, and altered the Lord Ordinary's judgment, because they held, as stated by the Lord Justice-Clerk, "the adjection of debts only infers that, *ob majorem cautelam*, the entailer desired to avoid the question, whether contracting debt would be held a 'deed'; and I do not think that it vitiates the plain effect of the word 'deeds.'" The House of Lords took a different view, holding that "such debts and deeds" could only apply to that limited character of deeds whereby, as in the case of debts, the lands could be adjudged or evicted contrary to the prohibition thereanent; and accordingly, as used in the Overton entail, that the intervening words, "and if they (the heirs of entail) do in the contrary," must be held as having a limited meaning, and being referential only to the same character of debts and deeds. I do not see any reason to doubt that, if the irritancy had applied to all such deeds without the adjection of debts, the irritancy would have been held to include all deeds done in the contrary of all or any of the Acts prohibited, whether alienation, contraction of debt, or alterations in the order of succession. The present case does not present the same peculiarity,—the words "facts and deeds" being both of them of general import, and the words by which the irritancy is introduced being also comprehensive and universal in their application to the whole premises, that is, the whole matters prohibited.

The Lord Ordinary refers to the case of Gilmour *v.* Gordon (Gilmerton entail), March 1853, as being nearest the present of all the decisions cited in the argument. In that case it was held, in contradistinction to the case of Lang, that the irritant clause was sufficient to cover all the prohibitions,—the antecedent to the relative "such" being, not the last member of the prohibitory clause, but the introductory words, "act or do in the contrary," of the irritant. After prohibiting deeds of alteration, or any other fact or deed whereby the succession might be altered, and sales and alienations of the lands—the prohibitory clause proceeded, "nor yet to contract debts, or to do any other fact or deed, either civil or criminal," whereby the lands might be adjudged or evicted,—and there followed these words, "declaring always that, in case the said heirs of tailzie shall act or do in the contrary, that not only all such facts and deeds, with all that may follow thereupon, shall, *ipso facto*, be void and null," and so forth. The Court held the irritant clause effectual as regards the whole prohibitions. The views taken by the Lord Ordinary (Lord Colonsay), and by Lords Fullerton and Ivory, are referred to for the grounds on which this entail of Gilmerton was to be distinguished from that of Overton. Lord Ivory, in particular, said that the expression "debts and deeds" did not occur in the irritancy, but the words used, "facts and

deeds," were both of them general words, and were unquestionably to be held referential for their antecedent to the words introductory of the irritancy, "act or do in the contrary." These words were regarded by the Judges as meaning "in the contrary of what is before described or prohibited," not of any particular part of it more than another, but of the whole or any part of it, in any respect in the contrary.

Other decisions have been pronounced recognising the importance of introductory words at the commencement of a distinct clause providing for the event of the heirs of tailzie acting in contravention of the prohibitions. Thus, in Knight *v.* Knight, Dec. 1, 1842, 5 D. 221, the words, if the heirs of entail "shall contravene or do in the contrary in any part of the premises, then not only shall all such deeds and debts be void and null," and so forth, were held an effectual irritancy as regarded all the prohibited acts; so that here even the word "debts" being added to "deeds" was not held to vitiate the irritancy. Again, in the case of Maxwell *v.* Maxwell, Feb. 13, 1852, 24 Scot. Jur. 247, where the prohibitory clause was complete, but closed with the words, "nor shall the said lands and others be subject or liable to any deeds contracted or done" by the heirs of entail, "or that shall [457] happen to be contracted or done by such members of tailzie before their succession,"—the declarator of irritancy which followed was held effectual, the words being that, "if any of the heirs of tailzie shall do in the contrary then and in that case all and every one of such acts and deeds shall be *ipso facto* void and null." That case came before me as Lord Ordinary, and in the note to the interlocutor sustaining the entail I explained the grounds on which it appeared to me that an irritant clause introduced by such words, as occur in this entail, as in the case of Maxwell, and where the word "debts" did not occur in "the irritant" clause, ought to receive a general and not a limited construction. And, in adhering to the interlocutor, the Lord Justice-Clerk observed, in terms very significant as applicable to the present case, "there can be no doubt in this case; there is no difference between the terms used here and the ordinary expression 'contravene in the premises.' I avoid inquiring into the intention of the entailer; we must, as the Lord Ordinary says, take the fair grammatical construction of the deed."

The words used in this deed, "if any of the heirs shall contravene the premises," must thus be regarded as the usual phraseology employed to set forth contravention generally by the heirs of entail of any of the prohibited acts. And there can be no doubt of their generality of meaning. "Contravene" is the word used in the statute 1685 as applicable to all or any kind of contravention of the fetters, and the word "contravener" to designate the party so acting. And the word "premises" has general application to the whole of what precedes it, and cannot but be held to embrace all or any part of the prohibitory clause. The hypothesis implied in the terms is of universal application, and the only ground on which it is attempted to be limited is, by the use of the relative "such," on the footing that it must be referred to those facts and deeds at the close of the prohibitory clause, which by their collocation are of limited import. I do not think that this can be held the fair grammatical meaning of the terms of the irritant clause. It is not reasonable so to limit the general meaning of the words, when in the hypothesis as to contravention we have sufficient antecedent to satisfy the term "such," without reverting to the terms at the close of the prohibitory clause. And this, accordingly, is the view taken in the cases to which I have adverted. All the more clear does this appear to me in this case from the limited meaning to which I hold the words "facts and deeds" in the prohibitory clause subject, *i.e.*, as applicable only to deeds of forfeiture, not including even debts. Assuming this, it would be quite unreasonable, and I think quite ungrammatical, to hold the words "such facts and deeds" in the irritant clause to be confined to the very limited class of acts to which, in this view, it must be referred.

I am not aware of any decision, either of this Court or of the House of Lords, at variance with the views which I have stated; but two cases were referred to, as if they were of a contrary tendency—I mean the cases of Ogilvie, March 1855, 2 Macq. 260, and of Udny, March 16, 1858, 20 D. 796. But however valuable the opinions which were delivered by the House of Lords, and in this Court, in the case of Ogilvie, with regard to the general principle of construction applicable to such questions, neither of the decisions at all conflict with the case of Craigmillar, and the other cases to which reference has been made. The decision in the case of Udny was indeed all but an echo of that in Lang *v.* Lang, M'L. & Rob. 871, and in giving effect to that authoritative precedent this Court did by no means intend to go against the principles recognised in

the case of Gilmour, 15 D. 587, only two years before. Had I thought this entail to be on all fours with Overton and Udny I would have arrived at a different conclusion. It is because I concur with the Lord Ordinary in holding it to be distinguished from Overton, by the same features as Gilmerton was held to be, that I concur in the judgment under review.

LORD BENHOLME, LORD NEAVES, and the LORD JUSTICE-CLERK concurred.

This interlocutor was pronounced:—"Refuse the desire of the reclaiming note: Adhere to the interlocutor reclaimed against: Find additional expenses due, and remit," &c.

DUNDAS & WILSON, C.S.—MACKENZIE & KERMACK, W.S.—Agents.

[*Commented upon*, Speirs *v.* Speirs' Trs., 1878, 5 R. 923.]

No. 87. X. MACPHERSON, 458. 8 Feb. 1872. High Court of Justiciary.—Justiciary Clerk.

JAMES CLARK, Suspender.—*Dundas Grant.*
JAMES DUNCAN BATHGATE, Respondent.—*Sol.-Gen. Clark—Shand.*

Suspension and Liberation—Appeal to Circuit Court—Tweed Fisheries Act, 1857, 20 *&* 21 *Vict. c.* 148, *secs.* 82, 84, *and* 96—*Tweed Fisheries Amendment Act*, 1859, 22 *&* 23 *Vict. c.* 70, *sec.* 11—*Third offence—Previous Conviction.*—Suspension of a sentence pronounced upon a summary complaint for contravention of sec. 11 of the Tweed Fisheries Amendment Act *refused*, and *held* that the only competent remedy was by way of appeal to the Circuit, in terms of sec. 96 of the Tweed Fisheries Act, 1857.

It is not necessary under the Tweed Fisheries Act, 1857, secs. 92 and 94, that the previous conviction of an offender be of the same offence in order to constitute a second or third offence in terms of that Act, and of the Tweed Fisheries Amendment Act, 1859.

This was a bill of suspension and liberation at the instance of James Clark, mason in Peebles, for setting aside a conviction and sentence by the Sheriff-substitute of Peebles (Hunter) upon a complaint under the Summary Procedure Act at the instance of the respondent, procurator-fiscal of Court.

The complaint set forth that the suspender, "the occupier of a fishery in the river Tweed, has contravened the Tweed Fisheries Amendment Act, 1859, particularly section 11th thereof, actor, or art and part, in so far as on the 3d day of January 1872, or about that time, the said James Clark, in contravention of the said Act, had, within or near the dwelling-house or premises occupied by him and situated in the old town of Peebles aforesaid, a net used and employed in taking and killing salmon, which net the said James Clark had neglected to remove and carry away on or before the 17th day of September last to some place or places appointed by the commissioners under said Act, where the same could be securely lodged and kept till the 13th day of February next, whereby the said James Clark is liable, this being a third or subsequent offence, to a penalty of £20, together with such costs attending the conviction as to your Lordships shall seem fit; and failing payment of such penalty and costs the said James Clark is liable to be committed to prison, there to remain without bail for any period not exceeding four months unless such penalty and costs shall be sooner paid and satisfied, and the said net must be forfeited in terms of said Act."

The suspender appeared, and objections were stated on his behalf to the relevancy of the complaint and repelled, and he pleaded not guilty. After hearing evidence the Sheriff substitute pronounced this sentence:—"Convict the said James Clark of the contravention charged, and therefore adjudge him to forfeit and pay the sum of £20 sterling of penalty, with the sum of £1, 14s. sterling of expenses; and in default of immediate payment thereof to be imprisoned in the prison of Peebles for the period of four calendar months from the date of imprisonment unless the said sums should be sooner paid."

The suspender having been incarcerated upon this sentence presented the present bill, in which he pleaded;—No offence against or contravention of the statute having been charged in said complaint, and the complainer not having committed any offence against or contravention of the statute, the sentence complained of ought to be suspended and warrant executed for the complainer's liberation. There being no specification in the complaint of the place or places to which it is alleged the complainer should have taken the net libelled, the sentence following thereon should be suspended, and warrant granted as aforesaid. The commissioners under [459] said statute not having fixed any place or places to which it is alleged said net ought to have been taken, said sentence ought to be suspended, and warrant granted as aforesaid. As the complainer was not an occupier of a fishery in the river Tweed, he was not subject to the provisions in the said 11th section of said Act in reference to said net, and said sentence ought therefore to be suspended, and warrant granted as aforesaid.

The respondent intimated that he objected to the competency of suspension under the Act libelled, the 22d & 23d Vict. c. 70 (the Tweed Fisheries Amendment Act, 1859), and that it would be contended that appeal to the next Circuit Court for the district was the proper remedy.

The suspender argued;—There is here no offence libelled in terms or under the authority of the statute, and if the complaint be not brought under the statute then the provisions of the statute, including those relating to appeal, do not apply. The 11th section of the Act contemplates that a place or places shall be fixed and promulgated by the Tweed Commissioners annually, to which the occupiers of fisheries shall remove their nets and other tackle at the periods therein mentioned. In order to have set forth a relevant charge under that section it was necessary that the complaint should have stated that the commissioners had complied with the provisions of the section in that respect, and had fixed certain places for the purposes mentioned. These places ought also to have been specified in the complaint, that the person complained against might know where the nets or other tackle in his possession should have been taken to. And lastly, it ought to have been stated that the accused having been requested to comply with the requirements of the Act had refused so to do. All that is set forth is, that the suspender neglected to remove or carry away the net in question on or before a particular date, "to some place or places appointed by the commissioners under the said Act, where the same could be securely lodged and kept," &c. It is no offence under the section to neglect to take any of the articles specified in it to some place appointed by the commissioners which never was appointed. There is also the further objection that the suspender has been convicted as for a third offence, and sentenced to the highest penalty and period of imprisonment competent under the Act, but he has never, nor is it contended that he has ever, been previously convicted of the particular offence in this section. It is only upon previous conviction of the same offence that the Act warrants the severer penalties.

The respondent argued;—The Tweed Fisheries Act of 1857 (20 & 21 Vict. c. 148)—the enactments and provisions in which Act for the prosecution of offences and recovery of penalties are incorporated with and made applicable to the Tweed Fisheries Amendment Act, 1859 (22 & 23 Vict. c. 70), the Act libelled—makes it competent by section 82 for the Sheriff to take the fact of previous conviction of an offence under the provisions of the Act into consideration in fixing the amount of penalty, &c. That means, not only previous conviction of an offence under the same section, but of any offence within the meaning of the Act. And where the offence is a third one, by the 84th section the Sheriff is bound "to cause" the offender to suffer the highest penalty and amount of punishment imposed under the Act. By section 90 of the Act of 1857 provision is made for review against any adjudication or sentence pronounced by the Sheriff by way of appeal to the next Circuit Court under the limits and conditions, &c., contained in the Heritable Jurisdiction Act, and on caution found. And it is declared that "it shall not be competent to" "bring any adjudication or conviction pronounced by any Sheriff" "acting under this Act under review in any other way than as herein provided," viz., by [460] appeal to the next Circuit. Review in the present form on any grounds is therefore excluded.*

* M'Phail *v.* Campbell, High Court, March 18, 1861, Irvine, vol. iv. 18; Halliday *v.* Bathgate, High Court, June 1, 1867, Irvine, vol. v. 382; Walker *v.* Lang, High Court, Nov. 25, 1867, Irvine, vol. v. 506.

LORD JUSTICE-CLERK.—As regards the question of competency, the kind of argument advanced by the suspender has been very frequently urged in cases like the present, where the right of review is excluded or restricted by statute. Unquestionably, if the Sheriff acts outwith the provisions of the statute his judgment will not be protected by any clause of finality; for the exclusive jurisdiction conferred upon him relates only to proceedings under the statute. But the case is quite different where objection is taken only to the abstract relevancy of a charge, the subject matter of which is admittedly within the statutory jurisdiction of the Sheriff. Now, that is the nature of the present case. The charge is that the accused did not carry away his salmon net, in terms of the Tweed Fisheries Amendment Act, to some place appointed by the commissioners. It has been argued that this does not imply that any place was so appointed; but I think it does, though the fact might no doubt have been more distinctly and specifically stated. Under such a charge it was, I think, quite open to the prisoner to prove, if such were the case, that no place had been appointed by the commissioners. At all events, I am quite clear that the matter was within the jurisdiction of the Sheriff; that he was entitled to decide as to the relevancy of the complaint; and that the limiting clause in the statute applies to this case, so that an appeal to the Circuit Court was the only competent remedy. On these grounds I think the suspension ought to be refused.

LORD COWAN.—I am by no means prepared to say that an application of this kind may not be sustained in certain circumstances. I think that a liberation would be perfectly competent, if any gross irregularity occurred either in pronouncing or in carrying out a sentence. Similarly, a sentence might be suspended if the complaint itself showed that the inferior Judge had no jurisdiction to entertain it, or that the charge was in reality not a criminal offence under the statute libelled. If the proceedings were thoroughly and radically inept, the Court would not hesitate to give redress. But the objection in the present case is merely that the statutory offence is not sufficiently described, inasmuch as the complaint does not state what place or places were appointed by the commissioners. Now, had I been in the place of the Sheriff-substitute I rather think that I should have acted as he has done in disregarding such an objection to the relevancy, for I agree with your Lordship that the statement of the complaint left it quite open to the prisoner to prove that no place had been appointed by the commissioners.

It appears to me that the limitation of the jurisdiction of the Supreme Courts under the Small-Debt Act and other statutes is of the greatest advantage to the country; but, at the same time, it is desirable that the parties, in the cases provided for in these Acts, should have the benefit of a local Court and a local tribunal of appeal. That benefit is, in the present instance, conferred by the statute under which this complaint was brought,—the Court of appeal being the Circuit Court of Justiciary.

Reference was made by the suspender's counsel to a case in which a sentence was suspended on account of the Sheriff having refused to take a note of the evidence adduced. That case, however, is not analogous to the present; for under the statute the prisoner was absolutely entitled, if he desired it, to have a record of the evidence.

On the whole matter, I think we shall act consistently with our previous judgments, as well as with the terms of the statute, in refusing this suspension.

LORD NEAVES.—I concur in the opinions expressed by your Lordships.

Suspension is a valuable means of obtaining redress when an actual wrong has been committed by an inferior Court. If, for example, the panel in this [461] case had been imprisoned notwithstanding his having tendered payment of the fine, or if some other gross irregularity had occurred in the execution of the sentence, we should certainly have given redress. But it is quite a different thing to review the judgment of an inferior Court either on the relevancy or on the merits. In every case it is an implied part of the duty of a Judge to decide the question of relevancy. In the present instance the Sheriff might have considered the complaint irrelevant, and dismissed it accordingly. Does not that imply that he might consider it to be relevant, and therefore sustain it? Of course he might decide the question wrongly; but that means no more than this—that he has no claim to infallibility. There may, indeed, be on the face of a criminal charge something so obviously and notoriously wrong that we should not hesitate to interfere. Thus, if in a prosecution under the Tweed Fisheries Act it was assumed (contrary to the ideas on geography which at least some of us possess), that the Trent or the Clyde was a tributary of the Tweed, or if a criminal

libel was raised against a man for riding with a white hat on his head, I should probably suggest that the procurator-fiscal's health should be looked after by his friends. But except in such extreme cases we ought not to interfere with the exclusive jurisdiction conferred by statute on inferior Judges. When the relevancy of a complaint is a debateable point it is only proper that it should be decided by the Court before which it is brought. Now, the objection here being merely the want of specification, I think the case is peculiarly one in which we should not interfere. Had the prisoner stated the objection at the trial, an amendment might have been made under the Summary Procedure Act, to the effect of stating what place had been appointed by the commissioners. I think, however, that such an amendment was scarcely necessary. The charge of neglecting to carry a net to a place appointed by the commissioners is necessarily implied, not only that there was a net to carry, but also that there was an appointed place to which it ought to have been carried; and I think that the general plea of not guilty entitled the prisoner to show that no place had been appointed by the commissioners.

THE COURT pronounced the following interlocutor:—"Refuse the bill as incompetent: Find the complainer liable in expenses, which modify to £4, 4s., and for which, and £1, 1s. as the dues of extract, decern."

JAMES BARTON, S.S.C.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

No. 88. X. MACPHERSON, 461. 9 Feb. 1872. 1st Div.—Lord Gifford, M.

COLIN CAMERON, Pursuer.—*Fraser—Strachan.*
JOHN MORTIMER, Defender.—*Shand—Reid.*

Agent and Client—Reparation—Diligence.—In an action of damages for wrongful apprehension by a creditor after having agreed to give delay, the verdict was for the pursuer. On a motion for a new trial, *held* (*diss.* Lord Deas and Ardmillan) that the verdict was against evidence, in respect that it was proved (1) that the law-agent employed to enforce the diligence had no express authority to grant delay; and (2) that a law-agent employed by another law-agent for his client to give a charge, and on its expiry to apply for and send on a warrant of imprisonment, being an agent for a limited purpose, and not employed generally to recover a debt, had no implied authority to give delay.

The pursuer, a retired officer of the Indian army, residing at Forres, accepted a bill for £10, 15s. 4d. on December 29, 1870, in favour of Dr. J. G. Mackenzie, Forres. The bill was acquired for value by the defender, a commercial traveller for Usher and Company, brewers in Edinburgh, who protested it for non-payment on July 2, the day on which it fell due. The pursuer was charged on 22d July. On Saturday the 29th July the pursuer was apprehended at the Station Hotel, Forres, and taken by the Sheriff-officer through the streets to the office of Mr. Mackenzie, the defender's agent, where the amount of the bill and expenses was paid under protest.

[462] This action of damages was brought by Captain Cameron against Mortimer.

The following issues were sent to trial before Lord Gifford and a jury on December 21, 1871:—"1. Whether, on or about the 29th July 1871, the defender, John Mortimer, wrongfully apprehended and detained the pursuer, or caused him to be apprehended and detained, without any legal warrant, to the loss, injury, and damage of the pursuer? 2. Whether, on or about the 29th July 1871, the defender, John Mortimer, wrongfully apprehended and detained the pursuer, or caused him to be apprehended and detained, after having agreed to delay diligence till Monday 31st July 1871, to the loss, injury, and damage of the pursuer? Damages laid at £975."

The pursuer abandoned the first issue, and the Judge directed a verdict for the defender upon it.

It was proved that on 27th July, being the day previous to that on which the charge expired, Mr. Peat, the pursuer's agent, saw Mr. Morrison, the agent in Elgin, who had been employed by Mr. Mackenzie, the defender's agent in Forres, to get the

bill protested and the diligence executed, and asked him for a few days' delay. Peat deponed—"I said I understood he was Mortimer's agent. He said he was. He said the bill had been sent to him to do diligence on it. I said to Mr. Morrison that I had seen Captain Cameron at station, and he wished a few days' delay to get the bill settled. Mr. Morrison said he had been instructed by the agent in Forres to carry out the diligence. I understood him to say by Mr. Alexander Mackenzie, Forres, and he did not know whether he could grant the delay or not. Mr. Morrison hesitated to grant delay. I said he had better consider, and let me know. We had some talk. He said Captain Cameron might go out of the way. I said this was not likely. We parted on the footing that he was to consider and let me know, and he was to send me a state of the debt. He said nothing about granting the delay conditionally if the Forres agent consented. I asked for a state of the debt, and he said he would send it. John Mortimer, the defender, came in in a few minutes. Still in the passage of hotel. I said to defender that I held a letter from Morrison delaying the diligence till Monday morning. The defender expressed a disbelief that I had such a letter. He said he had given no authority for granting delay, and he was determined to have Captain Cameron in jail that night. Cross-examined.—Mackenzie said he had sent over bill to do diligence. When I saw Morrison he said he did not know whether he could grant delay. He said he had been instructed by Mr. Mackenzie in the matter. He seemed to think he had no power to grant the delay. I inferred this from what he said. I said he had better consider. Agents sometimes take on themselves power. He hesitated to grant delay. I said consider. I understood that he (Morrison) thought he had no power to grant delay; but nothing was said about a change of circumstances. He did not say that if he got instructions from employer he would obey them. Did he give any reason for stating that he had no power? He gave no reason. He said he did not think he had the power. He said he had the diligence to go on with. He did not say he had instructions to give no delay."

Morrison, in the course of his examination, deponed—"I know Mr. Mackenzie in Forres intimately. I do anything in Elgin for him when Mr. Mackenzie is not there. Elgin is the seat of the Court. In July last Mr. Mackenzie gave me the bill and protest. Mr. Mackenzie was in delicate health, and gave it to me in Forres. He asked me to get bill and protest recorded, and a charge of payment given. He told me to give no time. I understood from him that these were his instructions from his own client. [463] I was to proceed with diligence, and give no time. These were my instructions." With regard to the interview with Peat he said—"He asked me to grant indulgence till Wednesday or Thursday of the next week. I told him plainly I had no power to grant time. I told him I had instructions from Mr. Mackenzie of Forres. I thought he knew that. He seemed to know that Mr. Mackenzie was the defender's agent. I told him that my orders were to give no delay; and I said I was sure I would be instructed to send on warrant when the charge expired. Mr. Peat pressed me. He said he was arranging the debt. I said—'Suppose I were to give delay, Captain Cameron would bolt and defeat diligence.' Peat said—'Nothing of the kind.' I said—'Well, I have no objections. If I don't receive instructions to send on the warrant I will delay doing so till Monday morning. Personally,' I said, 'I will do nothing till Monday if I get no orders, and there is no change in the circumstances.' Mr. Peat then said—'Very well; send a state of debt, and I will remit you on Monday morning.' I said I would send the state of debt; but I told him that if I got instructions to send on warrant I would do so,—that I must follow instructions. I merely personally agreed to do nothing if no instructions came. Mackenzie had told me to give no delay, and I told Mr. Peat that at the first. I told him that I had express orders to give no time. Mr. Peat then left. When I came back to office I wrote with state of debt. I wrote the letter. The letter does not detail the understanding as to my abstaining from sending on the warrant, unless ordered to do so; but I quite understood it in my own mind. The letter was written in reference to what I had said to Mr. Peat."

The letter referred to was as follows:—"Mortimer *v.* Cameron.—Dear Sir,—I enclose state of debt as requested,—amount £11, 14s. 9d. I must have a remittance by Monday morning's post." Morrison also wrote to Mackenzie on 31st July as follows:—"I have inquired and find the Captain not in jail, from which I infer that the debt has been paid. Mr. Peat assured me it would be paid this morning, but I have no word from him. I told Mr. Peat I had no power to grant time, but as he said the debt

was a debt of honour and would be paid I saw no objection to granting one day's delay, provided there were no change of circumstances. From your letter and telegram I suspected Mr. Peat was trying to steal a march on me, but I hope you have now got matters squared. I will write you again to-day with Miller's balance," &c.

Mackenzie had telegraphed on 29th July to Morrison :—"Send warrant of imprisonment by train to-night. Sequestration is being applied for, and Mortimer threatens action of damages against us if incarceration not effected."

The warrant was sent to Forres, and Captain Cameron was apprehended that evening (Saturday, 29th July).

At the trial counsel for the pursuer asked that the following directions in point of law should be given to the jury, as stated in Lord Gifford's notes :—

"1. That although the agent, Mr. Morrison, was employed by Mr. Alexander Mackenzie, yet Morrison must be held to be agent for the defender, in the same way as if he had been employed directly by the defender to raise and enforce diligence. 2. That if the jury be satisfied that Morrison was the agent of the defender to raise and enforce diligence against the pursuer, he had in law authority to grant to the pursuer a stay of diligence from Thursday the 27th July till Monday the 31st July 1871. 3. That although the jury be satisfied on the proof that special instructions were given to Morrison not to stay diligence till Monday 31st July 1871, yet if these instructions were not communicated to Mr. Peat, as agent [464] for the pursuer, and if Morrison did agree to stay diligence till Monday, the defender was bound by the undertaking of Morrison."

"I refused to give these directions in the terms asked, but I did so with special reference to what I had already told the jury, and I again repeated to the jury the explanations and charge in reference to the special directions sought. In particular, I refused to give the first direction in the terms sought, because it would imply that Mr. Morrison's powers and instructions were the same as the powers and instructions of Mr. Mackenzie, and I told the jury that this was a matter for them upon the evidence; and I explained that Mr. Morrison, though not employed directly by the defender, was in law the defender's agent for the purposes for which he was actually employed. I refused to give the second direction as sought, because I had left it to the jury to say upon the evidence what Mr. Morrison's instructions were, and whether these instructions were communicated to Mr. Peat, the agent of the pursuer, and the direction, if given in the terms sought, would mislead the jury. I refused to give the third direction in the terms sought, because it was inapplicable to the circumstances of the case, there being evidence to go to the jury that Mr. Morrison was only employed as sub-agent for a limited purpose, and that this was known to Mr. Peat, the pursuer's agent."

The jury returned a verdict unanimously for the defender on the first issue, and for the pursuer on the second issue, and assessed the damages at £125.

The defender obtained a rule on the pursuer to show cause why a new trial should not be granted, in respect that the verdict was contrary to evidence.

The defender argued that the letter by Morrison to Peat, dated 27th July 1871, and the evidence of Peat and Morrison, showed that Morrison had agreed to give delay till Monday the 31st July. The pursuer was entitled to rely on Morrison's undertaking, and to presume that he had authority to grant delay. Morrison was an agent for recovering a debt, and his power had not been restricted. If so, that restriction should have been stated distinctly to the other side. The presumption was that a law agent had discretion in a matter of this kind.*

It was argued for the pursuer that there was not evidence to show that the defender had authorised his agent to grant delay. On the contrary, an agent instructed to

* Wilson *v.* Snody, Jan. 31, 1817, F. C.; Gilchrist *v.* Sutherland, 1776, M. Ap., Messenger, 1; Miller, July 10, 1810, F. C.; Cullen *v.* Smith, Feb. 8, 1847, 9 D. 606; Cullen *v.* Thomson, Feb. 8, 1847, 9 D. 613; Burnett *v.* Clark, 1771, M. 8491; Anderson *v.* Ormiston, 1750, M. 13,955 (Kilkerran, 13,949); Dougall *v.* M'Cartney, Dec. 18, 1829, 8 S. 275; M'Kenzie *v.* M'Lean, Jan. 14, 1830, 8 S. 306; M'Ara *v.* Philip, Dec. 9, 1825, 4 S. 299; Sanderson *v.* Campbell, May 17, 1833, 11 S. 623 (Lord Cringletie); Hamilton *v.* Emslie, Nov. 27, 1868, *ante*, vol. vii. 173; Story on Agency, 126, 139, 452; Fraser *v.* Hill, April 12, 1853, 1 Macq. 392, and in Court of Session, Jan. 17, 1852, 14 D. 335.

proceed with diligence had no power to tie up his client's hands by granting delay. The law was so laid down by the Lord Ordinary at the trial, and the jury had gone directly in the face of his directions.

At advising,—

LORD PRESIDENT.—The first issue in this case was abandoned, and the jury were asked to return a verdict on the second issue only. The defender moves for a new trial, in respect that the verdict is against evidence. The issue was,—"Whether, on or about the 29th July 1871, the defender, John Mortimer, [465] wrongfully apprehended and detained the pursuer, or caused him to be apprehended and detained, after having agreed to delay diligence till Monday, 31st July 1871, to the loss, injury, and damage of the pursuer?"

The fact of the apprehension and detention was not disputed, but its wrongful character is denied. The wrong alleged by the pursuer is, that the apprehension took place on Saturday, the 29th July 1871, after the defender had agreed to delay diligence till the Monday following. The important question is, was there evidence that the defender did agree to delay diligence till Monday? It is not said that the defender personally agreed to give time, but it is said that he did this through his agent Mr. Morrison. Two questions arise, first, did Morrison agree to give delay? Second, had Morrison authority, express or implied, to give delay? If the pursuer's case breaks down on either of these points, the fact of giving delay, or Morrison's authority to give delay, the verdict cannot stand. Mr. Morrison says he did not give delay, and this is in accordance with Mr. Mackenzie's evidence. On the other hand, Mr. Peat, the pursuer's agent, says that on the 27th July there was a sort of agreement to take the question of delay into consideration, and that thereafter Morrison wrote the letter of that date which is produced. That is all the evidence in fact. But it is necessary to attend a little more to the character of the agent. Mr. Mackenzie was the agent of the defender. He resided at Forres, while the Sheriff-court is at Elgin. Mackenzie therefore employed Morrison to record the protest, give a charge, and on the expiry of the charge to obtain a warrant of imprisonment. The charge was given on the 22d July, and being a six days' charge, expired on the 28th. Morrison's duty then was to obtain the warrant of imprisonment. It was on the day before, viz., the 27th, that the conversation took place with Peat. If no conversation had taken place, all that Morrison had to do was to send the warrant to Forres. In regard to the conversation, Mr. Peat says Morrison did not assent to his proposal of delay, but that he wrote the letter of 27th July, in which he says—"Dear Sir,—I enclose state of debt as requested —amount £11, 14s. 9d. I must have a remittance by Monday morning's post.—Yours truly." That has been construed as an agreement on the part of Morrison not to do anything till Monday. I am disposed to assume that this is the meaning of the letter. But then the question comes, had Morrison authority to bind the defender by that letter? Did he even profess to bind the defender, and did he leave the pursuer's agent under the impression that he had power to bind the defender. Morrison is positive that he did not. Peat's evidence is as follows:—"Mr. Morrison hesitated to grant delay. I said he had better consider and let me know. We had some talk. He said Captain Cameron might go out of the way. I said this was not likely. We parted on the footing that he was to consider and let me know, and he was to send me a state of the debt. He said nothing about granting the delay conditionally if the Forres agent consented. I asked for a state of the debt, and he said he would send it." It rather appears to me that Morrison did not convey to Peat the impression that he was entitled to bind his client. But there remains behind the question whether Morrison had power to bind the defender? The question is one partly of fact, and partly of law. It would be a question entirely of fact, if there was any evidence of express authority. But there is none, and there remains the question whether there was implied authority. Looking at the nature of his employment as a practitioner in the Sheriff-court, to record the protest, give a charge, and on its expiry to apply for a warrant of imprisonment—looking, I say, to the limited scope of his employment, I think there was no implied power to grant delay. If he did agree to give delay, he did what was beyond his power. I am of opinion that the verdict cannot stand.

LORD DEAS.—This is a singular case, and it is extremely fortunate for the credit of human nature that it is so. Mortimer and Cameron both live in Forres. The latter does not seem to have been in very flourishing circumstances. Mortimer had a determined hostility against him, and bought up this bill at almost full value, not for the

purpose of recovering the debt, but for the pleasure of sending him (Cameron) to prison. It is evident enough, therefore, that Mortimer, person-[466]-ally, had no intention to give delay, but the reverse. Mackenzie was his agent, and Morrison was his sub-agent, and had been employed to give the charge on the bill, which for that purpose he had in his possession. Morrison was in quite a different position from a messenger-at-arms, who has no discretion—not even a right to take payment and discharge the debt. In whatever way Morrison's mandate may have been limited as between him and his principal, the question with third parties was a different matter. Now, I have no doubt that in its terms the letter of 7th July was a letter which entitled Captain Cameron to consider himself safe for the Sunday, assuming that the writer of it had power to grant delay. But a telegram to the contrary from Mr. Mackenzie came late on Saturday night, and the pursuer was actually apprehended on that night. How it was expected to get into the prison, which I infer to be at Elgin, at the late hour on Saturday night when it would be reached, I do not know. Mr. Mortimer was now told of the delay granted by Morrison, which he repudiated, avowing that he was not proceeding for the purpose of getting the debt settled, but for revenge, and accordingly when the debt was paid he expressed great disappointment. The jury have given Cameron £125 of damages, but though I think that sum too large I understand we are all agreed that the verdict should not be set aside on that ground. But then the question is, whether it should be set aside as against evidence?

The Lord Ordinary gave the following directions—(Reads directions); so that the whole matter was dealt with as one of evidence,—whether the instructions of Morrison limited his power, so far as to incapacitate him from granting the delay referred to. Your Lordship suggests that it was a matter of law whether there was implied authority. But this seems to me to have been fully more a matter of fact for the jury than a question of law for the Court. It is not like a question of direct written authority, which might have fallen to be construed by the Court. An agent unquestionably has a discretion, and in the absence of express instructions not to grant delay he generally has the power to grant it. He is to act on the supposition that his client really wants payment of his debt, not the gratification of revenge, and delay may be the most judicious policy in certain circumstances for obtaining payment. Moreover, we are not to set aside the verdict merely because we would have given a different verdict.

I do not see that the jury have gone so extravagantly wrong that we are entitled to set aside their verdict. The whole circumstances must be taken into account. Had it not been for the malicious motive on the part of the creditor the case would not have risen. That is not favourable to a party asking a second trial, especially where he did not venture to put himself into the witness-box.

Lord Ardmillan.—In this action of damages, at the instance of Captain Cameron against the defender, Mr. Mortimer, two issues were sent to the jury. On the first issue the verdict was for the defender, and no question is now raised in regard to it. The second issue is in the following terms:—"Whether, on or about the 29th July 1871, the defender, John Mortimer, wrongfully apprehended and detained the pursuer, or caused him to be apprehended and detained, after having agreed to delay diligence till Monday, 31st July 1871, to the loss, injury, and damage of the pursuer?" On this issue the jury returned a unanimous verdict for the pursuer, with £125 of damages.

The defender has challenged this verdict, and Mr. Shand has very ably and earnestly supported his application for a new trial, on the ground that, if a right view of the law be taken, the verdict will be found to be contrary to evidence. The law laid down by the Judge at the trial has not been in any respect objected to. We have not the whole charge before us. We must assume it to have been correct in point of law, and in so far as the directions given by Lord Gifford are disclosed on the proof they appear to me to have been extremely sound and appropriate. There was undoubtedly a conflict of evidence, and the Judge left the disposal of that question to the jury, and withdrew from their consideration no point calculated to aid them in coming to a right conclusion.

[467] It is not necessary for me to explain in detail the facts of this case. There are three matters of fact, however, which I consider most important, and about which I do not myself think that there is room for doubt, and even if there were some room for doubt, the unanimous verdict of the jury should now be held as conclusive.

The first point is, that Mr. Mortimer was not himself a creditor of Captain

Cameron. The bill had been granted by Cameron to a Dr. Mackenzie, and was purchased by the defender, Mortimer, in order that he, as a holder of the purchased bill, might enforce it against Cameron. That this bill was purchased by Mortimer and proceeded on by him, not to enforce a debt which had arisen in business, but to gratify spiteful and revengeful feelings against Cameron, is clearly brought out on the proof, so clearly that it was really not disputed at the bar. The defender said, in the presence of the witness Peat, "that he would have his revenge," and Mr. Peat adds,—"There had been a previous quarrel, and I knew this was what he alluded to." Again the defender said to Peat, that "he would rather have Captain Cameron in jail than have the money." He again said, after the bill had been paid, "that it would not signify though the Captain paid it. He would get others"—Mr. Peat adding, "I understood him to mean he would buy up another debt and enforce it. He said so." After all was over, he again said to Mr. Peat that what he had done was "to get his revenge, and put the Captain in jail." Now, Mr. Peat's evidence on this point is confirmed. Captain Cameron himself swears that Mortimer said "he did not care about the money, he would have his revenge." Rebecca Robertson says, that Mortimer stated that "he wished Captain Cameron in jail, and to have his revenge." Mary M'Lellan says that she heard the defender say that "he had his revenge, and would have the Captain in jail. Even Mr. Mackenzie, the defender's own agent, speaking of the payment of the debt, says, "Mortimer said he was rather vexed it was paid,"—the creditor vexed that he had been paid the debt. But all this receives additional corroboration from the fact that after the whole of the proceedings was over and the money paid the defender is stated to have proposed to advertise for claims against Captain Cameron, in order that he might still further proceed against him. Now, I am not imputing motives of which I imagine or suspect the existence. The motive is plain and avowed.

The first fact, therefore, whatever your Lordships think of its importance, is, that the defender is not here as a creditor of Captain Cameron in a debt arising from any transaction with him, or as the holder of a bill acquired in the course of business, but as the purchaser of a debt and a bill, and enforcing it for the purpose of gratifying revenge against a man with whom he had a previous quarrel.

The second fact to which I advert is, that Alexander Morrison, solicitor in Elgin, was the agent of the defender, Mr. Mortimer. These two stood to each other in the relation of agent and client. In the answer for the defender to the 2d article of the condescendence it is admitted that Morrison "acted as the agent of the defender Mortimer in raising and enforcing the diligence aftermentioned." Again, in the answer to article 6 of the condescendence, the defender speaks of Morrison receiving "instructions from his client, Mr. Mortimer." There can, I think, be no doubt that, through the intervention of Mr. Mackenzie, the defender's ordinary agent in Forres, but who was in delicate health, Mr. Morrison was employed to act, and did act, as the defender's agent in Elgin, in the proceedings for enforcement of this diligence on the purchased bill. In that matter, and so far as his agency extended, Morrison represented the defender, and Captain Cameron's agent dealt with him as agent for the defender. Morrison was, as agent, in possession of the documents of debt. The bill and protest were recorded by Morrison as agent, and the charge was given by him. He did indeed speak of having instructions to proceed without delay, but he spoke as agent, and he acted as agent, and he could have accepted and discharged the debt.

The third point of fact is one on which there was a conflict of evidence. I [468] mean the question of fact, whether Morrison did agree with Mr. Peat, the pursuer's agent, to delay diligence till the Monday.

On this question we must hold that the jury have decided for the pursuer; or, in other words, have decided that Morrison did agree to delay.

Viewing this as a question of fact depending on testimony, and a fact on which there is conflicting testimony, I am of opinion, with Lord Deas, that it was a proper question for the jury. They have disposed of it, and even though I doubted their verdict, or personally differed from it, I should not be disposed to disturb it. But I cannot say that I have arrived at a conclusion different from the jury. I think that, on this matter of fact, the preponderance of evidence is on the side of the pursuer. The letter of Morrison to Peat of 27th July 1871 is important, and is not easily reconciled with the view maintained by the defender; and I am quite as much

impressed by the testimony of Mr. Peat as by that of Mr. Morrison, though I see no reason to impute wilful falsehood to either. I am satisfied that Morrison did agree to delay diligence till Monday, and that he, as agent for the defender, and Peat, as agent for the pursuer, parted on that footing, both of them contemplating that the bill, with interest and costs, would be paid on the Monday.

On the evening of Saturday, 29th July 1871, Captain Cameron was apprehended at the defender's instance on the same diligence which Morrison had agreed to delay till the Monday. Of the circumstances attending the apprehension and detention of the pursuer I need say nothing. The witnesses are not agreed about these. Two remarks, however, I must make on them. The first is, that immediately after the apprehension, but before the removal and detention of the pursuer, the defender, who was, as Lord Deas has said, personally present, was told by Peat that Morrison had agreed by letter to delay diligence till Monday, and the defender, in the passage of the hotel, said he was determined to have Captain Cameron in jail that night, and that he would have his revenge; and accordingly, after receiving this communication, he directed the officer to proceed. This is distinctly sworn to by Mr. Peat, confirmed by Captain Cameron, and the defender withheld his own evidence.

The second remark is, that the debt is not proved to have been in danger. The money was paid on the Saturday, and it has not been maintained or suggested, and cannot be assumed, that the money would not have been paid on the Monday as agreed on. I see no reason to doubt it. The defender has not said that he doubted it. He did not venture to come forward as a witness. If payment of the bill was what the defender wanted, there is no reason to suppose that he would not have received payment, according to promise, on the Monday. The interest of the creditor, the only true and just interest of the creditor, never was imperilled. It is not pretended that it was. I would have been content to view the case as a question of fact, and to leave it as decided by the jury; and, indeed, the motion for a new trial is on the ground that the verdict is contrary to evidence, which I do not think it is. But it is said that there is a rule of law in respect of which, applying it to the evidence in the cause, this verdict must be set aside. It is said that Morrison, as agent for the defender, had only limited powers, and could not bind the defender to delay diligence till the Monday, and that, notwithstanding Morrison's agreement, and Morrison's letter of 27th July, and Peat's notice to the defender that he had got the letter, the defender was entitled, on Saturday, the 29th of July, to apprehend Captain Cameron, and to detain him under apprehension.

On this point I have the misfortune to differ from your Lordship in the chair. I think there is no inflexible rule of law upon the subject, apart from the circumstances of the case; and I think that, under the very peculiar circumstances of this case, the defender, after the agreement and the letter of Morrison, was not free to apprehend Captain Cameron, and, after receiving notice from Peat, was not free to detain him after apprehension. It is the fact that he did so, and did so under the influence of his avowed feeling of revenge, and in fulfilment of his declared intentions to gratify that feeling by the apprehension and imprisonment of Captain Cameron. I think that the defender could not honourably or in good faith, morally, or fairly, or justly, apprehend Captain Cameron, and detain [469] him under apprehension as he did on the Saturday; and therefore I think that he could not do so legally.

I do not think it is possible to shut out of this case the element of motive. It is a most important fact and feature of this case. Motive is the spring of conduct, and gives to conduct its true character. If, at close of day, I dig a pit-fall across a path in my own grounds, knowing that the man I hate is to visit me at night, the motive is manifest, and cannot be ignored, for it gives a character to the act. Shakespeare's wonderful delineations, such as those of Hamlet, of Prospero, of Hermione, of Iago, and of Shylock, are only intelligible if we connect the spirit with the conduct, and the motive with the act. It is a mistake to suppose that a Court of justice will not look to motives. The moral quality of acts and conduct cannot be set aside as irrelevant, and motive is essential to the morality of conduct. In the case of Stewart *v.* Menzies * the fact that certain letters, founded on as instructing marriage, were truly written to deceive another party, was held as conclusive against their effect in the question of marriage. The motive gave a character to the act.

* Feb. 14, 1836, 14 S. 427— . Oct. 6, 1841, 2 Rob. 547.

Again, in a case of Johnston *v.* Alston, decided by Lord Ellenborough in 1808 (1 Camp. Rep. 176), an attorney prosecuted for payment of his account. The client maintained that the agent had done him a wrong by failing to put in a certain plea which he had been directed to state. The Court found that the plea was not sound or true, and was suggested for delay only. Therefore the attorney did no wrong in omitting it, for Lord Ellenborough, who decided for the attorney, obviously considered the motive of the client as giving a character to his direction to the attorney. The disappointment of that motive the Court could not look on as a wrong.

I put the question to the defender's counsel, Mr. Shand, whether he maintained that Morrison, as agent for Mortimer, had no discretion whatever, but was restrained by a rule absolutely inflexible, so that he could not have agreed to delay for two hours till money could be procured, so that he was bound to apprehend a man in fever, or a dying man. I cannot say that the answer to the question was distinct, no admission was made; so I must consider the point under both views.

To hold, as I think the defender's counsel at first did, that no discretion whatever exists in the agent, to hold that no concession, no mercy, can be wrung from the humanity of the agent even by the most heartrending and most extreme combination of circumstances, and where there is no ground to suspect absconding or evasion of the debt, would be to introduce into the law and practice of Scotland a cruel severity which I humbly think does not now exist. If that is the view of the defender, I for one am prepared to negative it. Great strictness has been enforced in the case of messengers, but in the case of an agent there is no unbending rule excluding all discretion.

If, again, the defender's view is that the rule of law is not inflexible, but that under certain circumstances a reasonable concession, not extreme, not imperilling the debt, but fairly required by the justice and humanity of the case, may be permitted, that leads us to consider the peculiar circumstances of this case, including the nature of the wrong said to have been done to the defender by the humanity of his agent.

I do not wish to revert again in detail to what I think the painful and not creditable circumstances of this case. If recovery of the debt had been the real object of the defender Mortimer,—as of course it was the ostensible object, and the only object which the law can aid in promoting,—then the concession of a brief delay to the pursuer on promise of payment, and with no doubt raised that payment would have been made, was no injury to him. It is not suggested, and certainly it has not been stated by the defender, that between the 27th of July, and Monday, the 31st of July, till which day delay was given, the debt was in any peril, or that it would not have been paid. As a means of obtaining payment, it occurs to me that Morrison's arrangement, though merciful, was not [470] unreasonable, and would almost certainly have been successful. If he had any discretion at all, which I now assume, then it does not appear to me that he exercised it unreasonably or to the injury of the defender, supposing the defender to have desired payment and to have no unworthy motive.

But then it is true, and may be maintained on behalf of this defender, that he sought not the money but the imprisonment of Cameron; that he did not desire payment but revenge; that Morrison was employed not to recover the debt but to put the old officer in prison; and that, even though Morrison had by his humane agreement facilitated or promoted payment of the debt, he did the defender wrong by disappointing him of his revenge. Though the putting Captain Cameron into prison might not be required to obtain payment it was desired to obtain revenge. Now, I am humbly of opinion that the gratification of personal revenge, when clearly brought out and avowed, as it is in this case, is not an aim, or end, or motive of action which a Court of justice sitting in a Christian country ought to recognise as deserving to be promoted or protected in dealing with the rights of parties standing in the relation of creditor and debtor. If this motive had not existed there would have been no apprehension of Captain Cameron, and it is only in respect of this motive that any injury can be suggested as caused by the delay. The case seems to me to turn upon this point. If there is an inflexible rule of law in respect of which the agent's hands are absolutely tied, so that he has no discretion whatever, but must apprehend and cast into prison every debtor against whom he has diligence, even though the debtor's life be in danger and the debt be not in danger, then this case is at an end, and I have no more to say except to express my regret that the law of

this Christian country should be so inexorable and unmerciful. I do not, however, think that that is the state of the law. Some reasonable discretion suited to the circumstances and meeting the justice of the case does, in my opinion, rest with the agent; and if, in the reasonable and humane exercise of that discretion, he does not imperil the debt, he does no wrong to his client.

In the present case I think that the debt was not imperilled by any proceedings of the agent. It was paid under pressure on the Saturday, and I have no doubt that it would have been paid according to promise on the Monday. Nothing was lost to the defender but the satisfaction of imprisoning Captain Cameron on a bill purchased for the purpose of attaining that end. We cannot say, and I think we cannot presume that incarceration was here necessary to obtain payment. We know that it was desired, but not desired for that purpose. The creditor openly regretted when payment was made. He preferred the imprisonment of his enemy to the payment of his debt. I hope he will live to regret, and be led by reflection to regret, that he cherished such feelings. I at least am not prepared to recognise them as deserving protection in this Court. They cannot be ignored or set aside. They have been avowed by the defender. They are patent on the face of the case, and necessary to its explanation. If the disappointment of this revenge was not a wrong, no other wrong was inflicted on the defender by the humanity of his agent. I consider the defender's proceedings against Captain Cameron to have been vindictive and oppressive, and on the whole matter I cannot say that the verdict of the jury is wrong, and I do not concur in allowing a new trial.

LORD KINLOCH.—I am of opinion that the verdict in this case should be set aside as against evidence and against law, meaning thereby the legal result of the evidence. By the terms of the issue, which embodies the whole question in the case, the pursuer was bound to prove that the defender had wrongfully apprehended him after he, the defender, had given him time for payment of the debt. The pursuer did not prove that the defender personally had given such time. The utmost which he proved (and this in itself is debateable matter) was that time had been given by Mr. Alexander Morrison, writer in Elgin, professing to act as the defender's agent. But I think it clearly established that Mr. Morrison had no authority to act for or bind the defender in this matter. Mr. Morrison did not stand in the position of an agent employed generally for the recovery of a debt, and vested with a certain discretion by the very nature of the [471] employment. He was a sub-agent employed to no other effect than that of taking out and transmitting the legal warrant. He was so employed simply from the circumstance of his residing at Elgin, the seat of the Sheriff-court, whilst Mr. Mackenzie, the agent primarily employed, had his residence at Forres. Whether Mr. Mackenzie, the agent employed generally for the recovery of the debt, possessed such authority, it is unnecessary to inquire. It is enough for the decision of the present case that Mr. Morrison did not possess it. It is to me so clear that Mr. Morrison had no authority to give time for payment of the debt that I think it was not open to the jury to come to any other conclusion. In coming to the conclusion to which they did they acted, as I think, directly in the teeth of the evidence; and therefore the verdict cannot be sustained.

To hold Mr. Morrison to have possessed the authority claimed for him would be, I think, to throw utter confusion into our law on the subject of principal and agent.

I would only add that I think the evidence not only shown that Mr. Morrison had no authority from the defender to give time to the pursuer, but further, that Mr. Peat, the agent who acted for the pursuer, did not think that he had such authority, and whilst taking his letter for what it was worth, took his risk of what would happen. If no authority to give time was possessed, the apprehension was not wrongful. No more was the detention; for after Mr. Morrison's letter was made known to the defender he was entitled to say that it was unauthorised, and to proceed exactly as if it never had been granted.

In deciding the question before us I can pay no regard to the alleged revengeful spirit displayed by the creditor, which in no way bears on this question. I wholly disapprove of that spirit, but it is not my present function to visit it with a penalty. The only ground on which the creditor, the defender, is here sought to be made liable in damages is, that he executed his warrant after giving time to the debtor. If it is shown that he did not give time he is entitled to absolvitor from this action, and I have no right to set up against him, directly or indirectly, any other ground of damage.

LORD GIFFORD.—I should be very sorry if I thought that by setting aside this verdict I was giving any countenance to the motives which actuated the defender in using the diligence. But the question is altogether apart from such considerations. The issue is not whether the defender wrongfully apprehended the pursuer, having a bad motive for doing so, but whether he wrongfully apprehended him, having agreed to give him time. Now, he might have given time, either personally or through another properly authorised to consent for him. It is not pretended that he consented to the delay from Saturday to Monday personally; on the contrary, it is proved that he instructed his agent to give no delay. He had two agents, and when one agent instructs another it is always a delicate question how far the sub-agent has power to bind the principal. Morrison was only a sub-agent, and a sub-agent for a limited purpose. If Mackenzie had had complete power to give or refuse delay it would have been a fair question for the jury whether that did not pass to Morrison. But Mackenzie had no such power.

The next question is whether Morrison did give delay; and on this point it was pressed that he only gave it conditionally, *i.e.*, provided he was not compelled to go on. I think the jury were entitled to say whether this was so. But then comes the great question, had Morrison, in the relation in which he stood to the defender, power to bind him by giving delay—power to tie up his hands without his knowledge, and to the effect of making him liable in damages? It is here that the question assumes an importance in law.

I think there is no absolute rule as to what an agent employed to carry out diligence may or may not do. And unless we are prepared, for the first time, to lay down that any agent, or sub-agent, employed to carry out diligence is entitled to give supersedere, I do not think the verdict can be allowed to stand.

[472] There is another ground of some importance for coming to the same conclusion. Captain Cameron, through his agent, Mr. Peat, had notice of Morrison's want of power to grant delay. When an agent says, "I do not think I have power," and is pressed nevertheless to assume it, I think the other party has fair notice, and must take his risk. I am therefore of opinion that a new trial should be granted, not only on the ground that Morrison had no power to give time, but also because his want of power was intimated to the pursuer.

The rule was made absolute, and a new trial granted, reserving all questions of expenses.

W. R. SKINNER, S.S.C.—PHILIP, LAING, & MONRO, W.S.—Agents.

No. 89. X. MACPHERSON, 472. 14 Feb. 1872. Outer House.—Lord Ormidale, I.

MRS. ANNIE DOWLING SMITH OR STEWART, Pursuer.—*Sol.-Gen. Clark—Marshall,*

WILLIAM BRUCE STEWART, Defender.—*Watson—Rutherfurd.*

Husband and Wife — Divorce — Aliment.—By an antenuptial contract of marriage policies of insurance effected on a husband's life, with the sums insured and bonuses accruing thereon, were conveyed by him to trustees, with directions that upon his death they should pay to his spouse, if she survived him, the free income thence arising during her lifetime, as an alimentary allowance, not affectable by the debts or deeds of any future husband she might marry. The marriage-contract also contained an obligation on the part of the husband to pay the annual premiums on the policies. These, and other provisions in favour of the wife, she accepted in full of her legal claims. The marriage having been dissolved by decree of divorce, obtained by the wife on account of her husband's adultery, *held* by Lord Ormidale (whose judgment was acquiesced in), that she was not entitled to aliment until the sums insured should become payable by his death.

By antenuptial contract of marriage, dated 16th August 1869, between Mr. William Bruce Stewart, on the one part, and Miss Annie Dowling Smith and her father, on the other part, Mr. Stewart conveyed to trustees (1) Certain policies of insurance upon his

life, with the sums insured, amounting to £4500, and accruing bonuses thereon; (2) £500 due to him by the factor on the estate of Brugh, in Orkney, of which Mr. Stewart enjoyed a liferent under the settlement of a relative, for which sum the factor granted bond and disposition in security in favour of the marriage-contract trustees; (3) the free income of the Brugh estate, to the extent of £200 per annum. These funds the trustees were directed to apply (first) in payment of the expenses of the trust; (second) the interest of the said sum of £500, and the said £200 per annum, they were to apply in keeping up the policies of insurance upon Mr. Stewart's life, with a proviso that, in the event of the premiums being paid by Mr. Stewart himself (which by the marriage-contract he bound himself to do) the interest of the £500, together with the £200 per annum, should in each year be paid over to him; (third) that upon Mr. Stewart's death the free income arising from the sum of £500, and the sums to be received under the policies of insurance, with the bonuses thereon, should be paid to his wife, in the event of her survivance, as an alimentary allowance, not affectable by the debts or deeds of any future husband she might marry, the trustees being directed to hold the fee of the principal sums liferented by the widow for behoof of the issue of the marriage in fee, whom failing, for behoof of Mr. Stewart and his heirs and assignees.

These provisions were accepted by Mrs. Stewart as in full of her legal [473] claims; and she and her father put in settlement (1) a sum of £1500, payable to the trustees at his death, in name of tocher, and in satisfaction of his daughter's claim for legitim; and (2) 4300 rupees, belonging to Mrs. Stewart at the time of the marriage, which subsequently realised £463, 2s. 11d. These sums the trustees were directed to hold for behoof of Mrs. Stewart in liferent, exclusive of her husband's *jus mariti*, and for the issue of the marriage in fee, subject to a contingent liferent in favour of Mr. Stewart, in the event of his wife predeceasing him, and failing issue, for behoof of Mrs. Stewart's heirs, executors, or assignees.

Mr. and Mrs. Stewart were married on the 17th of August 1869. One child was born of the marriage, but it died in December 1870.

In August 1871 Mrs. Stewart raised an action of divorce against her husband, on the ground of his adultery, concluding also to have it found and declared that she had right to the whole provisions in her favour contained in their antenuptial contract of marriage, in the same manner as if he were naturally dead; "and in particular, and without prejudice to the said generality, it ought and should be found and declared that the pursuer is entitled, during all the days of her life, and preferably to all other claims, to receive from the trustees under the said marriage-contract the whole free annual income, interest, or proceeds of the sum of £500 sterling, therein conveyed by the defender to the said trustees; and also, of the principal sums to be received under the several certificates or policies of assurance, also therein conveyed by the defender to the said trustees, and bonuses or additions, or participations of profits which shall have accrued or been declared thereon, such payment to be made half-yearly, or otherwise as the same may be received by the said trustees, but always under the declarations contained in the said contract; and in the meantime, and until the sums in the said certificates or policies of assurance shall be realised by the death of the defender, the defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of £300 sterling per annum in name of aliment." The summons also concluded to have it declared that the pursuer was entitled to a reconveyance from the marriage-contract trustees of the sums put in settlement by herself and her father.

The pursuer pleaded;—(1) The defender having committed adultery, as condescended on, the pursuer is entitled to decree of divorce, as concluded for. (2) The defender having been guilty of adultery as aforesaid, the pursuer is entitled to the whole rights and benefits conceived in her favour by the said antenuptial contract of marriage, in the same manner as if the defender were naturally dead; and the defender has forfeited all the rights and benefits in his favour conceived by the said contract, and the pursuer is entitled to have decree accordingly, in terms of the conclusions of the summons, with expenses. (3) Until the capital sum payable under the certificates or policies of insurance on the life of the defender are realised by the said policies becoming claims on the death of the defender, the pursuer is entitled to aliment from the defender equivalent to the interest which would accrue upon the said capital sums if the same were now realised in consequence of the defender's death, and she is accordingly entitled to decree

against the defender for aliment during his life, in terms of the conclusions to that effect.

The defender pleaded;—(1) In the event of the pursuer obtaining decree of divorce, she will only be entitled to her conventional provisions, and not to aliment. (2) At all events, the amount of aliment claimed is [474] excessive. (3) In the event of decree of divorce being pronounced, the pursuer will only be entitled, in terms of the marriage-contract foresaid, to the sums put in settlement by herself and her father, and to the interest of the other trust-funds, including the present surrender value of the policies of insurance on the defender's life. (4) At least, should the pursuer obtain decree of divorce, and be found entitled to the interest of the principal sums contained in the policies of insurance upon the defender's life, the defender should be relieved of the obligation to pay the annual premiums thereon.

After proof, the Lord Ordinary pronounced decree of divorce, and having afterwards heard counsel upon the conclusions of the action remaining to be disposed of, his Lordship, on 20th January 1872, sisted process *in statu quo*, in order to give the pursuer an opportunity of calling as defenders the marriage-contract trustees.

Thereafter a minute was lodged in process by the pursuer, stating that she had resolved not to take any steps for making the trustees parties to the suit, and craving the Lord Ordinary to recall the sist, and, with the exception of the conclusions for aliment and expenses, to dismiss the action in so far as the conclusions of the summons had not been previously disposed of.

The Lord Ordinary pronounced this interlocutor:—(After reference to the pursuer's minute)—"Dismisses the action in regard to all the conclusions not yet disposed of, except the conclusions for aliment and expenses, and decerns; and in regard to the pursuer's conclusions for aliment, assoilzies the defender therefrom, and decerns: Finds the pursuer entitled to expenses down to and inclusive of the 22d of November 1871, when decree of divorce was pronounced, credit being always given for any sum or sums already paid to account of such expenses: Allows the pursuer to lodge an account of the expenses now found due; and remits it, when lodged, to the Auditor to tax and report; and *quoad ultra* finds neither party entitled to expenses, the one against the other." To which his Lordship added the following—

"NOTE.—The only contested matter in this case is the pursuer's conclusions for aliment. This conclusion has been resisted by the defender as opposed alike to principle and authority.

"There is no surviving child of the marriage.

"Besides policies of insurance on his life to the extent of £4500, the defender assigned to the marriage-contract trustees for the benefit of the pursuer, a sum of £500, secured by bond and disposition in security, and also £200 a-year of the income available to him from the estate of Brugh; it being declared by the marriage-contract that upon the death of the defender the trustees should pay the whole free income of the £500 and the principal sums to be received under the policies of insurance, to the pursuer during all the days of her life. The defender became also bound to pay the premiums of insurance and other payments, if any, that might be necessary for keeping up or reviving the policies. These provisions in favour of the pursuer were declared to be in full satisfaction of all legal rights or claims competent to her against the defender in name of terce of lands, half or third of moveables, *jus relictæ*, executry, or in any other manner of way arising out of her marriage.

"On the other hand the pursuer and her father assigned to the marriage-contract trustees two sums, one of £1500, payable to the trustees on the death of the pursuer's father, in lieu of all she could claim through his death, and a sum of 4300 rupees, to which the pursuer herself had right. And by the third purpose of the trust the defender, in the event of his survivance, was to have the liferent of these two sums.

"These being the provisions of the marriage-contract, subject to certain modifications dependent on contingencies which it is unnecessary to enter upon, the [475] Lord Ordinary cannot say that it appears to him the pursuer had any cause to complain of their inequality or inadequacy so for as she was concerned. The result consequent on the divorce is that the pursuer will, it is presumed, at once obtain, so far as at present practicable, the full benefit of the provisions in her favour, just as if the defender were dead, while the defender forfeits and is deprived for ever of all benefit which under the contract of marriage might have been available to him had there been no divorce. The pursuer, however, not content with this result, maintains,

in addition, that she is, in the meantime and until the sums under the policies of assurance come to be realised, entitled to decree against the defender for £300 a-year of aliment. Is such a claim maintainable in the circumstances? The Lord Ordinary is of opinion that it is not.

"All connections betwixt the pursuer and defender are now at an end. She is no longer his wife; nor is she his widow. She is restored to the position she held before her marriage as her father's daughter and member of his family; and it cannot be doubted that if necessity required, she could enforce her right to aliment and maintenance against him and his estate, like any other of his children. She is also as free to marry again as if the defender were actually dead. And her earnings and *acquirenda* of every description, whether accruing from succession or otherwise, become her own beyond the reach or interference of the defender in any way. On the other hand, all the rights and advantages which might have arisen to the defender by virtue of his marriage with the pursuer have in consequence of the divorce been cut off and lost to him for ever. His *jus mariti* no longer exists; his right of courtesy is gone, and he cannot now claim or acquire any funds or estate accruing through his marriage with the pursuer. Not only so, but the defender continues bound and liable for all the conventional provisions he undertook in favour of the pursuer.

"In this state of matters the Lord Ordinary must own that he has been unable to understand how the pursuer's claims for aliment against the defender can be sustained either *jure naturæ* or on any other principle. She might, if she had pleased, instead of divorcing the pursuer, have obtained decree against him for separation *a mensa et thoro*, and if she had done so she would have obtained a suitable aliment, just because she would have in that case still continued to be his wife, and to retain his name and status, and because he, on the other hand, would still have continued to retain all the pecuniary advantages, such as his *jus mariti* and right of courtesy accruing to him as her husband. But the pursuer although she has resorted to and obtained the remedy of divorce against her husband, the defender, is not content with the known and well-established consequences of such a remedy, but also by her present claim for aliment, attempts, in addition, to enforce against him what would have been her right under a decree for separation *a mensa et thoro*, or, in other words, attempts to enforce against the defender, although he is no longer her husband, a claim for what no liability could, in the Lord Ordinary's opinion, attach to him except in that character.

"Nor does the Lord Ordinary think that the pursuer was successful in showing that there is any authority to support her claim. The Lord Ordinary understood it indeed to be conceded that there was no such direct authority; but several cases were cited tending, it was said, indirectly and inferentially, to aid her plea. On examination, however, of these cases, the Lord Ordinary cannot say that they appear to him to afford any material assistance to the pursuer. (1) The case of Craigie *v.* Craigie (11th March 1837, 15 Sh. 836) can scarcely be relied on as an authority in favour of the pursuer, for there the claim for an aliment was refused by the Court, on the ground, no doubt, that the lady (pursuer in that case) declined a proof that the defender, her divorced husband, had any means or estate out of which aliment could be awarded. But while that was held to be sufficient for the decision, it does not appear from the report that any expression of opinion fell from the Court favourable to the principle on which the pursuer here places her claim; and indeed it does not appear that in the case referred to any contest or dispute was raised as to the abstract right of an innocent wife, who has divorced her husband, to a claim of aliment against [476] him. The defender in that case seems to have been satisfied to plead that he was himself in a state of destitution, and so unable to give any aliment supposing he had been liable for it, and this plea was held by the Court to be of itself sufficient to entitle him to absolvitor, seeing that the pursuer declined to undertake to controvert it by proving that it was ill-founded in fact. (2) The case of Hobbs or Baird *v.* Baird or Munro and husband (22d February 1845, 7 D. 492), is that of a widow suing the heir-at-law of her deceased husband, and has no bearing on such a case as the present, where the pursuer's late husband is still alive, and where consequently she is not and cannot be in any proper sense his widow. It is a mistake to conclude from the expression that the rights generally of an innocent wife who has divorced her offending husband accrue to her as if he were naturally dead, that she is entitled to all the rights which might be available to her as a widow. The expression has come into use as a compendious and convenient one, and in the general case a sufficiently accurate one, but it cannot

be allowed, and the Lord Ordinary does not suppose it has been ever held, to denote that a woman whose husband is still alive is to be treated as a veritable widow, and entitled to all the rights and privileges of one. She could not, for example, have a right to mournings as the widow of her deceased husband. (3) The case of Thom *v.* Thom (11th June 1852, 14 D. 861) is peculiar, and does not, as the Lord Ordinary reads it, touch the present. There the full right of liferent claimed by, and sustained in favour of, the innocent husband, in place of being divided with the offending and divorced wife, was held to have vested in the husband before the dissolution of the marriage by the divorce, and it was undoubtedly one of the conventional provisions secured to him by the antenuptial contract of marriage of the parties in respect of which he contracted the marriage; but in the present case the pursuer's claim for aliment, maintained as it is on the footing of the defender being dead, and of her right to be treated as if she were his widow, could not possibly have been vested in her before the dissolution of her marriage, and unquestionably was not one of her conventional provisions; and (4) in the case of Beattie *v.* Johnston (5th February 1867, 5 Macph. 340), the only point determined having any bearing on the present is that the innocent wife was entitled at once on the dissolution of her marriage by the divorce of her husband to the benefit of her conventional provisions in respect of which the marriage was contracted by her. But here, as has been already remarked, the pursuer does not and could not contend that her claim for aliment is one of the conventional provisions in respect of which she contracted marriage with the defender.

"It was also contended by the pursuer that she is at least entitled to an aliment from the defender while and so long as the sums in the policies of insurance cannot be realised by his actual death, or in other words, that as it was his fault that his estate has been so left on the dissolution of the marriage by his divorce that the pursuer's provisions cannot be immediately realised, he is bound to furnish her with a *surrogatum* in the meantime, in the form of an aliment as claimed. The Lord Ordinary cannot say that he sees either law or equity in this contention. The pursuer may, in consequence of the dissolution of the marriage by the divorce of the defender, be entitled to her conventional provisions as those have been constituted in her favour and accepted by her in the antenuptial contract of marriage, but the Lord Ordinary knows of no authority for altering and enlarging them in the way contended for. Indeed, he thinks that to do so would be contrary to the principles of decision in several cases. Thus, in the case of the Countess Dowager of Findlater and Seafield *v.* Lord Seafield and Colonel Grant, 8th February 1814, F. C., it was held that a widow who had married abroad, and who, in an antenuptial contract of marriage, had accepted a certain provision in lieu of her legal rights under the marriage, is bound by the contract, though drawn in a foreign form, from claiming a locality, terce, or aliment out of her deceased husband's estate situated in Scotland, the Judges remarking, according to the report, that 'there was no case on record where aliment had been given by the Court where there was an antenuptial contract. Such a deed settled irrevocably the rights of parties, and it were dangerous for the Court to go against it.' In Cunningham Fairlie against [477] Cunningham Fairlie (15th June 1819, F. C.) it was found that under an entail excluding terce, but allowing a certain provision to wives and husbands, a wife who had divorced her husband was not entitled to terce or aliment, or to more than the provisions allowed by the entail, even during the life of her husband. In the case of the Earl of Elgin *v.* Ferguson, 26th January 1827 (5 S. 243, N. E. 226), where a lady, the presumptive heiress of entail to two estates, was in 1808 divorced for adultery, and she succeeded to the estates in 1822, whereupon her former husband raised an action concluding for possession of these estates, or for an additional tocher stipulated in the marriage-contract to be paid on her succeeding to the estates, and for relief of certain provisions which he had made to the children of the marriage in reliance on this succession, the Court held that he could take no benefit, direct or indirect, from the wife's estate after the decree of divorce, and that he had no claim for damages against her. And in Donald *v.* Donald (11th March 1864, 2 Macph. 843), although the question arose in circumstances different in some important respects from those of the present case, there were indications of opinion by the Court adverse to the principles of the pursuer's claim. Lord Jerviswoode as Ordinary in the case stated in the note to his judgment (which was affirmed), among other things, that 'in the case of husband and wife, the obligation of the former is to afford aliment to the latter by force of the matrimonial tie, and by that only, but if that tie be severed by a final judgment, the

Lord Ordinary is unable to see grounds on which the divorced spouse can demand such aliment from him from whom she has thus been completely separated. The band is broken.' And in affirming Lord Jerviswoode's judgment it does not appear that anything fell from their Lordships of the First Division of the Court to the effect of there being any doubt of the soundness of the views which had been expressed by him. Mr. Bell, again, in his Principles (s. 1545), while he states what the rights of a wife are in regard to aliment, and that she is entitled to such in the case of her husband's desertion, on judicial separation, and during the dependence of an action of divorce, makes no allusion to such a case as the present. And Mr. Fraser (Pers. and Dom. Relations, vol. i. p. 442) says expressly, as the result of his researches, that 'if the parties be divorced, all obligation to aliment the wife ceases.'

"The Lord Ordinary has therefore been unable to come to the conclusion that the pursuer's claim for aliment in the present case is maintainable either on principle or authority. He thinks, on the contrary, that it is opposed alike to both.

"In regard to the question of expenses, the pursuer was of course entitled to them down to the date when decree of divorce was pronounced in her favour; and so far no dispute was raised. And as to subsequent expenses, the defender stated that all he asked was that neither party should be found entitled to any, and the Lord Ordinary has so found. The pursuer could not well insist for anything more favourable to her, seeing that since the date of the divorce she has been wholly unsuccessful."

The judgment was acquiesced in.

WILLIAM KENNEDY, W.S.—WILLIAM MILNE, S.S.C.—Agents.

No. 90. X. MACPHERSON, 477. 22 Feb. 1872. 2d Div.—Sheriff-substitute of Lanarkshire, I.

JAMES NIMMO, Respondent and Appellant.—*Watson—R. V. Campbell.*
THOMAS CLARK AND ROBERT JAMES WILSON, Petitioners and Respondents.—*Sol.-Gen. Clark—Moncreiff.*

Reparation—Culpa—23 *&* 24 *Vict. c.* 151 (*Mines Regulation and Inspection Act*, 1860), *secs.* 10, 11, 13, 22—*Special Rules—General Rules.—Held* that the 12th general rule contained in sec. 10 of the Mines Regulation and Inspection Act obliges the owner of a coal mine not only to provide an adequate brake to the engine, but also to see that it is kept in proper working order, and that, though pumping gear may serve the purpose of a brake, it is not a "brake" in the sense of the rule.

[478] *Reparation—Culpa*—23 *&* 24 *Vict. c.* 151 (*Mines Regulation and Inspection Act*, 1860), *secs.* 10, 11, 13, 22—*Special Rules—General Rules.—Held* that the owner of a coal mine, who, in terms of secs. 11 and 13 of the Mines Regulation and Inspection Act, had established certain special rules, in which the duties of a "bottomer" were defined, had thereby undertaken not to work the pit without a bottomer.

Expenses—Statute 23 *&* 24 *Vict. c.* 151 (*Mines Regulation and Inspection Act*), *sec.* 22.—A person convicted by the Sheriff of a contravention of the above Act appealed to the Court of Session. *Held* that the Court had power, in dismissing the appeal, to award expenses to the procurator-fiscal, although the Act conferred no power to grant expenses in the inferior Court.

The following complaint was presented under the Summary Procedure Act in the Sheriff-court of Lanarkshire at Airdrie by Thomas Clark and Robert James Wilson, the procurators-fiscal:—"That James Nimmo, coalmaster, residing in Slamannan, in the county of Stirling, has contravened section 10th of the Act 23 & 24 Victoria, cap. 151, by neglecting or wilfully violating the 12th general rule provided by the said 10th section of said Act: And the said James Nimmo has contravened section 11th of the said Act, by neglecting or wilfully violating the 9th special rule established and enforced under said Act, particularly the said 11th section thereof, at No. 1 coal-pit, Longrigg, in the occupancy of James Nimmo and Company, coalmasters there, in so far

as—(1) the said James Nimmo being, time hereinafter libelled, owner or agent under and as defined by said Act, particularly section 7th thereof, of said No. 1 coal-pit, Longrigg, and the said coal-pit being then worked, the said James Nimmo did, during the period between the 1st August 1871 and 19th August 1871, both inclusive, neglect or wilfully violate the said 12th general rule, by having, time above libelled, neglected or wilfully failed to have an adequate brake attached to the steam-engine used at said pit for lowering and raising persons, whereby the said James Nimmo is liable to forfeit and pay a penalty not exceeding £20, specified in the 22d section of the said Act: Likeas (2) the said James Nimmo being, time hereinafter libelled, owner or agent, under and as defined by said Act, particularly section 7th thereof, of said No. 1 coal-pit, Longrigg, and the said coal-pit being then worked, the said James Nimmo did, during the period between the 1st August 1871 and 19th August 1871, both inclusive, neglect or wilfully violate the said 9th special rule, then established and enforced under said Act, and particularly said 11th section thereof, at said pit, by having, time above libelled, neglected or wilfully failed to have a bottomer or signalman in said pit, or any person to perform therein the duties specified in said 9th special rule, whereby the said James Nimmo is liable to forfeit and pay a penalty not exceeding £20, specified in the 22d section of the said Act."

James Nimmo, the respondent, pleaded not guilty, and at his request the Sheriff-substitute (Logie) took notes of the evidence, and thereafter pronounced this judgment:—"In respect of the evidence adduced, convicts the said James Nimmo of the offences charged, and therefore adjudges him to forfeit and pay—1st, The sum of £5 sterling of modified penalty for having neglected to have an adequate brake attached to the steam-engine used at No. 1 pit, Longrigg, during the period referred to in the complaint; 2d, The sum of £20 sterling of penalty for having wilfully violated the 9th special rule established at said pit, by not having a bottomer or signalman therein, or any person to perform the duties specified in said special rule during the same period: Ordains instant execution by arrestment, and also execution by poinding: Grants warrant to officers of Court to arrest all debts and sums of money owing to the said James [479] Nimmo; and in default of payment within eight days from this date to poind his goods and effects, and to sell the same at the expiration of not less than forty-eight hours after such poinding, without further notice or warrant." *

---

* "NOTE.—Two penalties have been sought from the respondent in the present complaint—one for having neglected or wilfully failed to have an adequate brake attached to the steam-engine used at his pit No. 1, Longrigg, during the period between 1st and 19th August 1871, and the other for having neglected or wilfully failed to have a bottomer or signalman in said pit, or any person to perform his duties, during the same period.

"The brake required by the 12th general rule in section 10 of the Mines Regulation and Inspection Act, 23 & 24 Vict. cap. 151, to be attached to every machine worked by steam or water power, used for lowering or raising persons, is usually fixed on the fly-wheel, and sometimes on the winding-shaft. The brake on the fly-wheel is described by the Government inspector as a strap of iron placed half-way round the wheel, and worked by means of a lever, and the lever or handle is placed in the engine-house beside the engineman, to give him control over his engine in case of emergency. Two answers are given by the respondent to the want of a brake; 1st, that there was a brake on the fly-wheel, and that the lever had been removed by the engineman without his knowledge; and 2d, that the engine was used both for winding and pumping, and that the pumping gearing itself acts as a brake.

"With regard to the first answer, it is self-apparent that, even granting that all the component parts of a brake were at the pit at the time, so long as they were not put together so as to be in working order, and particularly while the lever or handle was detached, there was no adequate brake available to the engineman in case of emergency; 2d, that the lever was taken off by the engineman because the brake was requiring repairs of some kind, and that this was done in the presence of the underground manager some time before the 1st of August; 3d, that the respondent became personally aware that the lever was detached from the brake, so as to render it utterly useless as a brake, some time before the 1st of August, and that he failed in his duty to see that it had been replaced, after having given orders to have it done. According to his own statement, he gave orders to one of the enginemen some time before 1st

[480] The respondent appealed to the Second Division of the Court, and argued;—He was entitled to the same amount of specification as in a criminal libel. The whole of

August to have the lever or handle attached to the brake, and on a subsequent visit to the engine-house, finding that his orders had been disobeyed, he repeated it to the other engineman—both of these orders having been given prior to 1st August. That he then made no further inquiry whether the second engineman had been more obedient to his duty than the first, until he had brought an action under the Master and Servants Act against some of his colliers for desertion, when it came out in defence for them that there was no brake on the engine, in violation of the rules established at the pit. There was therefore such *culpa* or neglect on the part of the respondent as to leave no alternative but to convict the respondent of said offence, unless his second answer is held to meet the case.

"The second plea is, that admitting there was no brake on the fly-wheel, the engine has both winding and pumping gearing, and the pumping gearing acts as an adequate brake to the winding gearing. The Sheriff-substitute is of opinion that this defence is untenable. The Act, as already mentioned, requires that an adequate brake shall be attached to every machine which is worked by steam or water power, and is used for lowering and raising workmen. If it is attached to the machine either by being fixed to the fly-wheel or to the winding shaft, it is always there ready for use in every emergency. But even if the pumping gearing is as effectual as a brake as the respondent and his witnesses say it is, it is only of use when the engine is pumping as well as winding. There is fully higher testimony for the procurator than that for the respondent that *de facto* pumping gearing is not a brake at all, and it certainly is not a brake in the sense of the Act of Parliament. Mr. Moore, the Government inspector, says the [480] pumping does not act as a brake to the winding engine, and Mr. Graham Stevenson, a gentleman of the highest character and reputation as an engineer, says he never heard of pumping gearing being made to serve the purpose of a brake, and that, in his opinion, pumping gearing is not a brake at all, and, as a rule, that the engineman has less control of his engine when it is both pumping and winding than when only winding or only pumping. It would therefore be a most dangerous precedent, and, as it appears to the Sheriff-substitute, in direct violation of the words of the statute, if the owners of pits at which men are lowered to and raised from their work are to be allowed to disregard the rules established at their works, and to substitute something which, in certain circumstances, in their opinion, does as well. In Spon's Dictionary of Engineering, page 585, a brake is defined to be a piece of mechanism for retarding or stopping motion by friction by the pressure of rubbers against the wheels, and such is the piece of machinery attached as a brake to the fly-wheel or the winding-shaft.

"The Sheriff-substitute has modified the penalty to £5, because the respondent had really provided a brake at the pit in terms of the Act, so that his offence was one of neglect in not having it in working order and attached to the fly-wheel for a length of time far beyond what was necessary for any repairs it required.

"It is admitted that there was no bottomer or signalman in said pit during the period in question, and it came out in evidence that there never had been one since the pit began, some three years ago. There was therefore no alleviating circumstances, and the Sheriff-substitute has awarded the full penalty imposed by the Act. It was stated on the part of the respondent, as a good reason for not having a bottomer or signalman, that he did not employ drawers, but that the colliers in that pit drew their own coals. This, instead of being a justification for not having a bottomer, rather tells against him. If there had been a body of regular drawers engaged in drawing coals, and drawing only, it might have been supposed that these parties would soon become proficient in placing their loaded hutches on the cage, giving the appointed signals to the pit-headman, and observing any defects in the signal apparatus,—in short, discharging the duties of bottomers; but it appears from the proof that in this seam of coal there were in all about forty men and boys engaged in excavating the coal, drawing the hutches to the pit-bottom, and placing them upon the cage. That some of the colliers drew their own coals, but others of them had boys, who acted as drawers for their fathers. Boys of twelve or fourteen years of age may in this way have been employed, ignorant of the duties required of them, where there was no bottomer, and who were utterly helpless if a case of emergency arose. The object in having a bottomer or signalman at the pit-

the sections of the statute which he was said to have contravened ought to have been set out in the complaint. The special rule which was said to have been violated ought also to have been quoted.

On the merits;—It was not necessary to employ all the persons whose duties were defined by the special rules. The master sufficiently discharged his duty by providing a brake to the engine, and he was not responsible for the negligence of his engineman, whose duty it was to see that the brake was attached to the engine, and was in proper working [481] order. He had discharged his duty by providing a properly skilled man to perform the duties of engineman.*

The Court intimated that they desired the respondents' council to reply only on the question whether the appellant was responsible for the want of an adequate brake.

At advising,—

LORD JUSTICE-CLERK.—The provisions of the Mines Inspection Act are meant for the preservation of the lives of the miners, and if these provisions be not strictly observed and enforced the Act would become useless, and its object be defeated.

With regard to what has been said by way of excusing the appellant's omission to have a bottomer in the pit, no effect can be given to such explanations. The pit-owner, by the special rules, is bound to employ some one to fulfil the duties of a bottomer, and it cannot protect him to say that a bottomer was unnecessary. In the same way the Act requires that all engines shall be fitted with brakes, and if an engine have no brake, or its brake be useless, it can be of no avail to allege that pumping gearing operates as a self-acting brake. The statute has not been complied with, and the penalty must be held to have been incurred. The only difficulty in the case is, whether the appellant, after giving orders to have the handle of the brake restored, could be held to have been guilty of neglect. But since it appears from the evidence that although he was in the habit of visiting the pit three or four times a-week he never inquired whether his orders had been carried out it cannot be doubted that he was careless.

On the whole matter, I see no grounds for altering the Sheriff's interlocutor.

LORD COWAN.—Special rules for the management and protection of this coal-pit and the miners therein were prepared by the proprietors, and on their application duly sanctioned by the Home Secretary, and published for the information of all interested. These rules, therefore, are binding on the owners of this pit and must be complied with, and it cannot be now alleged that this pit did not require to be placed under these rules.

The rules are alleged to have been violated by the appellant in two particulars;—1st, As regards the brake. The appellant was the managing partner of the pit, and as such it was his duty to see that everything was right, and the rules adhered to. I thought at first that being the owner merely it was rather hard that he should be convicted for negligence and disregard of his orders by his servants, but it is proved that he attended personally at the pit three or four times a-week, and was, moreover, aware that the handle of this brake had been removed. I think there can be no doubt that the Sheriff-substitute's view is correct. He has also given effect to all the considerations by way of extenuation which have been pressed upon us during the discussion, and has only fined the appellant in a modified penalty as respects the inefficiency of the brake. It is of the utmost importance that the owners of collieries should know that when they issue special rules such as those we are considering they must observe them. Then 2d—With respect to the question of the absence of a bottomer. I felt at first that there was some difficulty, where the pit was small and there was no great necessity for such a person; but that ought to have been considered by the owner before he went to the Secretary of State to get his proposed special rules approved of. He could then have stated that the operations in the pit were so small in their nature as not to require the services of a bottomer. But when he had submitted the rules which we have before us, and had got them approved of as necessary for the working

---

bottom is to have there at all times a person of skill to see the loads properly placed upon the cage; to give the proper signals at the proper time, for the safety of the persons who bring the coals to the pit-bottom; and in so far as responsibility lies for want of a bottomer, it matters nothing whether the drawer who brings them is an experienced person directly employed by the master, or a helpless boy newly introduced by his father into the pit to assist him with his work."

* Dykes v. Merry and Cunningham, March 4, 1869, *ante*, vol. viii. p. 603.

of his pit, he bound himself to see them carried out. The very object of these regulations is to provide for the safety both of the miners and the owners of pits, to protect the one from their own neglect and carelessness and the other from the pecuniary consequences that may result from accidents or otherwise. It is the duty of the Court before which such cases are brought to see that these rules are duly observed, and when neglected to enforce the statutory provisions.

[482] I am of opinion that the appellant's neglect of both the rules referred to has very properly subjected him to the fines imposed, and that the interlocutor of the Sheriff should be adhered to, and the appeal dismissed.

LORD BENHOLME.—It appears to me that the neglect of superintendence is obvious. The managing partner allowed the handle of the brake to remain away from its place. He then ordered it to be restored to its place, but took no care to see that his order was carried out.

With regard to the other point, I think that when he proposed to the Home Secretary to sanction the special rules for this pit, the master became bound to employ a bottomer.

LORD NEAVES.—I concur. This statute is for the benefit of the workmen as well as of the masters. The workmen are often so ignorant or rash that they require to be protected by the Legislature. The employers are indebted also to the Legislature for imposing rules whereby they may conduct their operations with safety. Under the special rules applicable to the working of this pit there is an enumeration of the duties to be performed by the bottomer. It is out of the question to say that this only applies if the manager choose to employ a bottomer. It was his duty in reference to these rules to employ a man to perform this duty.

It is clear that the master neglected his duty in not seeing that the brake was in good order. The Sheriff-substitute has very properly modified the penalty.

Expenses having been asked by the respondents,

The appellant argued;—Under sec. 22 of the Summary Procedure Act no expenses can be recovered by or against a public prosecutor, unless authorised by another statute. Under the Mines Regulation Act there is no mention of expenses being given.

LORD JUSTICE-CLERK.—The intrepretation clause of the Summary Procedure Act does not include this Court in the list of Courts in which expenses are not to be recoverable, and moreover, we are in the habit every day of finding for expenses in suspensions of convictions under that Act in the Court of Justiciary. It is therefore clearly within our power to given expenses in this Court.

The other Judges concurred.

THE COURT pronounced this interlocutor:—"Find that during the period libelled no brake was attached to the fly-wheel of the engine at the appellant's works: Find that this was known to the appellant prior to 1st August 1871, and that he gave orders for the necessary machinery to be attached to the fly-wheel, but that although he visited the pit three or four times a-week he did not see that this was done, and that it was not done: Find that during the period in question no bottomer was employed in the appellant's pit: Therefore dismiss the appeal, affirm the judgment appealed against, and decern: Find the appellant liable in expenses in this Court, and remit," &c.

ALEX. WYLIE, W.S.—CHARLES MORTON, W.S., Crown Agent.—Agents.

No. 91. X. MACPHERSON, 482. 24 Feb. 1872. 1st Div.—B.

MRS. CECILIA HATTON OR BAIRD, Petitioner.—*Lord-Adv. Young—Mackay.*
THE TRUSTEES AND EXECUTORS OF THE DECEASED GEORGE BAIRD, Respondents.—*Sol.-Gen. Clark—Watson.*

Trust—Nobile officium—Allowance to Minor Heir.—The proprietor of large estates, with an income of £55,000 per annum, executed a settlement by which he directed that his whole property should be "under the exclusive management and direction" of his trustees until his son, an only child, should reach twenty-five years of age. The trustees were appointed tutors and curators to the son, [483] but the deed contained no directions with regard to the allowance to be made for his maintenance and

education. At the father's death the son was eight years of age, and his mother, who enjoyed an income from the trust-estate of £3500 per annum, obtained from the trustees for the son's maintenance and education, for the first year £1000, for the second year, £1500, and for the third year they proposed to allow £2000. During the currency of the second year, the mother presented a petition to the Court craving an annual allowance from the trustees of £3500 for the maintenance, &c., of the pupil. *Held* (1) that the Court had a discretionary power to fix the amount of the allowance to be made in cases of this kind; and (2) that in the circumstances £3000 per annum should be allowed for each of these years, reserving to either party to apply to the Court for an alteration of the allowance in the event of a change of circumstances (Lord Deas dissenting, on the ground that the fixing of the allowance was a matter within the discretion of the trustees, and that the Court were not entitled to interfere unless the trustees had committed a gross error in the exercise of their discretion, which had not been shown).

Mr. George Baird of Stitchill died on 24th August 1870, survived by his wife, Mrs. Cecilia Hatton or Baird, and by one child, George Alexander Baird, who at his father's death was eight years of age.

By trust-disposition and settlement executed in 1868 Mr. Baird conveyed his whole property to trustees, with directions, after payment of debts, &c., to pay to his wife, if she survived him, a free liferent annuity of £2000 over and above her jointure of £1500 per annum, secured to her by their marriage-contract, declaring that the additional annuity of £2000 should be increased to £4000 per annum in the event of the testator's son, George A. Baird, dying before majority, and without leaving issue; but that it should be forfeited in the event of the testator's widow marrying again. The trustees were also directed to deliver to the testator's widow, as her absolute property, such of his carriages and carriage horses, with their harness, as she might select, and to allow her the free use of the mansion-house, offices, and garden of Stitchill, with the whole household plenishing and effects situated in or belonging thereto at the time of his death, and to pay her an allowance of £150 sterling per annum towards the cost of keeping up the garden of Stitchill, but that only so long as she should occupy the mansion-house, and with no power to let the mansion-house to others; and it was declared that when George Alexander Baird, or any other child of the testator who should succeed to his estates, should attain the age of twenty-one years, he or she should be entitled to take up his residence at Stitchill House, if so inclined, in which event an allowance of £500 yearly was to be made to the widow to enable her to provide herself with another place of residence.

Mr. Baird also directed his trustees to execute a deed of strict entail of his estates of Stitchill and others in favour of his son, George A. Baird; and failing him, in favour of a series of heirs mentioned; and, after implementing all the other purposes of the trust, the trustees were instructed to hold the residue of the estate for behoof of the said George A. Baird, and the heirs of his body, in absolute fee and property; whom failing, for behoof of any other children of the testator, and a number of other persons in succession; "but under the declaration that the said residue should not be made over to the said George Alexander Baird, or any other son thereafter born to the truster, until he should attain the age of twenty-five years complete, it being the truster's wish and intention that his whole means and estate (including the lands and estates directed to be entailed) should continue under the exclusive management and direction of his trustees, without any right of interference or control on the part of his said son or sons."

[484] Mr. Baird appointed his trustees to be tutors and curators to his son, George A. Baird, and to any other person succeeding in pupillarity or minority as heir under the entail of Stitchill, &c., to be executed by the trustees.

The trust-deed contained no directions with regard to an allowance being made by the trustees for the maintenance and education of the testator's son, in the event of his succeeding to the estates during minority.

At his death Mr. Baird was in possession of the estate of Stitchill and other lands, the rental of which was about £15,000 per annum; and he also possessed other property of the value of about £1,000,000, yielding an income of about £40,000 per annum.

In these circumstances, Mrs. Baird, after her husband's death, presented a petition

to the Court, in which she stated that her son, in accordance with arrangements made by his father, was receiving his education at a preparatory school with the view of afterwards going to Eton, and ultimately to one of the Universities. "When not absent for the purposes of education, the pupil has resided with the petitioner. The petitioner has since her husband's death, when not absent on account of her health, which renders it necessary for her to live in England, or some more southern climate, during the winter months, resided at the mansion-house of Stitchill, where her son has also resided during his holidays. It is the desire and intention of the petitioner to continue her residence at Stitchill along with her son. It was the wish and intention of her husband that the pupil should reside at Stitchill, and the petitioner is satisfied that it will be greatly to his advantage that he should do so. The petitioner has received from the trustees the jointure of £3500 provided for her by her antenuptial contract and the trust-disposition and settlement, and the free use of the mansion-house of Stitchill, along with an allowance of £150 towards the cost of keeping up the garden, but this sum has been wholly inadequate and insufficient to enable her to maintain and educate her son according to his fortune and station, and to keep up the necessary establishment, and defray the expense of living at such a house as Stitchill, unless a reasonable and fair allowance is made to her by the trustees for behoof of her son. The trustees have hitherto allowed only £1000 a-year for the maintenance, education, and residence of the pupil; but in consequence of representations made to them by the petitioner as to the inadequacy of such an allowance, the trustees have intimated to her that an allowance of £1500 will be made for the year commencing 11th November 1871 and ending 11th November 1872, and thereafter an allowance at the rate of £2000 per annum. This allowance, which, along with the petitioner's jointure, will amount to £5000 for the year preceding 11th November 1872, and £5500 per annum thereafter, is quite insufficient, having regard to the station and fortune of the pupil, and the necessary expenses of the petitioner on his behalf, including a reasonable sum to assist her in keeping up the establishment at Stitchill as a family residence. The mansion-house of Stitchill is a very large one, being one of the finest houses in the south of Scotland. It was recently built for Mr. Baird, at a cost, including offices, of not less than £36,000. It requires an establishment of at least twenty-four servants in connection with the house and stables, to keep them in proper order, and in a becoming manner. The late Mr. Baird furnished the house in a handsome and expensive style, and placed in it many valuable pictures and statues, which still continue there. The petitioner cannot live at Stitchill, keep the necessary establishment there, and defray the costs of her own maintenance, and of her son's maintenance and education, at a less cost than £7000 per annum. The personal expenses of the pupil, incurred by the [485] petitioner for his education and clothing during the past year, have amounted to about £500, and they will be considerably larger when he is removed to Eton, as he probably will be when he arrives at the age of twelve. The petitioner submits that, in the circumstances, £3500 per annum is a moderate and proper allowance to be made to her on account of her son, and that it should commence as at the term of Martinmas 1870, and be payable in future quarterly in advance.

Mr. Baird's trustees lodged answers to this petition, in which they stated that they had "implemented the obligations undertaken by the deceased to the petitioner in their contract of marriage, and also the provisions, so far as prestable, made in her favour by the trust-deed of the deceased. The respondents also maintain the mansion-house and offices of Stitchill in repair, keep up the avenues, walks, and grounds, and relieve the petitioner of all public and local rates and taxes leviable in respect thereof. . . . The respondents fixed the allowance to be paid to Mrs. Baird for her son's education and maintenance at £1000 for the first year, then £1500 for the second or current year, and £2000 per annum thereafter; the allowance for the past year was paid quarterly. It is the intention of the respondents to pay such sums as may, in their opinion, be suitable when it becomes necessary to provide him with an establishment. The respondents have fixed these allowances after due consideration, and in accordance with what they believe to be their duty as tutors and trustees with reference to the upbringing of the truster's son. In conclusion, the respondents have respectfully to submit to your Lordships that there are no competent or valid grounds for interfering with their action in this matter, and that the prayer of the petition ought to be refused."

At advising,—

LORD PRESIDENT.—My Lords, this petition by Mrs. Baird, widow of the late Mr. George Baird of Stitchill, raises a question of considerable delicacy. Mr. Baird died on the 24th of August 1870, leaving the petitioner, his widow, and one child, a son. He left a very large estate, both heritable and moveable, particularly the latter. His landed estate is estimated at £15,000 a-year, and in addition to that the personal estate is said to exceed one million. By the marriage-contract Mrs. Baird was provided with an annuity of £1500 in the event of her surviving her husband, but by his trust-disposition, executed, I believe, in the year of his death, he provided her with an additional annuity of £2000. So that by this increase the lady's income is made £3500 a-year. Is is clear that for a lady with such an income as £3500 a-year Stitchill, as it has been described to us, is far too expensive a residence. It is a house containing sixty rooms, and requiring not less than twenty-four servants as the establishment for the house and estate. It is quite clear, therefore, that she would be much more comfortably and more suitably settled in a smaller house, and with a more moderate establishment. But then we must observe that it is the clear wish and intention of Mr. Baird, as expressed in his settlement, that she should live at Stitchill, and it is also clear from the same source that the reason of his wish was for the sake of his heir. He desired the establishment of Stitchill to be kept up by the widow in the interest of his son. The settlement gives no direction whatever as to the provision that is to be made for the maintenance of the heir. The lady's annuity is settled, but there is no provision made for the heir, and no direction given to the trustees under that settlement upon the subject at all. If he had fixed what the allowance of the heir was to be, we should probably not have interfered with that, and I doubt whether we could have interfered. Had he even expressly stated that he desired this matter to be left entirely to the discretion of his trustees, and that they alone were to be the judges of what the amount of the allowance to the heir should be, there would have been considerable difficulty in interfering with the discretion of the trustees, and we should certainly not have been disposed to do so, unless it could be shown that they had exer-[486]-cised that discretion very unwisely, or in such a way as to materially prejudice the interests of the heir. But in the present case the entire silence of the settlement upon this subject, I think, lets in the discretion of this Court much more fully than it could have been exercised in either of the cases that I have already spoken to. I do not say the trustees are not the proper parties to consider, in the first place, and give their opinion as to what the allowance to the heir should be, but they exercise that discretion subject to the control of the Court, and of course we must believe it to have been Mr. Baird's wish, in consequence of the silence of his settlement on the subject, that any discretion to be exercised by his trustees in this matter should be subject to the control of the Court. The only question we have then to consider is, what course is best for the interest of the heir himself? I think that is the single consideration which should influence the Court in a matter of this kind.

The trustees have very properly, in compliance with the plain intention of the testator, arranged that Mrs. Baird shall take up her residence at Stitchill, and that the boy, her son, shall live with her there, and have his home there when he is not at school. For the purpose of maintaining this establishment, or enabling Mrs. Baird to maintain this establishment at Stitchill, the trustees are of opinion that an addition of £1500 to her income is sufficient, making the entire income of the lady, including the provision for her son, £5000 in all. Mrs. Baird, on the other hand, suggests that this sum ought to be larger, and she says it is not possible for her to maintain an establishment, such as a place like Stitchill requires, under a sum of £3500 in addition to what she already enjoys. Now, there are various circumstances to be taken into consideration in dealing with these conflicting proposals, and undoubtedly the first and most prominent circumstance is the great wealth of Mr. Baird, which is all to be inherited by this only child, as soon as he shall attain the age of twenty-five. The income of the estate may be moderately estimated at £55,000 a-year. If the proposal of the trustees is sustained, and Mrs. Baird's income from the estate, including the provision of the heir, is limited to £5000, there will be, roughly speaking, a balance of surplus rents and income of £50,000 a-year. The boy being only ten years of age, and not being entitled to the possession of his inheritance until he is twenty-five, this surplus income in the intermediate fifteen

years will, without calculating periodically accruing interest, amount to £750,000. But suppose that Mrs. Baird's proposal is adopted, and that her income is increased to £7000 a-year by the addition of £3500, then the surplus rents and income of the estate would be £48,000 a-year, and that in fifteen years would give, exclusively of periodical interest, a sum of £720,000. The difference between the result of the one proposal and the other is this, that this boy's fortune, when he comes to possess it at the age of twenty-five, will be in the one case increased by £750,000, and in the other by £720,000. In either case he will be in possession of a landed estate of £15,000 a-year, and about two millions of money. Now, I venture to think that the difference between the effect of the one proposal and the other, which is a matter of £30,000 fifteen years hence, is not worth a moment's consideration. If indeed any interest secured under the settlement were to any extent sacrificed by an increase of the allowance now that would be a different matter. If there was any necessity for accumulating for the purpose of making provision for younger children that would be a very different matter, but the sole effect of the accumulation is to increase by so much the already enormous fortune which goes to this boy alone, and nobody else, when he attains the age of twenty-five. I leave out of consideration altogether the interest of those who are to succeed to this wealth, in the unfortunate event of this lad not reaching the age of twenty-five, because I think the son is the only person whose interests require to be considered in this matter at all. It is somewhat peculiar also that by Mr. Baird's settlement the income of Mrs. Baird would be very considerably increased in the event of the death of his son. I look on that as a circumstance of rather a delicate character, but one which I am not by any means disposed to throw out of view in dealing with the question before us. Her annuity of £2000 a-year secured by the settlement is, in the event of her son's death, increased to £4000, and in that event also she is to be [487] entitled to leave Stitchill and get £500 to provide herself with a house, so that she would have £6000 a-year clear under her own settlement if her son died, while in the meantime she has only £3500, and with the addition proposed by the trustees would have only £5000. It is not desirable, it is very undesirable, that the income of the lady should thus be liable to be increased by such a calamity as the death of her son, or that her son's surviving should make her poorer than she would be in the event of his death.

Still, with all these considerations before us, it is quite necessary that we should avoid anything like mere extravagance in fixing the provision for her, merely because the estate is so very large that it will not be missed. I do not think that is a fair view. It is argued by the trustees in support of the resolution to which they have come, that the mere expense of educating a boy ten years old will not much exceed £500 a-year, and to allow more than £1500 a-year for that purpose would necessarily be extravagant. But I think this is not a fair view of the case before us. It is very true that the mere maintenance and education at school of a boy of this age may not amount to more or not much more than is thus suggested, but the education of a young man with prospects like this heir before him is to be conducted not in school only, but I think one department of his education is to be received at home much more than at school. We cannot lay out of view what the necessary position of this boy will be in society if he lives to be a man, and his education therefore becomes a matter of very great importance. He is to be a landed proprietor to a very considerable extent, and it is most desirable that he should be familiarised with the interests of his estate as he grows up. It is in the highest degree desirable that he should imbibe a taste for field sports and other country pursuits, and it is not possible to expect that in his situation these tastes and habits should be acquired without a very liberal establishment both in stable and kennel, and that, as we know, is a very considerable expenditure. But I think the expenditure for this purpose suited to the capabilities and requirements of such a place as Stitchill is a very proper expense to come out of the income of this large estate. It appears to me, however, to be still more desirable, and indeed of paramount importance, that this young man should be early associated with those whose influence and example will engender and cultivate manly and refined tastes and sentiments, which will enable him when he enters into active life to take such part in society as his wealth and position will justify, and perhaps also to aid in advancing the civilisation of his country and the age in which he lives. I am well aware that these advantages cannot be directly purchased by wealth alone. But we all know that the want of wealth is not unfrequently the great obstruction to the

acquisition of such tastes and habits, and the surest way of attaining to that high cultivation is the combination of wealth with other favouring circumstances and good personal qualities; and it is of course in the hope that such a result may be attained that we would be justified, and in such a hope only we could be justified, in giving to this lady such a liberal allowance as she asks, or anything approaching to it. The expense which is necessary to attain the objects that I have thus indicated must of course be very considerable, and will involve a duty, and a very important duty, on the part of the petitioner, Mrs. Baird, who, if she is enabled to do so, will be in duty bound to surround herself and her son with the best society that she can command, and that is a result which I need hardly say can only be attained by making Stitchill as attractive a place as possible in the circumstances. I do not doubt in the least that she will perform this duty with pleasure and satisfaction, and I am satisfied that it is so important a duty upon her part that it would be most unwise and narrow-minded economy to refuse her the pecuniary means which are absolutely necessary to enable her to discharge that duty.

Upon the whole matter, I have come to be of opinion, that while perhaps the demand of Mrs. Baird may be somewhat in excess of what is necessary, it is not very much so; and I am inclined to recommend to your Lordships that the allowance offered by the trustees should be doubled, and that Mrs. Baird should have £3000 in addition to her provisions for the purpose of maintaining the place of Stitchill as a home and residence for her son.

[488] LORD DEAS.—Mr. Baird, as your Lordship has said, was married to this lady in 1858. There was an antenuptial marriage-contract by which, in case of her survivance, she was to have an annuity of £1500. She was to have £200 a-year for pin-money, and £750 for mournings and for aliment till the next term of Whitsunday or Martinmas after Mr. Baird's death, and £1000 for furniture payable at that term. Mr. Baird died in 1870, leaving the deed of settlement now before us. He was possessed of the wealth which your Lordship has mentioned, and by his deed of settlement he appointed certain trustees, whom he at the same time named tutors and curators to any child or children that he might leave. By that deed he gives his wife, in the event which has happened, an additional annuity of £2000, making up her income to £3500 a-year. He gives her also a right to possess the mansion-house of Stitchill, with the policies and furniture, until his son and heir shall attain the age of twenty-one. There is no provision that she shall have any allowance for another house if she leaves Stitchill before the son is twenty-one. After that, or if he dies in the meantime, she is to have £500 a-year to provide herself with another house. At the same time she is not laid under any obligation to live at Stitchill unless she pleases. If the son dies, her additional £2000 a-year is to be increased to £4000. Now, those are the provisions which the testator, Mr. Baird, who was of course entitled to deal with his own property according to his pleasure, thought it right to make for his widow; and I need hardly say that as respects those provisions we have nothing to do with the question whether they were or were not as liberal as they should have been in proportion to Mr. Baird's large fortune. That was a matter entirely for him; and even if I were of opinion that they ought to have been much greater, or that, in the same circumstances, I would myself have given much larger provisions, that would be no reason at all for interfering with what Mr. Baird has done. In addition to those provisions, which she is entitled to in her own right, the trustees have allowed her £1500 a-year for the current year on account of her son, and they have fixed £2000 a-year as the allowance to be made to her for her son during the succeeding year. What they may do after that we do not know; and we have no reason to suppose that they will not still further increase the allowance according to circumstances. All that is before us is the question whether £1500 for the current year and £2000 for the next year be or be not so inadequate an allowance to the lady for the maintenance and education of her son as to entitle us to step in, and, as your Lordship proposes, to double that allowance.

Now, before we do that, it is necessary to attend to what the testator himself did. He appoints, as his trustees, persons in whom he had confidence, and he names them tutors and curators to his son. Noboby doubts that, in the first instance, at all events, the question is for them, what allowance shall be made to the widow for the son; and they have made the allowances I have mentioned for the current year and the next. The son is residing in England for his education. I do not know whether

he is actually at Eton, but if not, he is preparing for going to Eton, and will be there in the course of the ensuing year. In the meantime his education and maintenance cost £500 a-year. That, it is said, may be somewhat increased—probably it will not be largely increased—when he goes to Eton, but in the next year the lady is to have £500 a-year more than she has this year. Well, he can only reside with her during his holidays. What the extent of these may be I do not know; they cannot be very great. In winter the lady resides in England; she says that this is necessary on account of her health. So the question the trustees had to consider was, what sum she ought to get in addition to the cost of the child's maintenance and education in England—what sum she ought to get in consequence of his living with her at Stitchill during such holidays as he may have in the summer; for it comes to that. They have allowed her for this year, as I have said, £1000 in addition to the £500 expended upon the child; and they have allowed her for next year £1500 in addition to the assumed sum of £500. As I have already indicated, the question for us is, whether that £1000 for this year and £1500 for next year, over and above the child's maintenance and education in England, be or be not so inadequate an allowance to her for keeping him at Stitchill during his summer [489] holidays as to entitle us to step in and increase it. I have great hesitation in coming to that conclusion. The trustees, who are tutors and curators, were, as I have said, selected by the testator. They are obviously persons in whom he had entire confidence. He gives them the very largest powers in every respect. For example, he leaves £25,000 for such religious, benevolent, and charitable objects and purposes as these trustees may deem most deserving, conferring upon them—(I read the words)—"the most ample and unlimited discretionary powers, both as to the objects and purposes to which the said bequest of £25,000 shall be devoted, the recipients thereof, and the amount to be expended in accordance herewith, and generally as to the distribution and disposal of said fund, being hereby conferred on my said trustees, who shall always be entitled to exercise their own judgment and discretion in all matters relating hereto,"—that is to say, in all matters relating to the selection of the objects, the recipients, and the distribution and disposal of that large sum of £25,000. Then, in case he shall leave no children, or in case his issue shall die, his whole means and estate are to be divided into forty shares: the great bulk of these are to go to his nephews and nieces, one exception being that three of these shares may be applied by the trustees for the same charitable and benevolent purposes I have already mentioned, and in respect of which he gives them the same ample powers. But with respect to the produce of the forty shares in so far as it is to go among those beneficiaries, he provides—"And I further provide and declare, that my said trustees shall have power, as they are hereby specially authorised and empowered, if they see fit, to limit and restrict the interest of any of the other residuary legatees and beneficiaries" (that is, the others with the exception of Mrs. Jane Baird or Jackson, about whose share there is a special provision), "under the settlement, to a bare liferent alimentary use of the interest or annual proceeds of the foresaid respective shares of the said residue hereinbefore provided to them, and that either during the whole lifetime of such residuary legatees and beneficiaries, or for such period as my said trustees may think proper, of all which they shall be the sole and exclusive judges." Then, in a subsequent part of the deed, he gives those same trustees power to sell and convert into money the whole heritable and moveable estate, with the exception of Strichen and Stitchill, which he had directed to be entailed. And he not only gives them that power, but he gives them likewise the power "from time to time to invest the trust-funds, or any part thereof, in the purchase of land or other heritable property, or of feu-duties or ground-annuals," stocks, &c., almost anything; then he adds the power "to compromise or to settle by arbitration, or by the advice of counsel or otherwise, all doubtful and disputed claims," and he follows this up by providing that "for the encouragement of my trustees, I declare that they shall be entitled to the fullest powers, privileges, and immunities usually conferred in such cases, and according to the most liberal interpretation; and particularly (but without prejudice to the said generality), I declare that it shall not be incumbent on them, *qua* tutors and curators, to give up inventories, that they shall not be liable in exact diligence," and so on. In short, there can be no question that the clauses of this deed indicate his most ample and entire confidence in these trustees. The codicils which are added to the deed do not bear much on this point; but the whole writings show that Mr. Baird himself, as well as the men of business he employed, had given to the consideration of these

settlements the most intelligent and careful attention; and that he was actuated by no unkindly spirit, appears from this fact, amongst others, that he directed £10,000 of the trust-funds, being a sum equal to his wife's marriage portion, to be settled upon his wife's sister and her family. In addition to the ample powers I have mentioned, and as still further showing his confidence in his trustees, we have a clause by which it is provided "that the said residue of my means and estate shall not be made over by my said trustees to the said George Alexander Baird, or to any other son to be born to me, until he shall have attained the age of twenty-five years complete, my wish and intention being that until that event shall occur my whole means and estate, both heritable and moveable, hereinbefore conveyed," including Strichen, Stitchill, and others, "shall continue under the exclusive management and direction of my said trustees, without any right of interference or control on the part [490] of my said son or sons." And then we have this other clause, "And in order that my trustees may be enabled more effectually to carry out the purposes of this settlement, and the trust hereby created, and of any codicils hereto, I hereby confer upon them all requisite powers."

Now, nobody can doubt that under that deed one of the powers, and an important one, vested in the trustees, was to fix what allowance should be made for the son's maintenance, board, and education. Your Lordship suggests that if an express power had been given in the trust-deed to fix the allowance it might have been more difficult for the Court to interfere. It humbly appears to me that the position of matters is precisely the same as if that had been done. The testator confers on these trustees all requisite powers for carrying out the purposes of his settlement, and it is impossible to read the deeds without being satisfied that he meant them to exercise the most ample discretion with reference to the allowances for his son as well as everything else. My difficulty, therefore, is to interfere with the discretion which has been exercised by those trustees, whom the testator has as nearly substituted in his own place as any man ever did or could substitute for himself a body of trustees. I can see, however, that if these trustees had gone extravagantly wrong,—if they had not exercised a rational discretion, but had done something palpably and excessively out of joint and inexpedient, we might have been called upon to correct the gross error they had committed. That we have an abstract power to interfere I do not doubt in the least, but to entitle us judicially to exercise that power the trustees must not merely have done something which we would not have done, but they must have done something which makes it matter of necessity or of clamant expediency for us to interfere. Now, my difficulty is to see that this has been the case.

The trustees have allowed £1000 for this year, and £1500 for next year, for such period of the summer months as the boy may have holidays and live at Stitchill, and the question is whether that, in reference to a boy of ten or eleven years old, is so palpably inadequate—such a mistake of the duty intrusted to them by this testator —that we are to interfere and double that allowance. I have great doubt about that. Your Lordship says what may be very true, that it is right and proper this boy should be brought up, with reference to his fortune, to see society, and cultivate the habits and manners befitting a man of that fortune. But I fail to see that while he is only eleven or twelve years old, it is to be so palpably necessary during his short stay at Stitchill, that there should be £1000 the one year, and £1500 the next year expended on entertainments and company, and so on, beyond what the trustees have fixed, as to lead us to infer that such was the will of the testator—for it comes to that. What the trustees may do the year after next we do not know. They have that in their own power. They may increase the allowance; they may go on increasing it as the boy increases in years, and when he comes to be seventeen, eighteen, or nineteen, they may probably see the propriety of balls, dinners, and entertainments at Stitchill on his account. The question here is not what would benefit the widow. Admittedly we have nothing to do with that. The question is what is for the benefit of the child. Unless it is obviously necessary or very highly expedient for his interest, we have no right whatever to interfere. I confess that where a man of intelligence and knowledge of the world, like Mr. Baird, names trustees and appoints them to be the tutors and curators to his child, I am not anxious to see this Court step in and become tutors and curators in their place. By interfering in the way proposed we are virtually taking this boy out of their hands until he is twenty-one or twenty-five years of age. We are taking up the duty and responsibility which Mr. Baird entrusted to his trustees.

I confess I think that is a most inexpedient thing to do, unless the circumstances had imperatively demanded it. No doubt there is here a very large fortune, and a still larger fortune will accumulate. That implies unquestionably that the allowance ought to be liberal. But it is no reason for making a larger allowance than what is requisite or expedient for his benefit. It is no duty of ours to prevent accumulation for the future. The question relates to the present: is £1000 this year and £1500 next year, over and above the expense of board and [491] education, not enough for a boy of eleven or twelve years of age, whatever his fortune may be? We are not to proceed upon communistic ideas, that large fortunes ought not to be amassed. Neither are we to consider whether, with Mr. Baird's large fortune, he might have been expected to have made larger provisions for his widow than he has done. Supposing we were of that opinion, we would not be entitled to supplement these provisions by increasing her allowance for her son beyond what would be otherwise an adequate amount. Nor would it be enough that we, as tutors and curators, might have given more than these trustees have done. They are the proper judges of the amount of that allowance, and if they have not done something grossly wrong,—which I do not see they can be said to have done,—we are not entitled to interfere.

LORD ARDMILLAN.—It is unnecessary for me to refer in detail to the very peculiar and unusual facts of this case. It is enough to say that the petitioner is the widow of Mr. George Baird, who died on 24th August 1870, leaving an only child, a boy, now ten years old. Mr. Baird left landed estates, of which the rental is £15,000 a-year, and also property, exclusive of his landed estate, of great amount, yielding annual returns of not less than £40,000 a-year.

Mrs. Baird had a jointure of £1500 a-year secured by her marriage-contract, and a liferent annuity of £2000 a-year provided by Mr. Baird's trust-settlement, of date 3d December 1868. She has also a small allowance of £150 towards keeping up the garden.

The trust-deed contains no direction, and gives no indication of intention, in regard to any allowance for support and education of the only child of Mr. Baird. The respondents (trustees of Mr. Baird) have, however, hitherto allowed £1000 a-year, but it is arranged to be £1500 during the present year, and £2000 a-year for the year commencing 11th November 1872, and thereafter.

It appears that the cost of education and clothing of the boy last year has been £500; and when he leaves the preparation school and goes to Eton the expense will be increased.

In the event of the death of the boy before majority, and without issue, the liferent annuity conferred by the trust-settlement on Mrs. Baird is to be increased from £2000 to £4000. Taking the allowance as it stands at present, it is obvious that, by the death of her son before majority, the income of Mrs. Baird would be augmented. It may be reasonably suggested that this is of itself a ground for increasing her present allowance. I agree with your Lordship in the chair on this point. The petitioner, Mrs. Baird, claims from the Court an award or a direction to the trustees to pay her an allowance, on account of her son, of £3500. The respondents (trustees of Mr. Baird) resist this claim, and maintain that no additional sum should be allowed.

On consideration of the whole circumstances of the case I am of opinion—(1) That it is within the power of the Court, in the exercise of a sound judicial discretion, to sanction and direct an increased allowance, if your Lordships think it just and right to do so. Mr. Baird has not himself disposed of this matter. If he had, the Court would not have disturbed his directions. Nor has he afforded the means of ascertaining, even by implication, his intentions. He has not even left, by express direction, the disposal of the matter to his trustees. If he had done so, nothing but a strong case, involving serious and I may say gross departure from a sound discretion, would induce the Court to interfere. But it is not so. There is in the deed nothing to indicate Mr. Baird's wish on the subject, either in the form of direction, or of special committing to discretion. In these circumstances I think that the application to the Court is competent and legitimate, and that the interposition of the Court, if we are satisfied on the merits of the petition, is quite within the power of the Court. I do not think that on this point there is difference of opinion.

(2) I think that, in the exercise of judicial discretion, the first and paramount consideration must be the welfare, the health, the happiness, the improvement of the boy. The claims of the widow in this matter can only be taken into account, and we can only now view them, as affecting the interests and prospects of her son.

[492] It is certainly possible for Mrs. Baird to live on even less than her present allowances. But, looking to the immense fortune which this boy has inherited, and to the enjoyment of which he will succeed if he reaches twenty-five years of age, and looking to the fact that Mrs. Baird's residence at Stitchill was contemplated by Mr. Baird as maintaining a home for the boy, your Lordships will consider the question as affecting him; and, if you think it better for his interests that this allowance shall be increased, then it is not only competent but right to increase it.

(3) I am of opinion that, being called to compare the advantage to the boy of the two proposals before us—increase or no increase of allowance—there is little doubt or difficulty in the choice.

These proposals are, first, the proposal of the trustees to continue to Mrs. Baird her present allowance for her son of £1500, to be raised next year to £2000, which, with her jointure and annuity, will amount to £5000 in all this year, and £5500 next year; and to accumulate for the boy the income of these great estates, to the extent of above half a million, in addition to his £55,000 a-year. I do not feel that I am expressing any communistic sentiment when I say that I do not think that this enormous accumulation, limiting the present allowance, is for the good of this youth.

Second, the proposal of Mrs. Baird to encroach slightly on this immense accumulation, and to increase her allowance for her son to £3500, so as to enable her to maintain a home at Stitchill for herself and her son, where he may return and enjoy himself, and, as I think, improve himself during his holidays,—a cheerful, tasteful, noble, hospitable home,—suitable to the position and prospects of this youth, whose great wealth must place him in a position of temptation and peril, against which his mother must desire to protect him by home influence, home attractions, and home feelings, so that the acquirements of school and college may be enhanced by the refinement of tastes cultivated in good society, and crowned by the worth and manliness, and courtesy, of a Scottish gentleman.

That the mother should desire this for her son, and desire it not for her benefit but for his own, appears to me natural and right.

I do not think that the money, taken out of the great fund for accumulation, could be better applied. Looking only to the interests of the boy, but using that term in its comprehensive sense, I think that Mrs. Baird's allowance should be increased. Lord Deas has said that Mr. Baird was liberally disposed towards his wife and son. In now dealing liberally by the widow and the son of Mr. Baird, in a matter on which he has left no direction, we are acting in the spirit which Mr. Baird would have desired.

In regard to the amount of increase, I have had some hesitation. I do not think Mrs. Baird's demand by any means extravagant. But the boy is very young. The cost of his education will increase, even before he goes to the University; and another application may be made, if the petitioner is so advised.

At present I think that an allowance of £3000 a-year ought to be awarded to Mrs. Baird for the maintenance, education, and residence of her son; and, under all the circumstances, I think that allowance moderate.

Lord Kinloch.—The question raised by this petition is, what is the amount of the allowance proper to be made to the petitioner, Mrs. Baird, for the maintenance and education of her son, George Alexander Baird, now above ten years of age, and who is admittedly in receipt of an income of at least £55,000 per annum. There can be no doubt of the competency of the Court to fix this allowance, if it shall appear to them that the trustees of the deceased (to whom the duty fell in the first instance) have not rightly exercised their discretion in the matter. Certainly the Court ought not to interfere on light or trivial grounds; but if a solid substantial case occurs for their interposition, it is both their privilege and their duty to afford it.

The petitioner has under her marriage-contract a jointure of £1500 per annum, and she received an additional yearly sum of £2000 under her husband's settlement, to be increased to £4000 per annum in the event of her son's death. [493] She obtained, besides, by that settlement a right to occupy her deceased husband's house at Stitchill (built by him a few years ago at the cost of £36,000) till her son attained twenty-one, with an allowance of £150 per annum to aid in maintaining the garden. The question is now, what additional sum she shall receive in name of maintenance and education of her son.

I think it clearly was the intention of the deceased Mr. Baird that his widow should continue to live at Stitchill House till his son attained majority, and that Stitchill should

till that period continue to be his son's home with his mother. Of course I do not mean that the son was not to be sent to school, as he has been; but to his mother at Stitchill, as to his proper home, it was, I think, clearly intended that he should return when not elsewhere resident. For the sake of his son, therefore, and not alone for the sake of his widow, I consider Mr. Baird to have specially intended that Stitchill House should be maintained and resided in by mother and child. And the present petition is presented on the express footing of this purpose being carried out. The allowance is sought, not to maintain a residence for the widow, but a home for the child.

But further, it is my opinion that this maintenance of Stitchill as the home, with his mother, of George Alexander Baird, is of the highest possible importance towards the training and upbringing of this boy. It may be said in a strictly proper sense to belong to his education,—for education is not merely school tuition; it is the formation of character, and comprehends, as an essential part of it, those many insensible influences which produce superiority in the individual. I think it is of the highest moment, in the upbringing of this young man, that he should be made familiar with the residence which is in all probability to be the home of his future life—with its scenes and with its people, his future neighbours, and tenants, and dependants. To them, on the other hand, he ought to be the object of close acquaintance and interest. It is thus he will best be brought up for filling the place which, under providence, he will afterwards assume. The home should further, as I think, be maintained, not merely well replenished with common material comforts, but full of those refinements, and accessible to that social intercourse, which befit so large a fortune, and contribute their insensible elements to the formation of an accomplished and well-bred gentleman. All this, I think, goes materially to the upbringing and education of George Alexander Baird, and ought to be secured to him by any reasonable annual outlay out of his magnificent income.

The question, therefore, in my apprehension, simply comes to be what annual sum should be paid to Mrs. Baird for the purpose of enabling her to maintain her residence at Stitchill relatively to these views and objects. The question is to be looked at entirely in the interests of the boy himself. But I think that it is best to promote his interests to enable his mother to maintain such a residence.

It is plain that, with her own allowance of £3500 per annum, Mrs. Baird cannot accomplish this object; and no one says that she is to devote all her own allowance to this object, without any addition from the boy's own income. The place is evidently an expensive one,—a house, it is said, consisting of sixty rooms, and requiring twenty-four servants in house and stables, with all the appendages of a gentleman's house of this magnitude. The style of living befitting such a house, and such prospects, will require a large outlay, to which the sum in question is quite inadequate. But I conceive the supplemental sum proposed by the trustees to be paid out of the pupil's income, viz., £1000 for the first year, £1500 for the second, and £2000 for the third and thereafter (for such is their resolution), to be greatly below the mark,—so greatly, that I think a proper case occurs for the interposition of this Court. I am of opinion that the sum of £3000 a-year, which has been mentioned, is not beyond a fair allowance. It is explained that the boy's schooling and relative expenses involve an actual outlay of £500 a-year, and that this will be increased when the boy goes to Eton. Allowing for this deduction, I think the surplus will not be more than is sufficient, added to her own jointure, to meet the expense of residing at Stitchill in the way in which I think she ought to reside. Certain I am that £3000 per annum, taken out of the immense yearly income of £55,000 a-year, will be employed in this way much more beneficially for the pupil than if [494] added to the enormous accumulation which will be his when he attains to twenty-five years of age.

I would only suggest, in addition, that this aliment should draw back to Martinmas 1870, the term posterior to Mr. Baird's death. The mere difference of age of the boy does not infer any material difference in the expenditure which the allowance is to meet, which will be substantially the same throughout.

This interlocutor was pronounced on 19th Jan. 1872:—"Find that the allowance to be made by the respondents to the petitioner for the maintenance, education, and residence of her son, George Alexander Baird, ought to be £3000 per annum: Decern and ordain the respondents to make payment to the petitioner of the said allowance quarterly, at the terms of Martinmas, Candlemas, Whitsunday, and Lammas, beginning the first term's payment at the term of Martinmas 1870, being the first term occurring after the death of the deceased George Baird, the truster, under deduction of the allow-

ance already paid to the petitioner by the respondents for the terms bygone; but reserving to both or either of the parties to apply of new to the Court to alter the said allowance in the event of any change of circumstances requiring or justifying such alteration: And direct the expenses of both parties to be paid out of the trust-estate."

ALEX. HOWE, W.S.—WEBSTER & WILL, S.S.C.—Agents.

No. 92. X. MACPHERSON, 494. 24 Feb. 1872. 1st Div.—Sheriff of Banffshire, M.

JAMES WATSON, Appellant and Defender.—*Asher.*
HUGH STEWART, Respondent and Pursuer.—*Scott*—*Strachan.*

Sheriff—Process—Appeal—16 & 17 *Vict. c.* 80, *sec.* 24.—An appeal is competent against an interlocutor of the Sheriff which merely recalls *in hoc statu* a final interlocutor of the Sheriff-substitute, where it appears that it is equivalent to an interlocutor sisting process.

Sheriff—Process—Dismissal of Action—16 & 17 *Vict. c.* 80, *sec.* 15—*Falling Asleep.*—Section 15 of the Sheriff-court Act provides, that, "where in any cause neither of the parties shall, during the period of three consecutive months, have taken any proceeding therein, the action shall at the expiration of that period *eo ipso* stand dismissed, without prejudice, nevertheless, to either of the parties, within three months after the expiration of such first period of three months, but not thereafter, to revive said action on showing good cause to the satisfaction of the Sheriff why no procedure had taken place therein, or upon payment to the other party of the preceding expenses incurred in the cause." *Held* (1) that, in respect of this enactment, a process cannot fall asleep in the Sheriff-court; (2) that proceedings in a judicial reference are proceedings in the cause; (3) that consent to revive a process may be inferred from the conduct of the parties, and revival may take place of consent without any interlocutor reviving the cause.

This action was brought in the Sheriff-court of Banffshire for the sum of £135, as the amount of an account for money advanced and goods furnished. The defender stated in defence, *inter alia*, that the pursuer's claims were extinguished by payments and furnishings made by him.

The Sheriff-substitute (Gordon) allowed a proof (April 7, 1869) to both parties; but after the proof had commenced the parties (August 2, 1869) lodged a minute referring the whole cause to Mr. John Forbes, solicitor, Banff. Of the same date the Sheriff interponed his authority to the minute. Various proceedings took place in the reference; and on May 14, 1870, the referee, of consent, postponed the proof which he had allowed until 12th October 1870. No proceeding took place during this interval. On October 7, 1871, the referee pronounced an award finding the pursuer [495] entitled to payment of £11, but finding him liable in all the expenses, to which, on October 25, the Sheriff-substitute interponed authority, and decerned.

The pursuer appealed to the Sheriff, contending, in a reclaiming petition, that as no proceedings had taken place before the Sheriff from August 2, 1869, until October 25, 1871, the action stood dismissed under section 15 of the Sheriff-court Act of 1853.

The Sheriff (B. R. Bell) pronounced an interlocutor (30th December 1871) *in hoc statu* recalling the interlocutor appealed against.*

---

* "NOTE.— . . . We have heard little or nothing since 1853 about processes falling asleep in the Sheriff-court. But this has been because under the Act of 1853, sec. 15, no process could in the ordinary case, if not moved in for six months, escape becoming extinct, and a dead process, of course, cannot sleep.

"But there is one class of cases, described in the close of sec. 15, to which the rules importing dismissal are declared not to extend. It is provided that nothing of the kind shall apply when 'the right under such action has been acquired by a third party, by death or otherwise, within such a period of six months.' And we are at present proceeding upon the assumption that the provision of the statute may possibly be found not to apply when the process has been before a judicial referee.

[496] The defender appealed to the Court of Session, and argued;—The appeal was competent, the interlocutor appealed against being virtually one sisting process, and therefore one of those enumerated in section 24 of the Sheriff-court Act of 1853. It was not an appeal for the purpose of review, but in order to get the cause proceeded with.* On the merits, the Sheriff-substitute's interlocutor interponing authority to the award of the referee was unobjectionable, in respect that the proceedings before the judicial referee were equivalent to proceedings before the Sheriff; and that, after the adjournment of the proof, which was of consent of both parties, proceedings had been resumed again without objection on either side, so that the pursuer was not entitled, when he found the decision to be against him, to repudiate what had been done with his full approbation and assent.†

The pursuer (respondent) argued;—The appeal was incompetent under section 24 of the Act. Nothing had been done in the cause for more than six months, and the case was *eo ipso* dismissed. Assuming that the dependence of a case before a judicial referee prevented the action from standing dismissed, that could only be on the footing that the parties were proceeding before the referee as they would otherwise have been bound to do before the Sheriff; and the requirements of the 15th section of the

---

"What, then, must follow?

"In ordinary cases a process in the Sheriff-court is prevented from sleeping by peremptory irretrievable dismissal, which has been called, and clearly is, the death of the process. When once dismissed, extinguished, or dead, a process cannot sleep. But if a case occurs in which a process lingers for not six months merely, but for twelve months and a day, and nevertheless from such peculiar circumstances as have been figured above does not die, the Sheriff does not see what there is to prevent its going to sleep.

"By sec. 51 of the statute 'laws, statutes, Acts of Sederunt, and usages' are repealed, 'in so far only as may be necessary to give effect to the provisions of this Act,' and clearly if there is any conjunction of circumstances in which sec. 15 does not operate the dismissal of a process in three months, or its death in six months, then to apply the law by which an action falls asleep after a year and a day to such a process can in no way interfere with the 15th or any other section of the Sheriff-court Act. In order to give effect to the Act of 1853 there is no occasion whatever to set aside the law which infers sleep after a certain period of inactivity. The statute in the ordinary case cuts short that period by producing death. But in those cases where the statute refrains from this ultimate distinction, where, indeed, it does not act or operate at all, the Sheriff cannot see that it in any way interferes with or can be supposed to repeal the law about falling asleep.

"But if that rule is not repealed it seems clearly to apply to the present action. It seems to be settled that proceedings before a judicial referee will not save an action from going to sleep—Bell on Arbitration, p. 278, sec. 552; Parker, 39 and 209; Darling, 258. The contest in Steuart *v.* Hickman, Dec. 1, 1843, 6 D. 151, was not really on this point, but as to whether that process had fallen asleep a second time. From the Session Papers it is clear that both parties were cordially agreed in holding that it had fallen asleep while before the referee, and so certain was this held to be, that it had actually been wakened in a regular process of wakening before the difficulty arose as to whether it had not fallen asleep a second time by reason of the process of wakening being itself allowed to fall asleep. It was found that there was a blundered partibus in the wakening, and that it was only apparently asleep. But, instead of contradicting, the decision confirms the rule stated by Bell, Parker, and Darling.

"It cannot be maintained that the pursuer has consented to the process being wakened. His position is that the process is dead. He insists that no step can be taken; and although he does not say that the process is asleep, that is because [496] he thinks it is more than sleeping. This is not the consent that if alive it shall be wakened.

"The result, then, comes to be, that whereas it is incompetent to take any step in the present process if it is dead, so it is equally incompetent to do anything *in hoc statu* if the process is alive, because if it be alive it follows that it is asleep."

* Harrington *v.* Richardson, Jan. 20, 1854, 16 D. 368.

† Mackintosh *v.* Mackintosh, Nov. 10, 1863, *ante*, vol. ii. 48; Steuart *v.* Grant, March 29, 1867, *ante*, vol. v. 736.

statute must apply to the procedure in the reference. Hence in this view also the action stood dismissed, because for five months, from May 14 to October 12, 1870, no proceedings took place before the referee, and no interlocutor was pronounced reviving the action.*

At advising,—

LORD PRESIDENT.—This appeal raises a question of some delicacy in regard to Sheriff-court procedure. It is necessary to ascertain the precise state of facts, particularly the dates of the various proceedings in the cause. This was an ordinary action in the Sheriff-court, which followed the usual course till 7th April 1869, when a proof was allowed. Thereafter the parties agreed to a judicial reference, and accordingly lodged a minute of reference, to which the Sheriff-substitute interponed his authority on 2d August 1869. Now, no interlocutor was thereafter pronounced by the Sheriff-substitute till 25th October 1871, when he interponed the authority of the Court to the award of the judicial referee, and decerned in terms thereof. Against this interlocutor the pursuer, who had substantially failed, appealed to the Sheriff, on the ground that, no proceedings having taken place between 2d August 1869 and 25th October 1871, the action had, by the operation of the 15th section of the Sheriff-court Act, ceased to exist, so that no judgment could be competently pronounced therein. The objection is certainly very formidable at first sight, but the Sheriff, though he felt some difficulty, got the better of it. But then another difficulty suggested itself to him, namely, that assuming the process not to stand dismissed by the operation of the statutory provision, it had fallen asleep by reason of the lapse of more than year and day without any interlocutor having been pronounced. He therefore followed the course of recalling *in hoc statu* the interlocutor of the Sheriff-substitute, thereby [497] plainly meaning that nothing more should be done in the cause till the defender had brought a summons of wakening. Now, it is against that interlocutor of the Sheriff that this appeal has been taken to us, and the first question is, whether the appeal is competent under the 24th section of the statute, which renders it incompetent to appeal against any interlocutor which does not either sist process or give interim decree for payment of money, or dispose of the whole merits of the cause. Now, I am opinion that this interlocutor does in all practical effect sist process. I do not think it absolutely necessary to make use of the words "sist process." In the present case process is practically sisted, for if the interlocutor stands nothing more can be done in the cause till the summons of wakening which the Sheriff thinks necessary shall have been brought. I therefore think that this appeal is competent under the 24th section of the statute.

Coming next to the merits of the interlocutor, I do not think that the view of the Sheriff is at all tenable. I am of opinion that the 15th section of the statute has put an end to the possibility of processes falling asleep in the Sheriff-court under any circumstances. In order more effectually to prevent that kind of delay which formerly made a process fall asleep it substitutes a rule of procedure of a much more stringent nature. I think that the Sheriff's construction of the proviso at the end of the section is unsound. He argues that a third party acquiring right to an action within the period of six months is not to be affected by the operation of the 15th section at any stage of the process, and that there is thus a possibility of a process falling asleep, since there would otherwise be no end to the delay thus unprovided for by the statute. I think, however, that the real meaning of the proviso is, that where a third party acquires right to an action within the six months the lapse of that period shall not affect him, but that when he is once sisted as a party to the process he is just as much subject to the regulations of the statute as any other person. If he allows three months to elapse after he has become a party to the process without any proceeding having been taken the action stands dismissed; and if he allows other three months to pass without getting it revived the action is out of Court altogether. There is thus, even in the case put by the Sheriff, no possibility of a Sheriff-court process falling asleep.

But although the ground upon which the Sheriff proceeded is untenable, there remain other and much more formidable grounds of objection to the interlocutor of the Sheriff-substitute. During the long interval between 2d August 1869 and 25th

* Campbell *v.* Blackwood, Nov. 7, 1862, *ante*, vol. i. 1; Macdowall *v.* Brown, July 13, 1865, *ante*, vol. iii. 1079.

October 1871 the parties were proceeding before the judicial referee, and the first question is, whether these proceedings had the same effect as proceedings in Court in excluding the application of the 15th section of the statute, which provides that "where in any cause neither of the parties thereto shall during the period of three consecutive months have taken any proceeding therein, the action shall at the expiration of that period *eo ipso* stand dismissed." That provision has thus no application, if during the period of three consecutive months either of the parties has taken a proceeding in the cause. Now, I think it would be far too strict a construction of these words to say that no proceedings can be taken in the cause except in Court and before the Sheriff. I think that proceedings in a judicial reference are proceedings in the cause in the proper sense of the term. Such proceedings are taken under the authority of the Court, as conducive to the ultimate settlement of the cause by the judgment of the Sheriff. I cannot but hold them to be proceedings in the cause within the meaning of the statute.

It has, however, been further maintained that there is in the proceedings before the judicial referee an interruption of no less than five months, viz., from 14th May to 12th October 1870, and it has accordingly been argued that if the proceedings before the judicial referee, which are absolutely necessary to prevent this cause from standing dismissed, are themselves interrupted for a period of three consecutive months, then there is an end of the cause, unless it shall have been revived within the next three months. This is undoubtedly a very serious argument; but it rather appears to me that there are specialties in the present case which will enable the Court to get the better of this difficulty as well as of [498] the others. On 14th May 1870 the judicial referee, of consent of both parties, pronounced a deliverance postponing the leading of evidence till 12th October 1870. The interruption was thus deliberately assented to by both parties, and they seem to have taken advantage of the interval to consider how their counter claims should be proved, for they lodged with the referee a minute dispensing with proof to a great extent. Many proceedings and discussions subsequently took place without any serious interruption till 7th October 1871, when the judicial referee issued his award. Now, looking to these facts, that the pursuer consented to the delay of five months and thereafter contested the case before the referee, thus taking the full benefit of his services and the chance of obtaining a favourable award, it is rather a strong proposal which he now makes, that we should hold him not bound by the result of the proceedings on account of the action having become a dismissed process. That is a kind of contention to which the Court will not feel disposed to give effect if they can avoid it. It seems to be settled by the cases of Mackintosh *v.* Mackintosh and Steuart *v.* Grant that after a process stands *ipso facto* dismissed the parties may revive it of consent, and that if that consent is given before the expiry of the six months it is effectual though the Sheriff may not have pronounced an interlocutor reviving the process till the six months have expired. Now, the proceedings which took place before the judicial referee after 12th October 1870 amount in my opinion to a consent to revive this process. What took place was quite inconsistent with the idea of its having been dismissed. These proceedings were within the time allowed by the statute to revive the process, and they indicate consent to revival in the plainest manner short of express words of consent. No doubt, no interlocutor reviving the process was pronounced by the Sheriff, and at first sight that omission appeared to me to create great difficulty. But on looking more closely at the terms of the 15th section I think it would be too strict a construction to hold that such an interlocutor is indispensable. That section renders it competent "to either of the parties, within three months after the expiration of such first period of three months, but not thereafter, to revive the said action on showing cause to the satisfaction of the Sheriff why no procedure has taken place therein, or upon payment to the other party of the preceding expenses incurred in the cause." Any one of the parties is thus entitled to revive the process, either by showing good cause, &c., or upon payment to the other party of the preceding expenses incurred in the cause, and the statute distinctly expresses what is to be the effect of this proceeding by either party "whereupon such action shall be revived and proceeded with in ordinary form." Now, I have no doubt that it is the practice for the Sheriff to pronounce an interlocutor holding the process to be revived, and that is certainly the most distinct way of recording the fact of revival. Still, it is a very serious question whether such an interlocutor is absolutely indispensable. Suppose that the party wishing to revive the

process pays to his opponent the whole preceding expenses, the statute says that thereupon the action shall be revived and proceeded with.

Could we possibly hold him to be deprived of the benefit thus purchased by him, merely because the Sheriff had not pronounced an interlocutor? And if a party paying the previous expenses may at his own hand procure the revival of an action, it seems very obvious that the opposite party may either expressly dispense with payment of expenses, or unmistakeably indicate by his conduct that he does not insist on payment. I am of opinion that a process may be revived within the six months by consent of parties, express or implied, even though no interlocutor of revival has been pronounced by the Sheriff. I am not prepared to say that in the circumstances of the present case it is necessary that such an interlocutor should be pronounced. But if it were necessary we might recall the interlocutor of the Sheriff, and remit to the Sheriff-substitute to revive the process and then repeat his judgment. But as I am of opinion that the parties are by their proceedings within the six months tied down to a revival of the process, I think it will be sufficient to recall the interlocutor of the Sheriff, and adhere to the interlocutor of the Sheriff-substitute.

The other Judges concurred.

[499] The following interlocutor was pronounced:—"Repel the objections to the competency of the appeal: Recall the interlocutor of the Sheriff of date 30th December 1871, and affirm the interlocutor of the Sheriff-substitute of date 25th October 1871, and decern: Find the appellant entitled to expenses both in this Court and in the inferior Court since the date of the said interlocutor of the Sheriff-substitute; allow accounts," &c.

A. MORISON, S.S.C.—D. MILNE, S.S.C.—Agents.

No. 93. X. MACPHERSON, 499. 24 Feb. 1872. 2d Div.—Lord Ormidale, Exchequer Cause, R.

THE LORD ADVOCATE, Pursuer.—*Sol.-Gen. Clark—Thomas Ivory.*
JOHN JAMES DRYSDALE, Defender.—*Millar—Webster—Gibson.*

Teinds—Tack—Tacit relocation—Inhibition—Bona fide Perception—Superior and Vassal.—The Crown granted a lease of the teinds and feu-duties of the lordship of Dunfermline to certain vassals, for themselves, and in trust for other vassals, which expired on 23d March 1799. The lease was continued by tacit relocation till 1838, and in that year the lease was brought to an end, so far as it related to subjects other than teinds, as at 23d March, by an action of removing. In May of that year the Crown also executed an inhibition of the teinds. Thereafter the vassals paid feu-duties to the Crown, but no teinds were paid or claimed till 1868. *Held* that the inhibition was inept, on account of its being executed after the term of entry for the year then current, and that it had been derelinquished by not having been acted on for thirty years, and that the vassal had a sufficient title to support the plea of *bona fide* perception.

In this action, the Lord Advocate, on behalf of the Crown, claimed various sums, amounting, exclusive of interest, to £1136, 3s., being arrears of the surplus teinds of the defender's lands of Easter and Wester Pitteuchar, due to the Crown as titular of the teinds of the lordship of Dunfermline, beginning with the crop of the year 1839.

The following facts were established in a proof which was led, or were admitted by the parties:—

On 2d October 1783 a lease was granted by the Crown in favour of the Earl of Elgin and others, "for themselves, and for behoof of the haill other vassals of the said lordship of Dunfermline, and heritors of lands, the teinds of which, or feu-duties payable out of the same, belong to the said lordship, and to the survivor or survivors of them and their assignees, and the heir or assignees of the last survivor," of "All and whole the foresaid lordship of Dunfermline, and all lands, mills, woods, fishings, towns, burrows, annualrents, tenements, customs great and small, kirk's teinds great and small,

tenants' tenandries, as well of burgh as of land, teinds, farms, duties, feu-farms, teind-duties, interests of price of teinds, profits, emoluments, casualties, and others whatsoever pertaining or annexed thereto, or to the patrimony thereof." The tack-duty was fixed at £100 sterling, payable at Whitsunday yearly, and the duration of the lease was to be for nineteen years from and after the 23d day of March 1780. After the expiration of this tack, in 1799, it was admittedly continued by tacit relocation till at least 1811; but the defender averred that it continued till 1838, and the case was argued in the Inner-House on that assumption. On 20th and 27th May and 10th June 1838 an inhibition of teinds, at the instance of Her Majesty's Solicitor of Teinds, was executed against the Earl of Elgin (the sole survivor of the lessees named in the tack) and the other heritors and possessors of the lands out of which the teinds were due, "that they, nor none of them, presume nor take upon them, under any colour or pretext, to lead, intromit with, take away, or dispose upon any of the teinds of the foresaid lands, liable in [500] payment of teinds to the said commissioners as having right in manner foresaid this instant crop and year 1838, without tack, license, or tolerance of the said commissioners first had and obtained thereto."

In order to put an end to the tack in so far as it included other subjects than teinds the Commissioners of Her Majesty's Woods and Forests raised an action of removing in the Sheriff-court of Fife against the Earl of Elgin; and in this action a judgment was pronounced deciding that an end was put to the tack as at 23d March 1839, so far as it related to subjects other than teinds.

In the year 1839 a correspondence took place between the Commissioners of Woods and Forests and the agents of Lord Elgin as to a settlement of arrears of tack-duty. The negotiations were conducted on the footing that the tack was at an end at Whitsunday 1839; and in 1851 the trustees of the Earl paid the whole arrears of tack-duty due at that term, with interest thereon till 1851.

Mr. Drysdale, the defender in this action, was one of the vassals of the lordship of Dunfermline, being proprietor of the lands of Easter and Wester Pitteuchar, the teinds and feu-duties of which were included in the lease above mentioned. Since Whitsunday 1839 the defender and his father had paid the feu-duties for their lands to the Crown; but they paid no proportion of tack or teind-duties for the period subsequent to 1839, either to the Earl of Elgin or to any other person as in right of the lease.

There was no allegation as to payment of stipend.

The Crown now claimed as titular the arrears of surplus teinds since the date of the inhibition. It was admitted that no claim was made therefore till 9th October 1868, and that the defender and his predecessors uplifted and consumed the whole rents and produce of the lands, including teinds, without being aware that any such claim existed against them. In consequence of doubts as to the effect of the inhibition of teinds of 1839 a new inhibition was executed in March and April 1871, and the defender thereafter purchased the teinds of his lands.

The pursuer pleaded;—(1) The said tack, in so far as it related to teinds, having been brought to an end by the said inhibition in 1838, and there having been no subsequent derelinquishment of the said inhibition, the Crown is entitled to decree, &c. (2) As the tack was one of feu-duties as well as of teinds, with a *cumulo* tack-duty for both, the putting an end to it in respect of the feu-duties imported the putting an end to it altogether, especially in the circumstances, or, at all events, prevented the operation of the principle of tacit relocation as to teinds. (3) Or otherwise, it having been expressly agreed or understood by the said Earl of Elgin during his life, as sole surviving lessee under the said tack, and subsequently by his trustees, on the one hand, and the Commissioners of Woods and Forests on the other hand, that the said tack as a whole should be held and dealt with as having come to an end as at Whitsunday 1839, and a final account having been adjusted and settled on that footing between the trustees of the said Earl of Elgin and the said Commissioners of Woods and Forests in 1851, the Crown is entitled to decree for the sums referred to in the first plea in law. (4) The said tack was at all events brought to an end by the death of Lord Elgin in 1841; and the said tack having been thereafter incapable of renewal by tacit relocation, and no new tack of the subjects therein contained having been subsequently granted, the Crown is entitled to decree for the surplus teinds for all crops and years subsequent to Lord Elgin's death.

The defender pleaded;—(1) The said tack having subsisted by tacit relocation up to the present year, the defender is not liable for the [501] surplus teinds of his said lands

of Easter and Wester Pitteuchar. (2) The inhibition executed in May 1838 was derelinquished or put an end to by the exaction of the tack-duty payable at Whitsunday 1839, and the acquiescence on the part of the Crown in the continued possession by the defender and his predecessors without making any claim for surplus teind. (3) *Separatim*, the claim now brought forward is excluded by the defender and his predecessors having received and consumed the rents and produce of the lands *bona fide*, in the belief that no such claim existed.

The Lord Ordinary in Exchequer pronounced this interlocutor:—"Finds as matter of fact (1) That the teinds and feu-duties of the lands of Easter and Wester Pitteuchar belong to the lordship of Dunfermline, and that the Crown is titular of these teinds; (2) That the crown lease of the lands and feu-duties of the lordship of Dunfermline, founded on and referred to in the record, was put an end to prior to the free or surplus teinds now being sued for becoming due; and (3) That the said free or surplus teinds are resting owing by the defender to the pursuer: With these findings appoints the case to be enrolled, that parties may be heard as to the sum for which decree is to be pronounced, and on the question of expenses of process." *

---

* "NOTE.—The primary and substantial question in dispute between the parties in this case is, whether the crown lease referred to was or was not put an end to prior to 1839. The pursuer contends that it was, and, consequently, that the defender is now resting owing to the Crown the free or surplus teinds of his lands accruing for the years and crops 1839 and 1869, and intervening years. On the other hand, the contention of the defender is, that the lease referred to did not come to an end, as maintained by the pursuer, but continued to subsist by tacit relocation till the present year, and, therefore, that he is not liable to the pursuer for the free or surplus teinds concluded for.

"The lease referred to having been granted in 1783, for nineteen years from and after 23d March 1780, expired in 1799, but was admittedly continued, by tacit relocation, until 1811. Whether it was also continued until 1839, although matter of dispute, does not require to be now determined. And neither party indeed has any interest, so far as the Lord Ordinary can see, to raise a discussion on the point, seeing that a settlement, on the footing of the lease, was come to sometime ago, for the period prior to Whitsunday 1839, and that the claim in the present case applies only to the subsequent period.

"In regard to this subsequent period there are various important circumstances to be kept in view—(1) The lease referred to embraces, not only the teinds, but also the feu-duties of the lordship of Dunfermline; and for both there was payable a *cumulo* rent of £100, without any distinction being made as to how much of that sum was to be held as for the teinds, and how much for the feu-duties. (2) This being so, it is not easy to understand how tacit relocation could have been interrupted, and the lease effectually brought to an end in March 1839, as it admittedly was, *quoad* the feu-duties, and not as regards the teinds. And at any rate (3) the inhibition, which was admittedly used in 1838, must, the Lord Ordinary thinks, be held, in the circumstances, to have effectually interrupted tacit relocation as regards the teinds, even supposing that the lease could have been thereafter continued till March 1839 *quoad* the feu-duties.

"Nor does the Lord Ordinary think that the defender was sound in his contention that the inhibition, not having been followed up by any steps for the purpose of ousting the tenants from possessing under the lease, must be held to have had no effect.

"The truth is, that the proper tenants had not possessed, or, at any rate, there is no evidence that they had possessed, under the lease after 1811; for, although the settlement above mentioned included all arrears of tack-duty, down to Whit-[502]-sunday 1839, it is obvious from the correspondence, Nos. 15 and 16 of process, and the account, No. 14 of process, that it was made by way of compromise, and not in respect of the tack being continued by tacit relocation till Whitsunday 1839. No proceedings, therefore, were necessary after the inhibition was used to oust the tenants from possession. And, most certainly, there is no evidence whatever that after Whitsunday 1839 they have drawn or attempted to draw from the defender, or any other vassal in the lordship of Dunfermline, in virtue of the lease, a single farthing either of feu-duty or teinds; and, admittedly, the Crown has not drawn or received any rent whatever under the lease. Neither does the defender say that he has paid, or been asked to pay, since Whitsunday 1839, anything to the proper tenant or tenants under the lease. There

Crown did not assume possession, and the act of the trustee was never followed out. The defender did acquiesce in the surrender of the tack, as regarded the feu-duties, because he paid them; and it is contended with great force that, as the rent was *in cumulo*, the termination of part of the lease must be held to stop tacit relocation entirely. I do not deny that this argument is a very strong one, but I am not satisfied that it is necessarily conclusive. The tack did admit of division, and the proceedings in 1838 and 1839 assumed that it did so—that it might be terminated as regarded the teinds, and not terminated as regarded the feu-duties. The procedure adopted necessarily implied that, and indeed, from the nature of the subjects let this must have been so, for the teinds of some of the lands might be purchased by the heritors who were entitled to purchase, notwithstanding the tack, and, in point of fact, this was largely done during the currency of the tack, the rent payable to the Crown suffering a corresponding abatement. The same thing might have happened with regard to the other subjects which were included in this lease, and in the course of the currency of a tack of this kind part of the subjects might have been evicted from one cause or other, by which the amount payable to the tacksman was diminished. The necessary result of that was, not to bring the tack to an end, but to make a proportional abatement in the rent which was exigible; and there was no difficulty manifestly in telling the proportion which should be so abated, because the proportion was exactly that which the heritor and vassal was bound to pay to the tacksman and his trustee. But I have great difficulty upon this part of the case. The inclination of my opinion would be that the tack was not terminated as regarded the teinds, but what I have said is almost conclusive with regard to the second point, because, considering the difficulty of the question whether the title subsisted, there seems little doubt that there was colourable ground for believing that it did subsist. I think therefore that the defender is released on the ground of *bona fide* perception and consumption from this claim for repetition of bygone teinds, which is a very unfavourable claim, as any colourable title with possession will be sufficient to put the heritor in good faith, and to exclude the claim for bygones. I have not found any case in which that doctrine was not applied where there was any colourable title at all for the possession. The two elements that arise here are, first, that the possession commenced upon a sufficient title, and secondly, that the title was one which [505] admitted of being continued by tacit consent; and if to these is added the fact that there is no act on the part of the titular to put the heritor in bad faith, I think that of itself would have been enough. Here, however, there is a very reasonable ground for maintaining that the title itself subsisted. But it is clear that, although the possession and good faith may not protect the tenant against the destruction of his title, as I think was said in the case of Anderson, it may be quite sufficient to protect him from a claim for repetition. The report of Scott of Ancrum *v.* The Heritors of Ancrum, in Bell's Folio Cases (p. 152), seems to me to contain the clearest statement of the principles of law applicable to this subject that I know, and in particular, the opinions of Lord President Campbell and Lord Justice-Clerk Braxfield as given by Mr. Bell. The Lord President says—"It is a very serious question whether an heritor is to be made liable for bygone teinds. I am one of those who think such claims most unfavourable. It is extremely hard that an heritor, ignorant who has the true right to the teinds, and paying *bona fide*, and without challenge, to the minister, should be exposed to such a claim; and little favour is due, on the other hand, to a titular who lies by all the time, careless of his own rights, and then comes forward with a claim for the teind of forty years." Lord Braxfield's observations are still more to the point. He says—"There was complete *bona fides*, and I hold that every colourable title saves from bygones; it was so decided in the Earl of Haddington and Earl of Home. There the bygone teinds of thirty-nine years were claimed, but they were not allowed. I was counsel in the case, and I remember the opinion of the Court was that a titular who allows heritors to possess is not entitled to complain of their intromission, but is held to waive and to intend to waive his claim for teinds." I think that is a true statement of the law, and I think it is entirely applicable to the facts of this case. There is a dictum of Lord Justice-Clerk Hope in the case of Trinity Hospital (Dec. 20, 1848, 11 D. 266) to the same effect, where he says that a delay of five years in following out an inhibition will raise a plea of *bona fide* perception. I have now shortly stated the principles upon which I come to that conclusion; but Lord Benholme has been good enough to prepare an opinion going fully into the facts and principles applicable to this case, and I entirely

to certain proprietors within the lordship of Dunfermline, for themselves and in trust for all the other heritors and vassals of the Crown. It was truly a trust, I cannot doubt, for the benefit of the crown vassals. It comprised, *inter alia*, the teinds and feu-duties exigible by the Crown from the vassals and heritors. These were let for nineteen years and crops from 1780 (although the date of the tack is 1783), at a rent of £100 a year—the first year's rent being payable at Whitsunday 1781. The tenants were taken bound to relieve the landlord (the Crown) of minister's stipend, schoolmaster's salary, and other public burdens; and the lease was taken in the names of certain parties, and the survivor of them, and the heir of the last survivor; but it was, in fact, a trust for all the crown vassals of the lordship who paid their proper share of the rent and burdens, and it must be assumed, I think, that in this case they did so. The provision that they should only be entitled to the benefit of the tack upon making that payment is a matter with which the landlord had no concern, and was entirely for the benefit of the tenants in trust. They were entitled to draw the full teind if the amount or proportion of the tack-duty was not paid to them by the heritor. Now, it is admitted that this lease was continued by tacit relocation until 1838; but in May and July of that year the Crown used an inhibition in ordinary form as regarded the teinds of the crop and year 1838; and, as regarded the feu-duties and other subjects, the Crown raised an action before the Sheriff for the purpose of determining the lease, in which action a decree was obtained in 1839 in regard to the subjects "other than the teinds." It is admitted that the defender has paid to the Crown year by year the feu-duties of his lands since 1839, and that he has paid no part of the teinds since that date, and that no demand upon this account has been made upon him. The teinds are valued; and I assume (although our information is scanty upon this head) that the defender has paid his proportion of stipend direct to the minister. There is no allegation upon that subject; but, as there is no statement that it was paid by the Crown, I assume that he continued to pay his proportion of stipend. There is thus no question that, as regards the feu-duties, the lease was at an end in 1839; and the question is, did it also terminate as regarded the teinds. With regard to the inhibition which was used in 1838, it is said that that was inept, on three grounds—first, because it was used too late; second, because it was not followed out for thirty years; and third, because it was derelinquished by payment of the rent for that year having been accepted by Lord Elgin's trustees in 1852. As to these pleas, if the inhibition was otherwise effectual, I do not think the settlement with the trustees of Lord Elgin thirteen years afterwards would affect it; but I am of opinion that, on the other two grounds, the inhibition was ineffectual. In the first place, I cannot doubt that, in a composite tack of this kind, tacit relocation took place, unless there was notice before the term of entry to the tack; and as [504] that was from the 23d March in each year, I have no doubt that on the 23d of March 1838 this tack was renewed by tacit relocation for a year, and that it is impossible in that respect to make a separation between the teinds and the rest of the subjects. But, even if that were not so, the delay of thirty years in following up the inhibition is fatal to it. An inhibition of teinds, although it puts a tacksman in bad faith to intermeddle with the teinds, and exposes him to an action for spuilzie, is only a warning—an interdiction, which requires to be acted on in order to preserve its effect. It does not of itself terminate the tenant's possession, or give the lessor a right to possess; and if it is not followed out with reasonable despatch, and the tacksman is left in possession, it is held to be passed from, and the action for spuilzie is excluded. A clear definition of the nature of an inhibition of teinds is to be found in Lord Bankton, 2, 8, 180, where he explains that its form was derived from the canon law, and he seems to think that an inhibition of teinds was the origin of an ordinary inhibition in cases of debt. I cannot distinguish this case from the case of the Magistrates of Forfar, quoted by the defender, in which the point seems to have been directly decided. It is true that in this case no part of the tack-duty was paid to the Crown after the inhibition, but the minister's stipend, which the tacksman was bound to pay by the lease, continued, I persume, to be paid by him. It would therefore seem that the tack, as regarded the teinds, had not been terminated by any judicial proceeding until this action was raised. It does not, however, follow that it subsisted; and this raises the most difficult question in the case—namely, whether the lease, as a whole, has not been conclusively surrendered. I think Lord Elgin in 1839, as the survivor of the trustees, had a right to renounce possession under the lease; and, if the Crown had assumed possession, the defender probably could have had no right to resist. But then the

Crown did not assume possession, and the act of the trustee was never followed out. The defender did acquiesce in the surrender of the tack, as regarded the feu-duties, because he paid them; and it is contended with great force that, as the rent was *in cumulo*, the termination of part of the lease must be held to stop tacit relocation entirely. I do not deny that this argument is a very strong one, but I am not satisfied that it is necessarily conclusive. The tack did admit of division, and the proceedings in 1838 and 1839 assumed that it did so—that it might be terminated as regarded the teinds, and not terminated as regarded the feu-duties. The procedure adopted necessarily implied that, and indeed, from the nature of the subjects let this must have been so, for the teinds of some of the lands might be purchased by the heritors who were entitled to purchase, notwithstanding the tack, and, in point of fact, this was largely done during the currency of the tack, the rent payable to the Crown suffering a corresponding abatement. The same thing might have happened with regard to the other subjects which were included in this lease, and in the course of the currency of a tack of this kind part of the subjects might have been evicted from one cause or other, by which the amount payable to the tacksman was diminished. The necessary result of that was, not to bring the tack to an end, but to make a proportional abatement in the rent which was exigible; and there was no difficulty manifestly in telling the proportion which should be so abated, because the proportion was exactly that which the heritor and vassal was bound to pay to the tacksman and his trustee. But I have great difficulty upon this part of the case. The inclination of my opinion would be that the tack was not terminated as regarded the teinds, but what I have said is almost conclusive with regard to the second point, because, considering the difficulty of the question whether the title subsisted, there seems little doubt that there was colourable ground for believing that it did subsist. I think therefore that the defender is released on the ground of *bona fide* perception and consumption from this claim for repetition of bygone teinds, which is a very unfavourable claim, as any colourable title with possession will be sufficient to put the heritor in good faith, and to exclude the claim for bygones. I have not found any case in which that doctrine was not applied where there was any colourable title at all for the possession. The two elements that arise here are, first, that the possession commenced upon a sufficient title, and secondly, that the title was one which [505] admitted of being continued by tacit consent; and if to these is added the fact that there is no act on the part of the titular to put the heritor in bad faith, I think that of itself would have been enough. Here, however, there is a very reasonable ground for maintaining that the title itself subsisted. But it is clear that, although the possession and good faith may not protect the tenant against the destruction of his title, as I think was said in the case of Anderson, it may be quite sufficient to protect him from a claim for repetition. The report of Scott of Ancrum *v.* The Heritors of Ancrum, in Bell's Folio Cases (p. 152), seems to me to contain the clearest statement of the principles of law applicable to this subject that I know, and in particular, the opinions of Lord President Campbell and Lord Justice-Clerk Braxfield as given by Mr. Bell. The Lord President says—"It is a very serious question whether an heritor is to be made liable for bygone teinds. I am one of those who think such claims most unfavourable. It is extremely hard that an heritor, ignorant who has the true right to the teinds, and paying *bona fide*, and without challenge, to the minister, should be exposed to such a claim; and little favour is due, on the other hand, to a titular who lies by all the time, careless of his own rights, and then comes forward with a claim for the teind of forty years." Lord Braxfield's observations are still more to the point. He says—"There was complete *bona fides*, and I hold that every colourable title saves from bygones; it was so decided in the Earl of Haddington and Earl of Home. There the bygone teinds of thirty-nine years were claimed, but they were not allowed. I was counsel in the case, and I remember the opinion of the Court was that a titular who allows heritors to possess is not entitled to complain of their intromission, but is held to waive and to intend to waive his claim for teinds." I think that is a true statement of the law, and I think it is entirely applicable to the facts of this case. There is a dictum of Lord Justice-Clerk Hope in the case of Trinity Hospital (Dec. 20, 1848, 11 D. 266) to the same effect, where he says that a delay of five years in following out an inhibition will raise a plea of *bona fide* perception. I have now shortly stated the principles upon which I come to that conclusion; but Lord Benholme has been good enough to prepare an opinion going fully into the facts and principles applicable to this case, and I entirely

concur in the views which he has communicated to us, and which will be laid before the Court.

LORD BENHOLME.—The question to be determined in this case regards the footing upon which the defender is bound to account for the teinds of his lands within the lordship of Dunfermline to the Crown as titular, from the year 1839, to which date the last settlement was brought down, till 1869, the year when he purchased those teinds. During this period of thirty years the pursuer contends that the defender is bound to account for the full surplus teinds, as not being embraced in any tack; whilst the defender maintains that he is entitled to have the account taken upon the footing of a tack originally granted by the Crown in 1783, for nineteen years, and subsequently prorogated by tacit relocation till the last of the said dates. The defence embraced this alternative form—that if the subsistence of the tack during the period in question cannot be affirmed as a strictly legal position, yet he is entitled to plead it as a colourable title, upon which is to rest his plea of *bona fide* perception and consumption of his teinds.

In order fully to understand the object and the effect of the tack of 1783 it is proper to refer to the well-known practice of the Crown in former times, and indeed until a comparatively recent period, of dealing with teinds of which the Crown held the titularity. This practice was to grant tacks of their teinds to each of the heritors at an easy and sometimes almost a nominal tack-duty, which tacks they were in use to renew from time to time as occasion required.

The great number of persons liable as heritors and vassals within the lordship of Dunfermline rendered it troublesome, if not impracticable, to follow this course in regard to the revenues of this lordship, consisting of feu-duties, teinds, and others; and the plan was adopted of giving the same substantial benefit to the heritors and vassals, by granting a tack of the whole lordship and its revenues to certain individuals among them in trust, the beneficiaries being [506] the whole parties liable for these revenues within the lordship—an aggregate sum of £100 per annum being the tack-duty to be paid for the whole. That this lease was no other than a pure trust is ascertained by the express terms of the tack, the lessees, as trustees, having no individual benefit from the tack beyond that which they shared with the other beneficiaries as vassals or heritors. As to the persons of the trustees besides the original lessees they were declared to be the survivors or survivor, and the heir or assignees of the survivor.

The original tack necessarily would expire in 1802. But it seems to be admitted on all hands that it was prorogated till 1839 by tacit relocation. What took place in 1838 and 1839 requires to be carefully attended to.

The tack was for so many years and crops from the 23d March 1783. The effect of prorogation, therefore, was to prolong the tack, on the arrival of the 23d March of each year, to the 23d March of next year. Thus, after the arrival of the 23d March 1838, without warning or interruption, the tack was prorogated till March 1839, and of course included not only the feu-duties, but also the teinds of 1838.

In 1838 an action of removing was raised by the Crown against Lord Elgin, which was terminated by decree of removing, as at Whitsunday 1839, from all the other subjects of the tack except the teinds. As to the teinds, an inhibition was used in May and June 1838, the prohibitions of which, however, extended only to the crop of that year. Now, it has been argued, and apparently with some reason, that this diligence was totally inoperative, in respect the teinds of 1838 fell under the terms of the original tack, as prorogated for a year from 23d March 1838; that as to the teinds of subsequent years it was equally inoperative, since the efficacy of an inhibition upon future crops depends upon its efficacy upon the crop specially and exclusively mentioned in its prohibitions. The *ratio* of this doctrine was illustrated by the analogy of a chain, which is effectually severed by the destruction of any one of its links, by which its continuity is absolutely dissolved; whereas if the link against which the force is employed stands the shock and remains unimpaired the whole chain is as entire as it was before.

The contention that the crop of 1838 fell under the tack seems to have been admitted by the Crown in the settlement of arrears effected in 1851, by which the teinds of 1838 and the other revenues of the lordship were estimated as under the tack at £100.

The defender's doctrine regarding the necessity of the inhibition being effectual as to the crop to which it relates, in order to have any effect on subsequent crops, seems to

quadrate with the dictum of Forbes (p. 437), who observes, "Inhibition of teinds is the legal and habile way of interrupting tacit relocation and use of payment, which being once duly raised and execute hath the like effect as a warning against the tenants and possessors of lands for that and all subsequent years." The necessary inference seems to be that its efficacy as to subsequent years depends upon its efficacy as to the year specially embraced in its prohibitions.

But perhaps the most weighty argument against the efficacy, or perhaps the subsistence of the inhibition of 1838, is the fact that for thirty years thereafter the advisers of the Crown took no single step to follow it up by demanding from the defenders that which, on the supposition that the inhibition put an end to the lease, they were entitled to demand,—the surplus teinds of the defender's lands. In the case of Lady Christian Graham *v.* Pate, Feb. 20, 1790 (M. 11,063), an inhibition was held to be lost by *mora*, an interval of thirty-four years having elapsed from the date of the inhibition to the raising of the action. The judgment of Court, following upon an action raised in 1796, proceeded expressly upon this *ratio*: "In respect the pursuers did not follow out their inhibition of teinds executed in 1762."

A similar judgment was pronounced in the case of the Magistrates of Forfar *v.* Carnegy, 1775 (Brown's Sup. v. p. 483), in which it was found that "an inhibition of teinds may be passed from, by not being insisted in for a tract of years and the acquiescence of both parties in a state of possession contrary to what was intended by the inhibition."

[507] I arrive at the conclusion that the first plea in law stated by the pursuer, which is founded exclusively upon the inhibition, ought to be repelled.

The pursuer's second plea seems to me to savour of metaphysics rather than of equity. It is to the effect that the tack, being one of feu-duties as well as teinds, with a *cumulo* feu-duty, the putting an end to it as to the former must be held to extinguish it also as to the latter. Perhaps the only practical embarrassment the defender has to encounter in meeting this plea is the apparent difficulty of apportioning the *cumulo* tack-duty between the one of these sources of revenue and the other. Yet, that such an apportionment is practicable, and is in fact contemplated by the tack itself, seems undeniable. The tack provides that the whole heritors and feuars are to be entitled to the benefit of the tack on their "paying to the lessees a rateable proportion of the said tack-duty of £100 per annum," &c. This provision contemplates an apportionment of the tack-duty, not only as between the feu-duties and the teinds, but also the farther apportionment of each of those portions of the tack-duty among the individual beneficiaries *inter se*. Such a detailed accounting was absolutely necessary in operating the relief of the last surviving lessee, whose trustees, on his account, had to settle the claims of the Crown, founded upon the lease, for arrears as between the years 1812 and 1839.

Further, it may be observed that such an apportionment of the tack-duty, in so far as regards the teinds, was to a certain extent made the basis of that long accounting, and regulated the deductions from the tack-duty, rendered necessary by the intermediate purchase of their teinds by certain of the heritors previous to 23d March 1839.

By these purchases the teinds of the several purchasers were, from the date of the purchase, excluded from the subjects of the tack. The *cumulo* tack-duty required therefore to be diminished, or, in other words, a deduction to be given from the £100, as from the date of the respective purchases. This was clearly stated by Mr. Horne in his letter of 9th December 1850, as follows:—"The commissioners will also deduct from the tack-duty the proportion which the subjects (teinds) purchased and paid for by certain of the vassals bears to the whole subjects of the tack."

This principle of apportionment was accordingly followed out in the accounting. The proportion of the whole tack-duty effeiring to the teinds of each heritor who had purchased his teinds was held to be the interest of the purchase money, which of course had been struck at nine years' purchase.

In effect, this interest was, in the accounting, deducted from the whole tack-duty, as at the date of the purchase, and interest charged only on the remainder. Had the account been made to assume a single continuous form—as in the interest account of a bank credit or deposit account—this would have clearly appeared to be the principle of the accounting. But exactly the same result was arrived at, by the mode of stating the account actually adopted, viz., the whole tack-duty, with interest, was set out as the debit of each year in an account of charge, and then, in a separate account of deductions,

the interest of the prices of the teinds was stated as a capital sum, as at the date of the purchase; and interest accumulated on that capital sum at the same rate as was charged in the charge account—the sum total of the one being deducted from the other to bring out the true balance in 1839.

It would be premature to determine what annual sum the Crown may be entitled to in place of the full surplus teind-duties, since upon that subject there has been no discussion. But of this I am satisfied, that the difficulty, whether of mere form or of actual practice, is insufficient to prevent the application of the pleas stated in defence.

The pursuer's third plea proceeds upon an assumption, both of fact and of law, which seems utterly inadmissible. The alleged understanding or agreement of the late Earl of Elgin, that the lease terminated in 1839, or that of his trustees after his death, is supported by no proper evidence. And even if it were, the beneficiaries, who are not alleged to have been cognisant of either, cannot be affected thereby.

The pursuer's fourth plea in law, founded on the death of the late Lord Elgin, [508] is manifestly ill-founded, since the tack expressly was conceived in favour of his heirs or assignees. And besides, the subsistence of a trust, by which important benefits are constituted in others than the trustees, does not come to an end by the failure of the trustees, who are merely the hand by which these benefits are to be drawn and administered.

Of the pleas maintained for the defender it is perhaps necessary only to notice separately the third, which is this—*Separatim*, the claim now brought forward is excluded by the defender and his predecessors having received and consumed the rents and produce of the lands *bona fide*, in the belief that no such claim existed."

This plea assumes its alternative form from the circumstance that it is relevant, and indeed is only properly applicable, upon the supposition that the defender is unable to establish an absolute exclusion of the pursuer's pleas considered above. For if he were successful in absolutely overthrowing the pursuer's pleas then this alternative plea on his own part would be superfluous and unnecessary.

To sustain the plea of *bona fide* perception it is notorious that a mere colourable title is sufficient. Nay, it has been held that an expired tack, even when tacit relocation is out of the question, is a colourable title, in respect of its ambiguity in regard to its duration—such as to defend from a claim for repetition of the real rent of lands, during the period of litigation as to its true meaning, between the landlord and tenant. I refer to the case of Carnegy *v.* Scott, Dec. 4, 1827, which was affirmed in the House of Lords.

In this case, immediately on the death of Patrick Scott, the original tenant, the landlord, Mr. Carnegy, brought his action of removing against his daughter and heiress. In defence it was stated that the lease did not expire on her father's death, but continued during her own life. A litigation ensued, which lasted for eight years, in the course of which conflicting decisions were pronounced. By the ultimate judgment in the House of Lords it was determined that the lease expired on the death of Patrick Scott.

A subsequent litigation then ensued, in which the landlord insisted that, if not entitled to violent profits, he was at least entitled to the actual rents of the lands (which had been sublet at a large surplus) from the date of his action of removing. But the defence of *bona fide* perception was sustained, both in this Court and in the House of Lords, relieving the tenant from any other demand during those years than payment of the principal tack-duty stipulated in the expired tack.

This case seems to be a stronger one than the present in favour of the defender, in respect, first, that the colourable title was truly in law a nullity; secondly, that there was no want of diligence—no laches on the part of the landlord—nor any conduct or attitude on his part that could mislead the defender; and thirdly, that the question related to the rent of lands, and not to teinds.

This last difference is of considerable importance, since the claim for bygone teinds is looked upon with peculiar disfavour by the law. In the case of Scott *v.* Heritors of Ancrum this bias of our practice is announced authoritatively from the bench as follows:—"Claims for arrears of teinds are extremely unfavourable. If the demand had been made in proper time the heritors would in all probability have purchased their teinds. Any title of possession, therefore, sufficient to put them *in bona fide* to suppose that they were not liable to a claim of this nature is always sustained as a valid defence against it."

The application of this doctrine to the present case is strikingly obvious. The long-continued silence or laches of the pursuer has unquestionably operated as a snare to the defender, inasmuch as the defender is pursued for thirty years' amount of his surplus teinds, whereas, had the pursuers brought their demand in 1839 the teinds would undoubtedly have been bought at nine years' purchase. The defender's position is aggravated by the necessity he has lately been under of paying nine years' purchase of his surplus teinds, independently of the severe fine of thirty years' more with which he is threatened by the present action.

[509] I am therefore of opinion that the interlocutor of the Lord Ordinary should be altered, and the third plea in law for the defender sustained.

LORD COWAN.—The opinion which Lord Benholme has just given was, as your Lordship has stated, submitted to us in consultation, and the grounds of the conclusion at which he has arrived were fully discussed and considered. These grounds of judgment have my entire acquiescence.

The difficulty which I have had throughout the argument has arisen from the apparent want of a proper title on which the plea of *bona fides* could be maintained; but I think the grounds which have been stated by my brother, and also by your Lordship, conclusively show that this was not an indivisible title, but was truly a divisible title. It was recognised as such in the settlement which took place between the Crown and the heritor in 1851; and although as regards the feu-duties the tack had certainly come to a close, there was the means of having separated from it the money to be paid for the teinds under the tack, had the Crown thought fit to have insisted upon their right. Farther, that matter was at least attended with great difficulty, and this of itself goes far to support the plea upon which the defender rests. It is at all events a colourable title to support the plea of *bona fide* perception and consumption.

LORD NEAVES.—I also concur in the opinions which have been delivered. This is an important case, as we are now deciding it, as a protection to the parties against what are hard and severe claims at the instance of the titular. One great reason why these are more unfavourably viewed is perhaps the peculiar nature of the right. If you are to have an accounting for teinds going back for forty years, without any warning to the heritor that he was to be so sued, you might in the general case—and the law will take its colour from the general case—be involved in litigation of the most vexatious and embarrassing kind, because, when you come to an arrear of teinds—unless in the case of a valuation, which may or may not exist—you get into an inquiry as to every crop grown upon the lands from the commencement of the accounting, in order to know what was teindable and what was not, and what the teinds consisted of. You are not to take a certain aliquot part of the rental; that is not the law or the practice, in a bygone accounting; but you are to inquire into the actual teinds; and, in fact, you must deal with the party as having in each of the years committed a spuilzie upon these teinds. That being the case, the law is very unwilling to institute such an oppressive inquiry where there has been *bona fides* with any colourable title, perhaps a weaker title than might protect a party in another case. The difficulty here is, as Lord Cowan has observed, upon the divisibility of this title; but, upon full consideration, I am convinced that in its own nature it was a divisible title. It contained subjects that were to some extent heterogeneous, and these subjects were such that tacit relocation with regard to each of them required to be terminated in a different manner. There is no way of stopping tacit relocation in a tack of teinds where there is no positive renunciation, except by inhibition; whereas in the case of lands or other subjects you can determine the tacit relocation by a sufficient warning, although that warning, of course, may be passed from again. But the nature of the subjects also showed that this was a divisible title, because the teinds were terminable by purchase; and when the Crown ceased to be the landlord of the actual teinds, these teinds of course ceased to be the subject of a tack. The Crown could not receive a rent for teinds of which they were not to continue to be the titulars. They must have abated, as they did abate, from the tack-duty what effeired to the purchased teinds, because then the party became owner of them in his own right, and nothing had to be paid for them. That might obviously separate the tack into parts. Besides, on the other grounds, I agree with your Lordship that, without fully determining whether this would be available in feudal law, it is at least such a colourable title as in the circumstances that occurred fully justifies the defender in escaping from an accounting for bygone teinds

He has already paid his nine years' purchase, I understand, and if he [510] were to pay thirty years' more, that would make him pay forty years' purchase for his teinds.

This interlocutor was pronounced:—"Recall the interlocutors of the Lord Ordinary: Sustain the third plea in law for the defender, and assoilzie him from the claim contained in the information; and find him entitled to expenses, and remit," &c.

MITCHELL & BAXTER, W.S.—DONALD BEITH, W.S.—Agents.

[*Partly affirmed*, 1874, 1 R. (H. L.) 27.]

No. 94. X. MACPHERSON, 510. 28 Feb. 1872. 2d Div.—I.

JAMES ALLAN, Petitioner.—*J. D. Fordyce.*
GEORGE ALLAN AND OTHERS, Compearers.—*A. J. Young.*

Poor's-roll, Admission to—Objections, time of stating.—Objections to the admission of an applicant to the benefit of the poor's-roll, on the ground that the applicant's circumstances are not such as to entitle him to that benefit, should be stated when the application is moved in the Single Bills, and before a remit is made to the reporters on *probabilis causa*.

This was an application for admission to the poor's-roll. A remit was made to the *probabilis causa* reporters, and they reported in favour of the petitioner. In their report they observed,—"An objection was stated to the reporters that the circumstances of the applicant do not entitle him to the benefit of the poor's-roll; but the reporters, following what they understand to have been the practice for many years, declined to consider it, as such objection is usually stated to and disposed of by the Court before the remit to the reporters is made."

The same objection was now urged by the compearer to the Court.*

The petitioner argued that the objection was too late.

LORD NEAVES.—This objection comes too late. Notice is given in the minute-book for the express purpose that objections may be stated when the case appears in the Single Bills. The change in the A. S. of 1842 from that of 1819 was made in order to alter the system formerly pursued.

LORD BENHOLME concurred.

LORD COWAN.—I think it very important that the present practice should be adhered to. According to it an opportunity for objecting on the ground of the poverty not being established is always given when the case is in the Single Bills, notwithstanding the power which the adverse party has under the Act of Sederunt to appear before the minister and elders. Objections are frequently stated in the Single Bills requiring to be investigated, and in that event we have remitted to the counsel for the poor to report on the matter of poverty under the certificates, along with their reports on the *probabilis causa*; or we have sometimes ordered a preliminary inquiry into the facts. But when no appearance is made, and no good ground stated to account for this, I am very clear that the objection on the ground of poverty not being proved comes too late. The objection truly is that there never should have been a remit at all, and I do not think it ought now to be listened to.

The LORD JUSTICE-CLERK was absent.

THE COURT admitted the applicant to the benefit of the poor's-roll.

R. A. VEITCH, S.S.C.—HAMILTON, KINNEAR, & BEATSON, W.S.—Agents.

[*Followed*, Douglas *v.* M'Veigh, 1881, 8 R. 667.]

* A. S., 21st Dec. 1842, sec. 5; A. B. *v.* C. D., Dec. 12, 1833, 12 S. 197; M'Glashan's Sheriff-court Practice (Barclay), 342; Dove Wilson's Sheriff-court Practice, 125.

No. 95. X. MACPHERSON, 511. 29 Feb. 1872. 2d Div.—Lord Mure, R.

ISABELLA GRANT, Pursuer.—*Pattison—Lang.*
JAMES YUILL, Defender.—*Macdonald—Harper.*

Parent and Child—Aliment—Custody.—The father of an illegitimate female child ten years of age, who at one time denied on oath the paternity, and only paid aliment under decree, but now judicially admitted the paternity, offered, in an action for continued aliment, to take the child, and place her with his sister, a widow, resident on a farm in the country. The father was unmarried. *Held* (1) that although the father had originally denied the paternity, having judicially admitted it, he was entitled to the custody of the child; and (2) that his offer to place her with his sister was reasonable under the circumstances.

In this action, Isabella Grant, residing at Auchinairn, near Glasgow, sued James Yuill, residing at East Kilbride, for the aliment of her female illegitimate child of ten years of age.

In a prior action the defender denied on oath the paternity of the child, and only paid aliment under decree. He now judicially admitted the paternity, and offered to place the child under the care of his sister, a widow, residing on a farm near Wishaw. The defender was unmarried. The child was not alleged to be in bad health.

The pursuer pleaded;—(1) The illegitimate female child of which the defender is the father having attained ten years of age, and being still unable to provide for herself, the pursuer is entitled to decree against him for aliment until the said child shall attain fourteen years of age, and the defender's offer is not, in the circumstances, sufficient.

The defender pleaded;—(2) The defender having offered, before and since this action was brought, and being still willing, to take the custody of his child, is entitled to decree of absolvitor.

After a proof, the Lord Ordinary (Mure) pronounced this interlocutor:—"Finds that the defender has made a reasonable offer to take charge of and educate the pursuer's child, who is now ten years of age: Therefore sustains the defences, assoilzies the defender from the conclusions of the action, and decerns: Finds him entitled to expenses," &c.*

---

* "NOTE.—The Lord Ordinary, having regard to the position of the leading witnesses examined for the defender, and to the manner in which they gave their evidence, has seen no reason to doubt that the offer made by him to aliment and educate the pursuer's child under the care of his sister, who is ready to undertake the charge in her own house, was made *in bona fide*.

"But the main difficulty the Lord Ordinary has felt in dealing with the case arises from the fact that the defender for some time denied the paternity of the child; and it appears to have been laid down in the case of Keay, February 19, 1825, 3 S. 561, that in such a case the defender could not discharge himself of his obligation to aliment a child by offering to take the custody of it. And if that decision is to be held as laying down a general rule, that in all cases where a defender has denied the paternity, and has only paid aliment under force of a decree in a defended action, he is to be precluded from at any time thereafter pleading his readiness to take the custody of the child, as a defence to a claim for continued aliment after the child has arrived at seven or ten years of age, as the case may be, the present defender is in that position. The Lord Ordinary, however, has been unable so to read that decision; because the report shews that, at the time the decision was pronounced, the defender was judicially denying the paternity, and the opinion of the Court appears to have proceeded upon that circumstance, as it bears that the defender was not entitled to the custody 'while,' and not because he had at one time denied the paternity.

"In the present case, on the other hand, the defender judicially admits the paternity, and if the offer of the defender had been to take the child into his own house, as in the case of Kay, June 14, 1826, 4 Shaw, p. 706; Corrie, Feb. [512] 24, 1860; and the older case of Ballantine, Feb. 22, 1803, Hume, p. 424, no objection could, it is thought, have been made to the proposal. The intention, however, of the defender is

[512] The pursuer reclaimed, and argued;—The pursuer cannot be compelled to give her child into the custody of the defender, who had denied the paternity, and perjured himself by denying it on oath.* The defender does not offer to take the child into his own house, but only to place it in the custody of his sister.

The defender argued;—The defender judicially admits the paternity of the child.† The defender was unmarried, and his offer to board the child, who was admitted to be in good health, with his sister, was the most reasonable he could make in the circumstances.

LORD BENHOLME.—This is a question respecting the rights of a father,—that is to say, not of a lawful father, but of a father by blood. The law is, that after the child has attained a certain age the father is entitled to say, I can relieve myself of the expense of maintenance, either by taking the child myself, or by making some other arrangement for its maintenance and education. There have, however, been certain special objections stated to the defender's proposal, and to the defender himself. It is stated that he not only denied the paternity, but was guilty of perjury. This is a grave charge, and there is no doubt as to its truth. Now, the question is, whether this ten-years-old perjury can be reared up against the defender, to the effect of disentitling him from making this offer. If ten years are not sufficient to do away the effect of a perjury, can twenty or thirty years do so? Or can any length of time do so? Yet it would seem strange that for a single act of this kind a man is to be incapacitated for life. The true question to which we have to apply our minds is this: Whether the sin or crime of which the defender was guilty is of such a kind as to lead us to believe that his character is so bad that the child's morals would be endangered. I think it would be difficult to hold that we have any ground for such a belief, especially as no allegation is made that his character is scandalous or licentious. We are relieved from the difficulty to some extent by the nature of the defender's offer. For it is an important circumstance that the defender is unmarried, and lives with his brother. He has no female living with him, who is to take care of the child. His proposal is that the child shall live with his married sister, shall be kept by her, and shall be sent to school from her house.

On the whole matter, I am for adhering to the Lord Ordinary's interlocutor.

LORD NEAVES.—I concur in opinion with Lord Benholme.

I shall make only two additional observations. I cannot agree with the argument for the pursuer. I do not think that a defender situated as this defender [513] is, is obliged to make it part of his offer that he will take the child to live with him in family. I think, indeed, that it would be positively wrong to order him to make such an offer. A man's wife and family ought not, I consider, to be compelled to receive among them the child of an illicit connection. Then, as to the objection stated to the defender's character: Is that objection sufficient to make us hold that he is unfit at this moment to regulate the maintenance of his child. The defender, ten years ago, is said to have committed perjury in denying the paternity of his child and his connection with the mother. I do not think we can hold that this occurrence is such a blot on the defender's character as to incapacitate him from the charge of his child. Nobody would maintain that perjury committed in any other kind of action would disqualify a man

---

not to take the child into his own house, but to place her under the care of his sister, a widow, resident on a farm in the country, who has agreed with him to aliment and educate the child, and the question raised is, whether that is a proper fulfilment of the defender's obligation. Now, having regard to the fact that the defender is unmarried, and has no female relative resident in his house, it appears to the Lord Ordinary that this is a fair and reasonable arrangement, for the child in question has never resided with the pursuer, and has for the last six or seven years been placed by her under the charge of her sister, where the pursuer occasionally sees her; and as the period has now arrived when the putative father is entitled to discharge himself of his liability, as explained by Lord Cowan in his opinion in the case of Corrie, by an offer either to take the child into his own house, or to make other arrangements for its aliment, it appears to the Lord Ordinary that the proposed arrangement for the aliment of the pursuer's child is one which, in the circumstances, he would not be warranted in refusing to give effect to."

* Keay *v.* Watson, Feb. 19, 1825, 3 S. 561.

† Kay *v.* M'Laurin, June 14, 1826, 4 S. 706; Corrie *v.* Adair, Feb. 24, 1860, 22 D. 897; Ballantine *v.* Malcolm, Feb. 22, 1803, Hume, p. 424.

from exercising such a right or duty. I can see no principle on which we can hold that the delinquency referred to is a forfeiture of the defender's rights.

LORD COWAN.—I concur with your Lordships. On the general question the Lord Ordinary has taken a just view of the legal rule applicable to the circumstances of this case. In answer to the pursuer's demand for aliment for her child, now ten years of age, the defender is entitled to offer to take the child into his own house, or to make suitable arrangements for its support and education. The offer must be such as is not open to the charge of being unfair or objectionable on reasonable grounds. This being the general rule, are there any specialties in the present case to make it exceptionable? It is said the defender has been guilty of perjury, inasmuch as, while in the action of filiation ten years ago he denied the paternity, he now admits himself to be the father of the child. Is this enough, the defender's moral character being otherwise unexceptionable, and this offer being a fair one, viz., to place the child under charge of his married sister? I do not think it a good answer to the defender's demand. But it is said that in Mr. Fraser's work on "Parent and Child" there is a statement to that effect. On referring to the authorities quoted by Mr. Fraser I do not find that they support the general assertion beyond this, that if the father is leading an immoral life an offer to take the child into his house would not be sufficient. There is, however, another defence, viz., that the arrangement proposed is unsatisfactory, because the defender's sister has never allowed that the child was really her brother's. On that point I will only observe that, in the circumstances, I think no better arrangement could be made. But the defender's sister must remember that in her treatment of this child she is to treat it as her brother's child—as it must be held, both by the judgment of the Court and by his own admission, to be.

The LORD JUSTICE-CLERK was absent.

This interlocutor was pronounced:—"Refuse the note: Adhere to the interlocutor reclaimed against: Find additional expenses due," &c.

KEEGAN & WELSH, S.S.C.—MORTON, WHITEHEAD, & GREIG, W.S.—Agents.

No. 96. X. MACPHERSON, 513. 1 Mar. 1872. 2nd Div.—Lord Ormidale, I.

JAMES COOK, Pursuer.—*Mair—Kirkpatrick.*
NORTH BRITISH RAILWAY COMPANY, Defenders.—*Maclean.*

Mora—Abandonment—Acquiescence—Delay—Constitution—Reparation.—A person in the employment of a railway company was severely injured in 1846. He claimed at the time no *solatium*, but was employed by the company in easy work till 1870, when he was dismissed. *Held*, in an action by him for damages for the accident in 1846, that his claim was barred by *mora*. *Observed* (*per* Lord Benholme) that as to claims which require constitution mere delay was sufficient to support a plea of *mora*, though it was not alleged there had been abandonment or acquiescence.

[514] James Cook raised this action against the North British Railway Company, concluding for implement of an obligation alleged to have been undertaken by them to provide the pursuer with constant employment of a light and easy kind, and for payment of £250 for breach of contract; or (2) for payment of damages for injuries sustained by the pursuer in a collision on the North British Railway at St. Margaret's on 28th Nov. 1846.

The pursuer averred;—(Cond. 4) "During the pursuer's illness, occasioned by said collision, he was repeatedly visited by Mr. Learmonth of Dean, then chairman of the company, by Dr. Hamilton Bell, the deputy-chairman, and Mr. Davidson, the general manager, all of whom, acting on behalf of the North British Railway Company, undertook, as a compensation to the pursuer for his said injuries, and assured him, that if he was ever able to work he should be constantly employed by the defenders, as long as he lived, at such light work as he might be able to perform." (Cond. 5) "As soon as the pursuer had so far recovered from the effects of said injuries as to be able to walk about, Professor Alison wrote to the board of directors, and also to Mr. Thornton, super-

intendent of locomotives, to the effect that the pursuer would be incapacitated, not by temporary weakness, but by permanent internal injuries, from doing any work for the future except of a light and easy kind, and that in the open air." (Cond. 6) "On 28th September 1848 the pursuer was accordingly, in implement of the undertaking and assurance referred to above in condescendence 4, appointed by the defenders inspector of waggons at Leith. His duties were of an important and responsible, but physically easy character. The pursuer performed these duties efficiently and faithfully for a period of nearly twenty years." (Cond. 7) "In or about the month of May 1868 the pursuer was removed from his post at Leith, and transferred to the Waverley Bridge Station at Edinburgh, where he was employed in the same capacity as before; but the work was more laborious, and he was, moreover, required to do night work. While thus engaged at the Waverley Station he was falsely accused of having been intoxicated, or having otherwise misconducted himself, in or about 12th June 1869. In consequence of this accusation he was dismissed by the company from their service at or about the beginning of July of the same year; but the company, on investigation, discovered the accusation to be totally unfounded, and they accordingly received pursuer back into their service in or about the month of December 1869. Meanwhile, however, the pursuer's office as inspector of waggons had been filled up, and the company, instead of assigning to him work of the kind to which he had been so long accustomed, or any other such light work as he was alone fit for (and as they undertook to provide him with), sent him to Cowlairs Station, near Glasgow, where they required him to perform work to which his strength was quite unequal. The pursuer repeatedly called upon the defenders to give him work of a light nature, such as he was able to perform, but this they refused to do. Notwithstanding frequent attacks of acute pain, resulting from the internal injuries sustained in consequence of said collision, and the heavy work the defenders gave him to perform, the pursuer persevered in his new employment until February 1870, when he was at length compelled to succumb and abandon his employment. Since that date the pursuer has applied in every legitimate way to the company for such light and suitable employment as they were bound to give him. The company, however, took no notice of the pursuer's applications until February 1871, on the 24th of which month he received a letter from the secretary, informing him that 'the directors,' after full inquiry, declined to re-employ him."

The pursuer pleaded;—(1) The defenders having undertaken to employ [515] the pursuer during his lifetime at such light work as he might be able to perform, as a compensation for the injuries received by him, and which undertaking was acted upon by the defenders for a period of twenty years or thereby, they were not entitled to depart from such undertaking, and they are therefore liable in implement and damages as concluded for. (2) The pursuer having suffered severe and permanent loss, injury, and damage, both in his person and in his business, by and through the gross and culpable negligence and carelessness or want of skill of the servants or officials employed by the defenders, and for whom defenders are responsible, the defenders are liable to him in damages and *solatium* therefor.

The defenders pleaded;—(1) Action is barred by *mora*. (2) The pursuer has not set forth facts relevant or sufficient to support the conclusions of the summons, and the action should be dismissed, with expenses.

The Lord Ordinary (Ormidale) pronounced this interlocutor:—"Finds that the allegations of the pursuer are not relevant or sufficient to support the action as laid, and therefore dismisses the same, and decerns." *

---

* "NOTE.—The summons as it came into Court, and as it was first brought under the consideration of the Lord Ordinary, contained two alternative conclusions—the first for implement of an alleged obligation, whereby it is said that the defenders undertook to employ the pursuer constantly in light work, and for payment of £250; and the second for payment of £1000 damages.

"It was explained on the part of the pursuer, and the record shows, that the first of these alternative conclusions was founded on the assumption that the defenders had undertaken and bound themselves, by way of compensation for injuries the pursuer had sustained through their fault in 1846, to employ him in light work so long as he lived and was able for it, and that the defenders had recently broken that contract, and refused to go on with it, and were consequently for that breach liable to him in the £250 concluded for; and that the second alternative conclusion was to meet the

[516] The pursuer reclaimed, and argued;—The Lord Ordinary was in error in supposing that the pursuer had abandoned the first alternative of the summons. The agreement was a binding agreement on the defenders. It was entered into by parties entitled to bind the defenders, and was adopted by them.* At all events the defenders were liable in damages for the injury suffered by the pursuer.

The defenders argued;—There was no averment except of personal responsibility on the part of the directors who were said to have formed the contract. The chairman and manager of a company were not entitled to enter into a contract by which the company was permanently bound. The action was excluded by *mora*.

At advising,—

LORD BENHOLME.—Damages are claimed in this action upon two grounds, and the Lord Ordinary has dismissed the case as laid upon both grounds. As to the first of these, I agree in thinking that no relevant case has been stated upon record; but as to the second, my opinion differs from that of the Lord Ordinary. I think that the claim for damages is cut off by *mora* on the part of the pursuer. The word *mora* suggests mere delay, but I am free to admit that in the ordinary case delay of itself is not sufficient to establish a plea of *mora*, and that abandonment must be implied in

---

contingency of the pursuer failing to establish the first, and being obliged to resort to his remedy against the defender, in respect of the injury he sustained in 1846, just as if there had been no such agreement as that upon which the first alternative conclusion of the summons was founded.

"But after discussion, and when it is presumed the pursuer became sensible that he could not succeed in supporting his first alternative conclusion, he amended his summons to the effect of deleting from it that conclusion altogether; so that there is now only one conclusion, viz., that which was formerly the second alternative one.

"It appears to the Lord Ordinary that the allegations of the pursuer are not relevant or sufficient to support the action as it is thus now laid.

"The agreement, whereby it is said that the defenders bound themselves to employ the pursuer in light work, is averred in article 4 of the condescendence. It is not, however, there said that the defenders were parties to that agreement, but only that certain individuals, 'acting on behalf of the North British Railway Company, undertook, as a compensation to the pursuer for his said injuries, and assured him that if he was ever able to work he should be constantly employed by the defenders as long as he lived.' It was accordingly maintained by the defenders at the debate that they, a statutory company, who could only enter into contracts in conformity with their statutes of incorporation, could not be bound by any such verbal undertaking and assurance of the individuals referred to; and further, that the allegations of the pursuer are insufficient to admit of such an undertaking and assurance being rendered operative and effectual against the defenders, on the principle of *rei interventus*, or otherwise.

"These appeared to the Lord Ordinary to be very formidable objections to his sustaining the action *quoad* the first alternative conclusion of the summons; but it has become unnecessary to deal further specifically with that conclusion, as it has now been, on the motion of the pursuer himself, deleted, and the summons to that effect held as restricted or amended.

"[516] Then, in regard to the other and only conclusion of the summons as it now stands, viz., that which was formerly the second alternative one, it appears to the Lord Ordinary that it cannot be sustained. He can find no relevant or sufficient allegations in the record to entitle the pursuer to maintain such a claim against the defenders after the lapse of more than twenty years, during which, not only was it not brought forward, but, according to his own showing, he had been receiving other compensation in lieu of it. It must, the Lord Ordinary thinks, be held, on the showing of the pursuer himself, that such a mode of redress as that now attempted to be enforced under the summons as it now stands was long ago waived and abandoned by him; and not only so, but also that in lieu of it he had betaken himself to another and different mode of redress, the full benefit of which he has reaped for many years. In this view of the pursuer's action, as it is now laid, the Lord Ordinary has dismissed it, being of opinion that his allegations are irrelevant, and insufficient to support it."

* Dickson on Evidence, vol. i. sec. 564; Hodges on Railways, p. 55; 7 & 8 Vict. c. 66, sec. 90; Moncrieff *v.* Waugh, Jan. 11, 1859, 21 D. 216.

the delay. But when the claim is one which requires constitution, such as the claim in the present case, I think the plea of *mora* will be justified by delay for a certain length of time in constituting the claim. In such a case presumption of acquiescence or abandonment is not required. I do not think that this poor man ever acquiesced or abandoned his claim against the railway company; but his failure to constitute a claim for so many years was an injury to the defenders, which justifies the plea of *mora*. I am of opinion, therefore, that we should recall the Lord Ordinary's interlocutor, and assoilzie the defenders.

LORD NEAVES.—I am of the same opinion. I am clear that the first claim, which is one for damages for non-implement of an alleged agreement, is not relevantly set forth in the record, and consequently no breach of obligation can follow. If this poor man trusted to the sort of transaction alleged, it was his misfortune. It cannot be held that an agreement of this sort, by which a man was to become a pensioner of the company for life, can be constituted in the manner alleged.

The real question is, has there been *mora*? I think there was *mora*, involving taciturnity. It is not mere delay or lapse of time which makes *mora*, but delay which leads the other party to believe that the claim has been given up. It is unfair that a man should be allowed to keep back a claim of this kind until it suits him to bring it forward, when all the means of rebutting it may have been lost. As long as the pursuer lives he is a witness to the accident, but the witnesses to prove the defence of the railway company may die. Whenever the pursuer [517] was in a position in which he could have brought the action, and did not bring it, there was *mora*. It is out of the question to allow such a claim—which, as your Lordship remarked, requires constitution—to lie over for five-and-twenty years. I know of no case where an action of damages—an action for slander or assault, for example—has been sustained after such a time. There is a vicennial prescription as to crimes. There may not be such a prescription here; but, as Lord Glenlee says in a question of taciturnity, wherever such a lapse of time has occurred as to place the opposite party to disadvantage, and to make him think that the claim has been sopited, the law will hold it to be so.

LORD COWAN concurred.

The LORD JUSTICE-CLERK was absent.

This interlocutor was pronounced:—"Recall the interlocutor of the Lord Ordinary; and as to the ground of the action set forth in the pursuer's first plea, of new find the action irrelevantly stated, and dismiss the same: *Quoad ultra*, in reference to the pursuer's claim set forth in the pursuer's second plea, find the pursuer's claim cut off by *mora*, and assoilzie the defenders, and decern: Find the defenders entitled to the whole expenses of the action," &c.

THOMAS LAWSON, S.S.C.—DALMAHOY & COWAN, W.S.—Agents.

No. 97. X. MACPHERSON, 517. 2 Mar. 1872. 1st Div.—B.

ALEXANDER BRODIE MACKINTOSH AND OTHERS, Pursuers.—*Fraser*—*W. F. Hunter.*

J. M'ARTHUR MOIR, Defender.—*Sol.-Gen. Clark*—*Crichton.*

Process—Verdict—Right of Way.—In a declarator of right of way a verdict for the pursuer fixes the direction of the road in question, but leaves it to the discretion of the Court to fix what the precise line of the road should be.

Observations on the opinions in the House of Lords in White *v.* Lord Morton's Trustees, July 13, 1866, *ante*, vol. iv. H. L. 53.

Ante, p. 29.

This case was tried for the second time in May 1871 upon an issue, "Whether for forty years, or for time immemorial prior to 1844, there existed a public road or right of way for horses, carts, and other conveyances, and also for foot-passengers, or for any and which of these purposes, leading from Hillfoot Street, Dunoon, through the lands of Milton and Gallowhill, to Argyle Street of Dunoon, in or near the direction

shown by the red line on the plan, No. 6 of process?" The jury returned a verdict in favour of the pursuers, which the Court refused to disturb.

By an interlocutor of 2d November 1872 the Court applied the verdict, and of consent of both parties remitted to Mr. James Peddie, C.E. "to visit the ground, and report in what line the road ought to be laid down, consistently with the verdict, and of what breadth the said road ought to be, and to lay down the said line on a plan to accompany his report," &c.

Mr. Peddie reported on 6th February 1872 in terms which are stated by the Lord President in his opinion.

The pursuers contended that the brown line deviated too much from the red line to be fixed on as the line of road consistently with the verdict. A line which deviates in some places from 20 to 22 yards from the red line does not answer the description of being "in or near the direction of that line."

The defender maintained that the expression "in or near the direction" was quite vague, and wide enough to include a line deviating even more than 22 yards. There was in fact authority for saying that a verdict in such terms was too vague to be applied at all—White *v.* Lord Morton's Trustees, *ante*, vol. iv. H. L. p. 53. To this case the defenders called the [518] attention of the Court without founding any argument on it, with the view of preventing the verdict being applied.

At advising,—

LORD PRESIDENT.—In this case we are now engaged in a duty which this Court is often called to discharge, and in the exercise of a well-recognised function. I say so, because there appears to have been a serious understanding in the House of Lords in the case of White *v.* Lord Morton's Trustees as to the powers and practice of this Court. The noble and learned Lords appear in that case to have overlooked the fact that this Court has jurisdiction as a Court both of law and of equity, and to have thought that after the verdict of a jury in such a case as this the duty remaining to us is purely formal, and that we have nothing to do but to pronounce decree exactly in the words of the verdict. Now, this Court never has done that, because the verdict in a case of right of way, while indicating the direction of the road in question, always leaves to the discretion of the Court to fix what the precise line of the road should be. So it was in this case. The conclusion of the pursuer's summons is to have it found and declared "that there exists a public road or right of way for horses, carts, and other conveyances, whether with or without wheels, and also for foot-passengers, leading from Hillfoot Street, Dunoon, through the lands of Milton and Gallowhill to Argyle Street of Dunoon, in or near the direction shown by the red line on the plan herewith produced." Under such a summons as that the question sent to the jury is not in what particular line the public enjoyed the right of way, if ever they did so, but the question is whether they enjoyed the right of way in the direction generally indicated in the summons, and when the verdict of the jury has been returned, for the purpose of informing the Court regarding the fact of use and possession, it then becomes the duty of the Court, when the verdict is affirmative of the question, to fix the line in which the road should run. It may be that all this is unintelligible to common lawyers in England, where the Court has no such power, but this is a Court of equity as well as of law, with power to fix the point so left to its discretion, not according to technical rules, but according to our judgment of what is practically just and right.

I think it necessary to make these observations in case this or any similar cause should be appealed to the House of Lords.

Now, the verdict in this case affirms the existence of a right of way "for horses, carts, and other conveyances, and also for foot-passengers, leading from Hillfoot Street, Dunoon, through the lands of Milton and Gallowhill, to Argyle Street of Dunoon, in or near the direction shown by the red line on the plan, No. 6 of process."

To say that the verdict should establish more distinctly what the line of the road is cannot from the very nature of the case be suggested. The jury could not possibly return a verdict of that kind, where the possession as here has been so extremely vague. This case affords, therefore, the best possible illustration of the absolute necessity of leaving with the Court the power to fix the precise direction of the line of road. Accordingly, in applying the verdict on 2d November 1871, we pronounced an interlocutor in a form perfectly recognised in the practice of this Court in these terms:—"Apply the verdict found by the jury in this cause: Of consent of both parties remit to Mr. James Peddie, civil engineer, Edinburgh, to visit the ground, and

to report on what line the road ought to be laid down consistently with the verdict, and of what breadth the said road ought to be, and to lay down the said line on a plan to accompany his report: Find the pursuers entitled to the expenses hitherto incurred in this process."

The report of Mr. Peddie, which is now before us, describes three lines from which to choose. The first is a red line, corresponding to that specified in the pursuer's summons; the second a blue line, which has the advantage of being shorter; and the third a brown line, which the reporter says is broader, more convenient for the public and better for the defender in the view of buildings being erected on his ground than either of the others. These are great recommendations, and to them it has to be added that the gradients of this last line are [519] much superior to those of the others. In both the red and blue line there is a gradient as high as 1 in 9 for 48 yards, while in the brown line the highest is 1 in 11 for 37 yards, the rest being 1 in 50, 1 in 60, and 100 yards level. In the other two lines the gradients vary from 1 in 15 to 1 in 25, and the level is only 32 and 35 yards respectively. The only objection to the brown line suggested on the part of the pursuers is that it is not consistent with the verdict. I hardly understand that objection, unless we are bound to adopt the red line. The question therefore is, whether the variation between the red line and the brown is so great that the latter cannot be brought within the general description of the right of way in the summons. Now, it appears to me that the description in the summons is merely a general indication of the points of the compass between which the right is claimed, and that any road entering at one of these points and passing out at the other, in a line generally the same as that stated in the summons, is quite within the conclusions of the summons and the verdict.

Another objection is one of sentiment rather than anything else. It is said that the view will not be so good on the brown line. But in the construction of a road we are accustomed to listen to the suggestions of engineers rather than of landscape painters, and the convenience of the public has to be consulted more than the education of their taste. The result is that I think the brown line should be adopted, but so as to give effect to a suggestion by the defender, to which the pursuers have indicated their willingness to accede, that in entering the ground at Hillfoot the road should enter eight yards further from the defender's ground than is indicated on the plan.

The width of the road is specified as to be twenty feet. As to the question whether the pursuers are to have anything more than the road, in the shape of a fence, I cannot give any opinion, because I never before heard of such a thing being demanded in such a case as this.

Lord Deas.—I agree with your Lordship as to the practice of this Court in cases of right of way. That practice is recommended by experience, and is, indeed, so established as to have become with us matter of law. I also agree that this case is a good illustration not only of the expediency, but almost of the necessity, of such a practice. If the issue in this case had required that the jury should specify or indicate the particular line of road which had been used, that would have been imposing an impossibility upon them, because no particular line of road has existed so far back as can be traced. The only thing the jury could affirm was "a right of way" in or near a certain direction, and if we could not extricate that the verdict would be useless. We know in this case from the evidence that there is no trace whatever in the direction claimed of any particular line even of footpath, still less of a cart or carriage road. In many instances in Scotland, where there are moors to be passed over, the public have a right of way, and yet they may have used twenty different lines for going from the one terminus to the other, taking the one they liked best or found most suitable in the state of the ground and of the weather. In this case, unless the public are to be allowed to wander over the whole ground as they did before, the line must be fixed, and there is no other way of doing so but to refer to an engineer to define the most suitable line. I agree further with your Lordship that the brown line recommends itself in preference to the other two as the most suitable and convenient. As to the proposal to have it fenced, I think it is a reasonable one, and I should be glad if we could order it, but we have no power to do so.

Lord Ardmillan.—I entirely concur with your Lordships as to the power and duty of the Court to extricate a question of this kind from the technicalities which might prevent the doing of justice if we had not a large equitable jurisdiction entrusted

to us. The pursuer's demand is a declarator of right of way between two points, and that right is to be ascertained by the verdict of a jury. But the right to a particular and defined line between the two points where there is no existing road must be settled by some adjustment. To fix such a right by a line drawn from one point to another has never been done by a jury, and cannot be, because it is the duty of an engineer. If the Court, even without [520] consent of parties, had not the power to remit to an engineer in such a case, the extrication of the question would be almost impossible. But the defender is entitled to have the line so laid out as not needlessly to damage him or interfere with his rights. The engineer in this case has proposed a line shorter than that proposed by the pursuers, and more level; and as the jury found only a right of way in an undefined direction, it is plainly the duty of the Court to decide on the most suitable line.

LORD KINLOCH.—I agree with your Lordship. I have no doubt of the competency of our doing what is nothing more nor less than to define a line of road within the latitude allowed by verdict of the jury, and I agree also as to the brown line being the best mode of carrying out that verdict.

This interlocutor was pronounced:—"Find that there exists a public road or right of way for horses, carts, and other conveyances, and also for other passengers, leading from Hillfoot Street, Dunoon, through the lands of Milton and Gallowhill to Argyle Street, Dunoon, generally in the direction shown by the red line on the plan No. 6 of process, and that the pursuers and the public generally are entitled in time coming to the free use and possession of the said right of way in the particular line and direction shown by the brown line laid down on the plan No. 154 of process, and distinguished by the letters A B C D E F on said plan: And having considered the joint minute for the parties, No. 155 of process, remit to the said James Peddie to stake off the line of road 20 feet wide, in conformity with the said brown line, and to see all obstructions on the line of road removed, and report."

W. F. SKENE & PEACOCK, W.S.—DUNCAN & BLACK, W.S.—Agents.

[*Held inapplicable*, Hozier *v.* Hawthorne, 1884, 11 R. 766.]

No. 98. X. MACPHERSON, 520. 5 Mar. 1872. 1st Div.—Sheriff of Aberdeenshire, M.

WILLIAM GORDON, Pursuer and Appellant.—*Reid.*
GEORGE WALKER, Defender and Respondent.—*Mair—Rhind.*

Process—Expenses—Sheriff-court.—Observed, per cur., in dismissing an appeal with expenses, that a simple affirmance by the Sheriff of the Sheriff-substitute's interlocutor carries the expenses of the appeal to the Sheriff.

PHILIP, LAING, & MONRO, W.S.—WILLIAM OFFICER, S.S.C.—Agents.

No. 99. X. MACPHERSON, 520. 5 Mar. 1872. 2d Div.—Lord Gifford, I.

JOHN MANNERS, Pursuer.—*Burnet—Rhind.*
GEORGE FAIRHOLME AND OTHERS, Defenders.—*Fraser—Hall.*

Friendly Society—Jurisdiction.—Held that where the claim of a member of a friendly society was, by the rules of the society, contingent upon his satisfying the executive council, by medical and other testimony, that he was permanently disabled, it was incompetent for the Court, when this condition had not been purified, to consider the claim upon allegations that the evidence produced to the executive council was sufficient evidence of permanent disability.

Amalgamated Society of Engineers, Machinists, Millwrights, &c.—Permanent Disability —Rules.—Held that the executive council of the amalgamated society, and not the branch society, were the judges of the sufficiency of the evidence of permanent disablement required under the 23d rule of the society to entitle a member to the permanent disablement allowance of £100.

Process—Expenses—Observations as to the granting or refusing expenses to the successful party in an action.

This was an action by John Manners, iron-turner at Dysart, against the office-bearers of the Kirkcaldy branch of the Amalgamated Society of Engineers, Machinists, Millwrights, Smiths, and Pattern-makers, as repre-[521]-senting the branch society, concluding for payment of £100, with interest from the date of citation.

The pursuer in 1847 became a member of a friendly society established in Kirkcaldy, which afterwards became a branch of the Amalgamated Society of Engineers, &c. The object of the society was to raise funds by contributions among its members for mutual support in case of sickness, accident, &c. The society consisted of between three and four hundred branches in England, Scotland, Ireland, Australia, the United States, and other foreign parts.

The preamble to the rules set forth that "every branch of this society shall appoint its own officers and conduct its own business in the manner set forth in the following rules." By rule 15 it was provided—"The contributions paid by members shall be held for and devoted to the payment of the benefits held out by these rules, and such other objects as the rules contemplate." Rule 19 provided for payment of sick-money. Rule 23 provided—"Any free member, not more than 16s. in arrears, who may, by losing a limb, or having one disabled by accident or otherwise, or through blindness, imperfect vision, apoplexy, epilepsy, or paralysis, be rendered permanently unable to follow any of the branches of trade mentioned in the preamble of these rules, provided such was not the result of intemperance or other improper conduct, shall receive the sum of £100, on the production to the executive council of satisfactory medical and other testimony of such permanent disablement." The executive council consisted of thirty-seven members appointed by certain branches specified in the 9th rule, and the eleven members appointed by the branches of the London district formed the local council. Six members of the local council formed a quorum, and transacted the ordinary business of the society. By the 9th rule it was provided—"The council shall decide in cases of appeal, such decision to be final, except in the case of a branch, which, being dissatisfied with a decision of the local council, shall appeal to the general council, or in a case where a branch may give notice of its intention to appeal to the delegate meeting, in accordance with the 34th rule." And by the 34th rule—"Any branch feeling aggrieved with the decision of the local council shall have the power to appeal to the provincial members of the general council, as a court of arbitration, constituted in accordance with the 7th clause of the 9th rule; and if the branch be dissatisfied with the decision of that court, it shall have the power to appeal to the delegate meeting." Delegate meetings were composed of delegates from each branch of the society in the United Kingdom, Australia, and the United States.

The pursuer suffered the loss of a part of the forefinger of his right hand. He applied for sick allowance under the 19th rule, and received 10s. per week for twenty-six weeks, and 5s. per week thereafter till the institution of this action. In January 1867 he applied under the 23d rule for £100, on the ground of permanent disability. The local council, on the ground that he had not produced satisfactory evidence of permanent disability, refused his application. Against this decision the branch society, at his instigation, on 30th October 1869, appealed to the general council. Without waiting the result of this appeal, on 4th March 1870, the pursuer raised this action against the branch society.

The defenders pleaded;—(1) This action is incompetent, in respect that the dispute in regard to the claim made must, by the rules of the society, be decided by the councils therein specified. (3) The defenders ought to be assoilzied from this action, in respect that they are not the parties who have right or power to decide upon the pursuer's claim. (4) The defenders ought to be assoilzied in respect that they are not the parties bound to [522] make payment of the sum claimed, even although it had been admitted by the society. (5) The pursuer not having produced the testimony required by the 23d rule to the general council as to his permanent dis-

ability, the defenders ought to be assoilzied. (6) The pursuer not being permanently disabled, the defenders ought to be assoilzied. (7) This action ought to be dismissed, in respect that the defenders have appealed the judgment of the local council, as above set forth, and such appeal is now pending.

The Lord Ordinary allowed a proof, from which it appeared that the branch society at Kirkcaldy were unanimously in favour of granting the pursuer's claim, and authorised a committee of their number to negotiate with him, on the footing that if he would give up all claim on the society he should receive the £100. In the course of the proof, Mr. Danter, the general secretary of the society, deponed—"The executive council is composed of local members and provincial members. The local council is composed of members living in London and the neighbourhood, what is called the London district. (*Q.*) In the 9th rule, subdivision 4, it is provided that six members of the local council shall form a quorum, and shall transact the ordinary business of the society; under these words, 'ordinary business of the society,' do the local council dispose of claims for the benefit of the accident fund under rule 23? (*A.*) Yes; I may add that the local executive council, about which I am now asked, have power to decide any question that comes before them with respect to these rules in the case of a member, but in the case of a branch they have a further appeal, and it is to the provincial members of the society. The rules of the amalgamated society were deposited with the Registrar of Friendly Societies on 9th November 1864; and Mr. Tidd Pratt, the registrar, gave a certificate of depositation, which I now exhibit. I am aware that the local council in the case of John Manners declined to admit him to the benefit of the accident fund; and I am also aware that an appeal was entered against that judgment by the Kirkcaldy branch to the provincial members of the executive council. That appeal has not yet been disposed of. It still lies undisposed of, along with many others. The reason of that is, that the business has not been of such importance as to warrant the society incurring the expense of fetching the provincial delegates to London to dispose of these cases. There is no specified time for doing that. It is only when business accumulates that the provincial members are cited. They are entitled to be paid during the time they are travelling, and while they are in London disposing of the business of the society. A meeting of the provincial delegates would cost the society something like £400. They have to come from all quarters of Great Britain and Ireland. I think it is very possible that there may be a meeting of the provincial delegates within the next three months, in consequence of the recent Act of Parliament."

The Lord Ordinary (Gifford) pronounced this interlocutor:—"Repels the plea stated in defence, and decerns and ordains the defenders to make payment to the pursuer of the sum of £40, 15s. sterling, being the balance of the sum sued for, after deducting therefrom the sum of £59, 5s., being the amount of sick money admittedly received by the pursuer from the defenders up to 15th April 1870, together with interest at the rate of five per cent. per annum on the said balance of £40, 15s. from said 15th April 1870 and until paid: Finds the pursuer entitled to expenses," &c.*

---

* "NOTE.—The defenders in this case are the office-bearers of the Kirkcaldy branch of the Amalgamated Society of Engineers, Machinists, Millwrights, Smiths, and Pattern-makers. The defenders are in the full administration and [523] management of the whole affairs of the said branch, and are in possession of its funds. By the laws of the amalgamated society it is provided (preamble) that 'every branch of this society shall appoint it own officers and conduct its own business,' and it is proved that the defenders receive the whole contributions of the branch, and make all disbursements therefrom to their own members and contributors.

"Such being the case, the Lord Ordinary thinks that the parties called as defenders are the proper parties to defend the action, and that the action is rightly laid against them. The defenders' pleas of no jurisdiction, in respect that the action should be laid against the London committee, none of whom have either residence or funds in this country, appear to be ill-founded.

"No action would lie against either the London or the provincial committees even if there were jurisdiction, for these committees, or councils, as they are called, have not the funds from which the pursuer's claims, if well-founded, are to be paid. The general council has a mere power of equalising branch funds, but this power does not appear to have been exercised as to the Kirkcaldy branch funds, and at all events it is

[523] The defenders reclaimed, and argued;—The local council were, under the 23d rule, the sole judges of the sufficiency of the evidence of disable-[524]-ment. The only

not pretended that the Kirkcaldy branch has no funds to meet the claim. The Lord Ordinary reads the laws as constituting each branch a separate society, with merely certain duties and relations to the amalgamated society, to which it is affiliated.

"The next and the most important question in the case is whether the pursuer's claim is not excluded by there having been a decision against him by the tribunal appointed by the laws, which decision, either by the laws themselves or by the provisions of the Friendly Society Acts, is not subject to review.

"The laws of the amalgamated societies, and which are binding on all the branches, are somewhat complicated and difficult to read. Indeed some of the provisions are not very easily reconciled with others, and it requires both attention and construction to reach a fair and consistent interpretation. The Lord Ordinary is of opinion, after carefully considering the whole laws and the whole minutes, that there is no proper decision at all against the pursuer's claim, and that even if there were, that is, even if the minutes of the London council could be held to be a decision against the pursuer, that decision is not made final to the exclusion of the present action either by the laws or by the Friendly Society Acts.

"The pursuer, on 24th March 1866, met with an accident to his right hand while at work at his trade. The greater part of the forefinger had to be amputated, and the second and third fingers were much crushed. The pursuer's case is that this accident has prevented and will permanently prevent the pursuer from practising his trade as an iron turner, and that he is in respect thereof either entitled to the superannuation allowance, or to the allowance for permanent disablement provided under the laws of the society.

"Evidence has been led before the Lord Ordinary as to whether the pursuer is or is not permanently disabled from working at his trade by reason of the injuries which he sustained in March 1866. The evidence led by the pursuer and defenders is conflicting, but the Lord Ordinary has no hesitation in saying that the preponderance of evidence is in favour of the pursuer. The Lord Ordinary prefers the evidence of Dr. Handyside and Dr. Bell to that of Dr. Dunsmure and Mr. Annandale, not only as more satisfactory in itself, but as more in accordance with what the Lord Ordinary holds to be the real evidence in the case. The evidence might have been better on either side, both parties apparently declining or omitting to call the medical gentleman who at the time of the accident and subsequently attended the pursuer. But as the evidence stands, the Lord Ordinary, acting as a jury, holds it to be sufficient. He cannot altogether lay out of sight the successive certificates which the pursuer obtained, and from time to time submitted to the defenders and to the London council; and though the verity of these certificates has not been proved by calling the gentlemen who [524] granted them, the fact that they were submitted, and never questioned or objected to, is a material fact in the case. If, therefore, the claim were a mere claim resting upon the evidence in process, the Lord Ordinary would hold it to be sufficiently proved.

"But the present judgment is supported on other and different grounds.

"The branch society of Kirkcaldy has never decided against the pursuer, or refused to admit his claim. On the contrary, it appears that the branch society of Kirkcaldy was unanimously in favour of giving the pursuer the £100 due under the 23d rule. The branch authorised a committee of their number to negotiate with the pursuer, that if he would give up all claim on the society he would receive the £100, and this was reduced to writing by Mackie, is No. 24 of process, and was duly reported to the society. This settlement or compromise was really a most wise and beneficial arrangement for the defenders; for if the pursuer, instead of the £100, were to get either continued sick money or superannuation allowance, it would soon come to a far larger sum.

"The obstacle against payment did not come from the Kirkcaldy branch at all, who seem to have been quite satisfied with the evidence of the pursuer's permanent disablement, and who had employed and paid their own doctor, who had certified to this effect. The objection seems to have come from the local council in London, who, for some untold reason, which could not even be explained at the bar, seemed to have been not satisfied with the certificates transmitted. So far from the Kirkcaldy society

appeal was to the general council, and from them to the delegate council. An appeal had been taken to the general council. The [525] Kirkcaldy branch had no power to grant the pursuer's demand, and were not, therefore, the proper defenders. The evidence of disablement was insufficient.

The pursuer argued;—The branch society was in possession of the powers from which the pursuer's claim fell to be satisfied. They had agreed to the pursuer's claim. The local council had no right to interfere when the branch from whose funds the claim fell to be paid was satisfied.

At advising,—

LORD COWAN.—To estimate at its just weight the objection so ably stated in the argument of the counsel for the defenders to the interlocutor of the Lord Ordinary it

---

opposing the pursuer, they even appealed in his favour to the executive council—an appeal which, though taken more than two years ago, has not yet been disposed of, and it is difficult to say when it will be.

"But the Lord Ordinary is of opinion that the London council or the 'local council' had no right to object to the Kirkcaldy branch paying a claim which the Kirkcaldy branch were satisfied was justly due, and regarding which they had made a special contract with the pursuer himself. Each branch is to manage its own business, and pay its own claims, and is to all intents and purposes a separate society, and although in certain cases the funds of one branch, when superfluous, may be made to contribute to the deficient funds of other branches, the Lord Ordinary has found nothing in the laws entitling the executive or general council, much less the mere local council of London, to interdict a branch from paying sick money, or superannuation, or any other benefits to its own members, when the branch is satisfied that such benefits are really and honestly due.

"The local council no doubt has reprimanded the Kirkcaldy branch for entering into the agreement with the pursuer about the £100. Nay, it even finds fault with the branch for paying 6s. to its own surgeon for examining and giving a certificate regarding the pursuer, which was quite satisfactory. It is thought the local council had no right to interfere thus, for that is not allowing each branch to conduct its own business and make its own payments, but is arrogating to a mere London committee, chosen by London branches, and in whose appointment the Kirkcaldy branch has not the slightest say, power over funds with which they have no concern, or at least no concern except for a special purpose of equalisation.

"The defenders maintained that the local council or committee was made final on appeal. This is not so. It is the executive council which is final on appeal. But there was no appeal at all to the executive council either by the pursuer or by the Kirkcaldy branch, who were quite agreed. It is impossible to read the provision that satisfactory certificates shall be transmitted to the executive council as an appeal in any sense, or as entitling the executive council or the local council, which is a different body, arbitrarily to say that the certificates are not satisfactory. In the present case, the certificates were quite satis-[525]-factory in themselves; but it is sufficient to say that they were quite satisfactory to the persons who were to disburse the funds.

"The effect of depositing the laws of the amalgamated society with the English registrar was much commented on. It is doubtful whether deposition in England would have any effect as regards a Scotch branch, which is, for purposes of contribution and of distribution and payment, and even for all purposes, a separate society. But apart from this, the finality clauses in the Friendly Society Acts are quite inapplicable to the present case, where there is no competent decision of any kind to which these clauses can apply.

"It was admitted that under the laws the pursuer cannot have both sick-money and the £100 benefit 'for the same complaint' or injury, and as the pursuer admitted that he had received £59, 5s., the Lord Ordinary has deducted this from the sum sued for, but he has given interest on the balance from the date when the sick allowance ceased.

"As the pursuer has been throughout successful, he is entitled to expenses. The defenders ought to have settled in terms of the written bargain made by their authority by Mr. Mackie. Indeed, they would have done so but for the action of the local council. In the Lord Ordinary's view, this litigation has been wholly caused by the improper conduct of that council."

is necessary to attend to the precise nature of the pursuer's claim, and the circumstances in which it has been advanced.

The pursuer in 1847 became a member of the friendly society referred to in the record, established at Kirkcaldy, and which afterwards became a branch of the Amalgamated Society of Engineers, Machinists, Millwrights, and others, carrying on its operations by means of branches formed in all parts of England, Scotland, and Ireland, and also in Australia, Canada, United States, and other foreign parts. This society is conducted according to rules, to which all the members of the several branch societies are bound to conform, and a printed copy of which is in process. The preamble to the rules sets forth, that for the benefit of its members the society shall be divided into branches, and that "every branch of the society shall appoint its own officers, and conduct its own business in the manner set forth in the following rules." Various regulations are stated as to the election of office-bearers of the branches, and their several duties, and their remuneration, to which it is not necessary to refer. Then follow rules as to the scale of entrance-money and the contributions or payments to be made by the members, and by rule 15, sec. 8, it is provided—"The contributions paid by members shall be held for and devoted to the payment of the benefits held out by these rules, and such other objects as the rules contemplate." These benefits are specified in subsequent rules, most of which are what may be called ordinary benefits, and others extraordinary. Rule 17 provides for allowance to members out of work, subject to the provision therein made. Rule 19 provides for cases of sickness or lameness, in which cases notice is prescribed to be given to the secretary of the branch, according to the form placed at the end of the rules, and the secretary is then to order the stewards to visit the sick member, who is declared entitled to 10s. per week for twenty-six weeks, and 5s. per week so long as he continues ill. And rules 20 and 21 have regard to the same matter. All these are, by the express terms of the several rules, committed [526] to the management of the branch society to which the sick member or members may belong; and passing over, in the meantime, rule 23, which I am inclined to regard as providing an extraordinary benefit, there follow certain regulations as to superannuation, which also appear to be left to the consideration and decision of the several branch societies. And so likewise as to the funeral allowances and others provided for in rule 25. I see no reason to doubt that, as regards any of those matters, any member entitled to the benefits of the society in one or other of these respects, may insist on having his rights recognised, examined, and satisfied by the branch society to which he specially belongs, and into whose funds his contributions have been paid. And had the present action related to any such claims, I would have had little hesitation in adopting the views of the Lord Ordinary, as explained in the note to his interlocutor. But it is all-material, as regards the disposal of the present action, that the claim advanced in the summons and record has exclusive reference to the pursuer's alleged right to the benefit secured by rule 23, to members permanently disabled by accident or other special cause.

The 23d rule, sec. 1, on which this action is thus laid, provides that any free member not in arrear of his contributions, who may, through the causes therein specified, "be rendered permanently unable to follow any of the branches of trade mentioned in the preamble of these rules, provided such was not the result of intemperance or other improper conduct, shall receive the sum of £100 on the production to the executive council of satisfactory medical and other testimony of such permanent disablement," subject to the proviso, in regard to the rule as to the superannuation benefit, that such member, not having been in the society eighteen years or attained the age of fifty at the time of such disablement, "must accept this benefit in preference to any other." This is the rule on which the present claim is exclusively laid, and to establish it it is indispensable that the condition attached to the right of the pursuer to receive the sum be fulfilled—that is, the production to the executive council of satisfactory medical and other testimony of the alleged permanent disablement. It is not the branch society or its members to whom this production of evidence is to be made, and who are to be satisfied. It is to the executive council that the evidence is to be submitted, and who are to be satisfied. Unless this condition be implemented there is no ground on which the claim for the £100 can be judicially recognised.

The non-recognition of the conditional character of the benefit conferred on members by this 23d rule appears to me to be the fallacy on which the reasoning of the pursuer,

in support of the Lord Ordinary's interlocutor, proceeds. It is nothing to the purpose to say that the branch society and its office-bearers were satisfied with the evidence. That is not the condition of the right conferred. The "executive council" alone is the body to whom the duty and power of considering and deciding upon the evidence is exclusively committed. Nor can the party claiming this benefit justly complain of this provision. For, in the first place, it is prescribed by the very rule on which alone his claim rests; in the second place, he is not left destitute by its refusal, as he has the other benefits of the society, on which he may rely; and in the third place, when the constitution of the "executive council" is examined, it is not so unwieldy and inaccessible a body or court in its actings as may at first sight appear. The executive council is provided for by rule 9. It is to consist of thirty-seven members, to be appointed by the branches specified, and of whom there are local members and provincial members. Section 4 of the rules declares that the "local council should consist of the eleven members appointed by the branches of the London district," and that "six members of the council shall form a quorum, and shall transact the ordinary business of the society; but in all cases of emergency they shall convene a meeting of the general council." And by section 7 it is provided that the council shall decide in cases of appeal, "such decision to be final, except in the case of a branch, which, being dissatisfied with a decision of the local council, shall appeal to the general council," and so forth. It cannot be said that these provisions of this 9th rule are free of ambiguity; but it appears sufficiently clear that the ordinary business of the [527] "executive council" is to be transacted by the "local council," subject to the supervision of the general executive council. And as regards such claims as the present, while it is provided that the "executive council" must be satisfied with the evidence of permanent disablement, it is, I think, to be inferred, having regard especially to the evidence of the general secretary, Mr. Danter, that it is the "local council" by whom that matter, in the first instance at least, shall be judged of. How a claim of the kind here made is to be brought under the notice of the executive council, or its acting committee, the local council, is not defined. The claim, however, was fully brought under their cognisance by the branch society, of which the pursuer was a free member, and was disposed of by them.

The procedure followed by the pursuer, on the occurrence of the accident by which he was disabled, was first of all to get himself placed on the sick-list, whereby he became entitled to the regulated weekly allowance. This was duly paid him from the time of his disablement in 1866 until the institution of this action in April 1870—the amount he has thus drawn being £59, 5s. Thereafter, apparently on the suggestion of the defenders themselves, who thought their funds might thereby be ultimately benefited, the pursuer advanced this claim for the £100, under the 23d rule. The branch were satisfied with the evidence of permanent disablement, and put themselves in communication with the general secretary of the executive council, with the view of the claim being considered by them. A good deal of communication ensued between the branch and the general secretary on the subject; and ultimately the local council intimated that the testimony produced to them was not satisfactory, and on that account no sanction was given for payment of the pursuer's claim. It appears that against this resolution, as suggested by the general secretary, an appeal has been entered to the executive council itself by the Kirkcaldy branch. Whether this can be recognised as a legitimate proceeding may be doubtful, but it appears to have been adopted with the sanction of the pursuer, and at all events it was taken for his behoof, so that in terms of the 23d rule he might have the benefit of a judgment by the general executive council, should they see fit to adopt a different view of the matter from that taken by the local council. That appeal has not been disposed of, but I do not see any trace of objection having been taken to its competency. In any view, however, it is certain that the condition, on fulfilment of which alone a claim under the 23d rule can be maintained, remains unsatisfied. And yet this action has been brought into Court as if the condition had been purified, and the amount was due and exigible.

This being the true state of the case, it appears to me impossible to hold that this Court can enter on the investigation whether the evidence, medical and other testimony, ought to have satisfied the executive council, or whether there was disablement caused by the accident which entitled the pursuer to this allowance of £100. A different tribunal has been declared to be the judges of that evidence, and to be, under the rules,

alone competent. Hence, I think the proof that has been gone into is so far objectionable and inadmissible; and I do not consider that the Court are called on or entitled to judge of its effect.

The defenders urged that there was no room for an action in any circumstances against them for payment of this sum, and no jurisdiction in this Court at all to entertain such an action. I am not prepared to acquiesce in the views that were so strongly pressed as to these matters. Had the executive council, through their local council, held the medical and other testimony satisfactory, I am far from thinking that, in the event of payment not being made to him, the pursuer could not have insisted in proceedings against the branch society, seeing that it was out of the funds under their charge and in their hands that payment fell to be made. In such a situation it became one of the recognised benefits to satisfy which these funds were declared to be held by the branch society. The actual state of matters, however, does not require that the question thus raised should be decided. It is enough for the disposal of this action that the claim put forward by the pursuer is not supported as it required to be under rule 23, and has been in any view prematurely insisted in by judicial procedure directed against the defenders.

[528] In conclusion, I may observe that the result of these proceedings may possibly prove more prejudicial to the defenders than to the pursuer, seeing that his right to the sick allowance, which has been stopped because of the institution of this action, may very possibly be held to revive. This, indeed, was stated in course of the argument to be the result of his present claim being disallowed, so that, as contended, he will not be left destitute, pending the discussion of the claim by the general executive council. But with this contingent claim the Court, under this record, are not called on to interfere judicially.

On the whole, I am of opinion that the interlocutor of the Lord Ordinary should be recalled, and this action dismissed.

LORD BENHOLME.—When this case was opened I certainly conceived a very different view of the effect of these elaborate rules from that which I have ultimately come to entertain, in consequence of the very forcible, and I think, convincing speech by Mr. Fraser. These rules are by no means clear in themselves, and especially, I think, they are very vague in the statement which they make with regard to the executive council. Their definition of that council is in rule 9, where it is said, "There shall be an executive council which shall consist of thirty-seven members appointed by the following branches." Then there are local members, and then there are provincial members, amounting in all to thirty-seven. "Candidates for the executive council shall have been five years in the society"; and various other regulations are made about that council. Now, I do not find in any part of these rules a statement that any other body is the executive council; and on that matter we are left to interpretation,—an interpretation which is equally forced upon us by the rest of the rules. We are forced to adopt the explanation given by a gentleman who has long been secretary, and has a knowledge of the working of the society, Mr. Danter. We are forced to adopt his explanation in interpretation of what the executive council is. He no longer gives us to understand that the executive council consists of the thirty-seven members, because his view is that the local council is the executive council, although it never is called the executive council, and consists of only eleven members. When Mr. Danter is examined upon that matter he is very naturally asked by the Lord Ordinary, "Is the general council the same as the executive council?" That certainly does not appear from the rules, because there is a definition of the executive council, and afterwards a definition of the local council too. But when the Lord Ordinary puts that question to him he says, "They are one and the same thing." Who could discern from the rules that the council of thirty-seven were the same thing as the council of eleven? The council of thirty-seven consists of members not only near London, but from all over the country. Who could discern that they are the same thing as the eleven members who are resident near London? Mr Danter says, "they are one and the same thing; only the general council is an extension of the local council." Where do we find that in the rules? You may say that the local council are a sort of contraction of the other, but it is absurd to say that the general council is an extension of the local council. It is nothing of the kind. The general council is composed of the provincial members and the local members mixed together. That is to say, that the executive council is composed of provincial members and also the members of the local council. "We merge

the local into the general then, and it is called the general executive council." The question then is put, "Then what is the executive? (*A.*) It is the governing body of the society. (*Q.*) Does it consist of something more than the local council? (*A.*) When the general council are not called together the local council is the executive, and the governing body." And Mr. Danter ultimately says, "The local council are the executive council." Now, it is in vain to say that these rules are drawn up in a lucid and intelligent manner. I confess my impression was that the executive council was the one body which is said to consist of thirty-seven members, but upon looking through the whole case I am constrained to admit that, in the working of this amalgamated society, Mr. Danter's explanation must be held as conclusive, and the only practical one. This local council, which is never said distinctly to be the executive council, appears to be inferred, from numberless [529] places in these rules, as having the place and functions of the executive council. What they have to take up as an executive council is in fact the general business of the society. They are to work the society, and not the general executive council. I shall not fatigue your Lordships by going through these rules, which thoroughly convince me that the local council must be the executive council in substance; and although certainly not stated, that this must be held to be meant, throughout these rules, where the executive council is mentioned; and consequently that our first impression, or at least my first impression, that the executive council must be that which it is stated to be in the commencement of these rules, and that the local council was not the executive council, is completely removed. Now, that leads to the necessary inference that in the 23d rule, upon which the claimant's demand is founded, the executive council there mentioned, to whom satisfactory medical and other testimony of such permanent disablement must be produced, is the local council. That is the necessary result of this evidence; and when one has arrived at that, there appears to me to be only one other question, and that is, what is meant by the production to the executive council of satisfactory medical and other testimony of such permanent disablement. Is it meant evidence that shall be satisfactory to that executive council, or is it that to that executive council evidence satisfactory in itself shall be produced? If the former is the interpretation I do not think we have anything to do with this case, because it is the satisfaction of that council which is the *sine qua non*. If, on the other hand, it were held that the executive council is not only the body to which such evidence is to be produced, but that evidence must be satisfactory when it is produced to them, then, if they do not accede to the claim, we must consider it as a case of neglect of duty on their part, and then I suppose upon that supposition this action has been raised. After considering this question with all the attention in my power I have come to be of opinion that what is meant here is that the evidence shall be satisfactory to that council, and that, without that satisfaction of that body of eleven members, there is no claim for the £100. My view as to this matter is very much strengthened by observing that in the next section of rule 23 there is an expression very much in favour of it: "Should any free member meeting with an accident, or being afflicted with any of the afore-mentioned diseases, have so far recovered that he considers himself fit to work at any of the branches of trade mentioned in the preamble, and resume work for some time, but through the effect of the said affliction is compelled to leave his employment, and evidence be given satisfactory to the executive council of his unfitness for work at the time, and apparently during his lifetime, the member shall not be deprived of the benefit of this rule." Now, here it appears to me, that a very similar question is made to depend undoubtedly upon the satisfaction to the minds of this executive council of the condition in which the man is, and that very much strengthens my view that in the immediately preceding section it is evidence satisfactory to that local council which is the *sine qua non*. There is, I think, very great reason in this rule, because the members of that council are men who may be expected to be practically acquainted with the business in which the members of the society are employed, and to know very much more than other men what is the nature of the injuries that do occur in engineering work, and their practice and experience must every day be increased by dealing with these claims. Their experience will tell them whether the evidence sent up with regard to the accidents which have been sustained by the member is really good and sufficient evidence, or is merely intended to mystify, and to make out a case where there is none. I believe it is a most salutary rule that this matter should be left to a body of men who are of all men best fitted to say whether the evidence before

them is sufficient or not; and truly for us to attempt to reverse their judgment upon different evidence, upon evidence that never was before them, appears to me to be an exceedingly unsatisfactory thing, and a proceeding which would vitiate the main principle of rule 23 of the Amalgamated Society of Engineers. The question before us is one of very great importance to this society. I think it is of very great importance that they should vindicate their rights to keep clear of the interference of the courts of law with regard to a matter which [530] falls so naturally, and, as I think, most exclusively, to the determination of these professional men, members of the society. Therefore, I think the decision to which we shall arrive in this case is one of the utmost importance to this society. I have great doubts whether it was ever intended that from a decision of this local council upon a claim by a member there should be any such appeal to the general executive council. I have very grave doubts of that indeed, and accordingly we find that a member himself has no right to enter such an appeal; but strangely enough an appeal has been taken by the branch society against its own office-bearers. That is acting in a strange kind of way. They are in a false position, and I look upon it that this appeal is, to say the least of it, exceedingly doubtful in its competency. My own idea would be that the decision of the local council upon this man's claim is conclusive in itself. I do not mean to say that it might not be supplemented by certificates, or more ample certificates or other evidence, such as the evidence of practical workmen who can know what is necessary for the turner's hand, especially his right hand, and who are much better able than we can be to say whether this man or that man is disabled from working as a turner. But at present the local council are not satisfied, and I think we should not interfere with their decision. It is a question of very considerable importance to the society, and I am by no means sorry that it has received such ample consideration here. I cannot help thinking that these very forcible views which were submitted by Mr. Fraser, and to which there was no answer, probably because there was none that could be given, have cleared up the functions, and ascertained the duties of the different bodies constituting the society, in such a way as to be very beneficial to themselves. They will perhaps be able now more distinctly to understand what their functions are, and to act in consistence with what Mr. Danter declares to be their general function, although it contradicts the rule of the society itself. I am of your Lordship's opinion that we should dismiss this action.

LORD NEAVES.—This is a case of considerable importance, presenting rather remarkable features, and I am not surprised that the Lord Ordinary should have formed the impression which he has stated in his note, or that he arrived at the conclusions which he did. My own opinion upon the case has fluctuated a good deal. When I first considered it, I was inclined to think that the Lord Ordinary had gone too far, but I began to be more impressed with the view which he had taken, and ultimately I have come to be clearly of opinion that the judgment which your Lordships pronounce is the right one. We must look at the facts of the case with great accuracy and precision. It appears that the pursuer was originally a member of a friendly society which existed in Kirkcaldy several years before the amalgamated society was established. He became a member of that society in 1847, and that society, it is said, was afterwards merged in the amalgamated society, of which it became a branch. This action is not raised upon any claim or right which the pursuer is said to have under the constitution of the original friendly society, nor is there anything to show that any claims or allowances which he would now be entitled to from that original society have been preserved to him in the amalgamated society. This action is raised and based exclusively upon the rules of the existing amalgamated society, and by these rules his case must stand or fall. Now, the rule which he founds upon, and the only rule, is that which is quoted in the fourth article of his condescendence. "By one of the rules of the said society it is provided that any free member not in arrears, who may be rendered premanently unable to follow any of the branches of trade mentioned in the preamble to the rules, shall receive the sum of £100, on the production to the executive council of satisfactory medical and other testimony of such permanent disablement." That is obviously a conditional right. He is only to receive the £100 on the production to the executive council of the kind of evidence there stated. It is not perhaps very logically set forth in his record that he complied with that condition. Certainly it is not set forth in terms; but in the 8th article he says that he has endeavoured from time to time since 1866 to obtain payment of the sum to which he is entitled from the society, and that he has

several times [531] called upon the branch, and so on. He has also, he says, made several communications to the office in London and to the secretary of the amalgamated society, who has been furnished with medical evidence that the pursuer has been permanently disabled from work. The pursuer does not say that he has furnished to the executive council satisfactory medical and other testimony. He does not say so much as that in words, so as to make a true logical connection; but he says that the secretary of the society has been furnished with medical evidence that he (the pursuer) has been permanently disabled from working at his trade. That certainly is not logical in form, but it might be supported perhaps by proof of what he did send to the society. However, when we come to look at the facts, I do not well see what evidence actually was furnished. There was a certificate from Dr. Gillespie referred to, which I cannot find, and which I think has not been printed, but in which he does not seem to have said anything about permanent disability. That certificate, however, does not seem to have been sent to London at all. What was sent was apparently a certificate not obtained by the pursuer, but obtained by the local branch at a cost of 5s. from a very excellent medical man in Kirkcaldy, Dr. Dewar, who supported so far the pursuer's claim, and there were also sent some other certificates of later date in 1869 from other medical men. Now, if the condition was to be complied with, I hold that it was meant that that evidence should be furnished to the executive council; and the only executive council which we see acting in the matter is the London council, which, as Lord Benholme has said, is the true acting organ of the executive council. These certificates have been furnished to them, and it is quite plain that the London council have not held them to be satisfactory. At one time I was inclined to consider it a serious matter whether that was an irrevocable and irresponsible deliverance, or whether the branch, in their wish to get the money paid to the pursuer, might not have been allowed to supplement the medical testimony by bringing forward testimony of another kind. But when I look at what the branch applied for more carefully, it appears to me that they do not go upon the fact that the man was permanently disabled, but upon the idea that it would be convenient to get rid of him, whether his claim was well or ill founded, and to pay him off altogether by allowing him to get the £100, thereby saving themselves all superannuation allowances and allowances from the sick fund. I do not wonder at the local council in London being jealous of that kind of testimony, nor do I wonder either that they should have required some other testimony than mere medical testimony, because it is plain that a doctor is not the only possible witness upon a subject of that kind. He might or he might not be well acquainted with practical turning, and with the uses of the organs which are required for that work, and therefore, if this judgment of the local council is a *bona fide* one, I cannot help thinking that they were entitled to pronounce it, and to say that the evidence, as placed before them, was unsatisfactory. In this opinion, I do not wish to say that I have made up my mind as to whether in certain cases the committee in London could stand upon their declaration that they were not satisfied with certain certificates, and that if we saw it to be necessary we might not have the power of deciding that the evidence ought to have been held satisfactory. I do not know that any society ought to be allowed to usurp such an irresponsible position as that. Supposing the certificate had borne that this man had lost his hand altogether, or had lost both his hands, and that the London council had declared that they were not satisfied that he might not have learned the art of iron turning with his toes,—I confess that if anything so absurd as that were brought before us I should be inclined to try to get behind it if I possibly could. But nothing of that extreme and irrational or dishonest kind arises here, so far as I can discover. On the contrary, I see no hesitation in the council to consider this man's case with care and with fairness, and I cannot help thinking that the council have arrived at an honest doubt as to whether he is not "shamming Abraham." I do not say that exactly, but that he has been exaggerating, or allowing to be exaggerated, a partial disablement, so as to get the benefit of this money. I think the dealings of the branch with this man were calculated to make the [532] board in London exceedingly jealous of such a claim. That being the case, I cannot see how the pursuer has established his case. He must come under the 23d rule, and show that he has complied with it. He must show, at least, that he has furnished evidence, or produced medical and other testimony to the effect in question, such as we would think conclusive, and which the other party were not entitled to regard as unsatisfactory. In that respect he does not

appear to me to have made out his case. I agree very much with what Lord Benholme has said about the London council. It seems to be just the acting council on the spot in place of the executive council, although the decisions are subject to a right of appeal. That right of appeal is not given to private members, and one cannot wonder that a little surprise was created in the Lord Ordinary's mind, as it has unquestionably been here, that the branch who are now resisting this man's claim are appealing in its favour to the executive council, to be held nobody knows when, which is like an appeal from some of the Catholic Churches to the next Œcumenical Council, which may be held, but which never is duly called. I agree that if the pursuer had shown that he had complied with the rule, and had got the warrant of the executive council or of the London council, his action would not have been ineffectual as directed against the defenders, because what is wanted on their part is not a *persona standi*, for they are the parties having the funds, but what is wanted is the warrant which obliges and entitles them to pay to him the amount of his claim—in short, the warrant that vests in this man a completed and enforcible right under these rules to the demand which he has now made. As he has failed in that, he must fail in his action.

The LORD JUSTICE-CLERK was absent.

The defenders asked expenses.

LORD BENHOLME.—In this case various considerations tend to induce me to find no expenses due to the defenders. The position which the branch society has occupied here is a very anomalous one. They were of opinion that this man's claim was right. That was their own view, and although they are repenting now, and taking an appeal from the society's ruling, I do not think that alters their position. Certainly the rules of this society are not so clear as they might be, and if we do now pronounce a decision which, so far as the Scottish Courts go, will regulate their interpretation in time to come, I think it is a benefit to the society, obtained no doubt in some degree at the expense both of the branch and of the individual members. I am of opinion that the case is one in which we ought to find no expenses due.

LORD NEAVES.—I am of the same opinion. There is a good deal in what your Lordship has said about the interpretation of these rules, but we can have no sympathy, I think, towards the branch, and the way in which they have blown hot and cold in the matter, and fomented this party's desire to have his action decided here. My impression, formed at several stages of the case, is, that the defenders were more anxious to be defeated than to succeed; and they thought it more for their interest that the pursuer should succeed than that he should fail. In these circumstances one cannot wonder at this man being led upon the ice, and therefore I think the Court are entitled, and indeed bound, to deny the defenders their expenses.

LORD COWAN.—The general rule is undoubted, that expenses follow success. But we have relaxed that rule frequently from the peculiarities of the cases with which we have had to deal, and as I quite concur with your Lordships as to the peculiarities of this case, and particularly with the views of Lord Neaves, I am clearly of opinion that no expenses should be given.

The following interlocutor was pronounced:—"Recall the interlocutor reclaimed against: Dismiss the action, and decern: Find no expenses due."

JOHN A. GILLESPIE, S.S.C.—JOHN GALLETLY, S.S.C.—Agents.

No. 100. X. MACPHERSON, 533. 5 Mar. 1872. 2d Div.—Lord Ormidale, R.

DAVID ADAMSON AND ROBERT ATKINSON, Petitioners.—*Scott*—*J. P. B. Robertson.*

EDINBURGH STREET TRAMWAYS COMPANY, Respondents.—*Shand*—*Mansfield.*

Statute 34 *&* 35 *Vict. c.* 89 (*Edinburgh Tramways Act*, 1871)—*Title to Sue*—*Local Authority*—*Arbitration.*—By the Edinburgh Tramways Act it is provided that where in any road in which a double line of rail is laid there shall be less width between the footpath and the nearest rail than 9 feet 6 inches the company shall construct a passing place. *Held* (1) that two private individuals were entitled to

complain of a breach of this obligation, and that the local authorities referred to in the Act were not the only parties entitled to do so; and (2) that the jurisdiction of the Court of Session was not excluded by the statutory clauses of reference.

This was a petition presented under the 91st section of the Court of Session Act, 1868, by David Adamson and Robert Atkinson, omnibus and cab proprietors in Edinburgh, against the Edinburgh Street Tramways Company, to have them ordained to construct a passing place or places connecting the one line of tramways with the other at a point in Leith Street, Edinburgh, where there was less than 9 feet 6 inches between the outside of the footpath and the nearest rail of the tramway.

By section 8 of the Edinburgh Tramways Act, 1871, it is provided that "Where in any road in which a double line of tramway is laid there shall be less width between the outside of the footpath on either side of the road and the nearest rail of the tramway than 9 feet 6 inches, the company shall, and they are hereby required to, construct a passing place or places connecting the one tramway with the other, and by means of such passing place or places the traffic shall, when necessary, be diverted from the one tramway to the other"; and by section 10, "any difference between the company and any road authority or surveyor, or other person, with reference to any of the matters foresaid, shall be determined in manner provided by the Tramways Act, 1870, with respect to differences between the promoters and any road authority." By section 33 of the General Tramways Act, 1870, it was provided, "If any difference arises between the promoters or lessees on the one hand, and any local authority or road authority, or any gas or water company, or any company, body, or person to whom any sewer, drain, tube-wires, or apparatus for telegraphic or other purposes may belong, or any other company on the other hand, with respect to any interference or control exercised or claimed to be exercised by them or him, or on their or his behalf, or by the promoters or lessees, by virtue of this Act, in relation to any tramway or work, or in relation to any work or proceeding of the local authority, road authority, body, company, or person, or with respect to the propriety of, or the mode of excavation of any work relating to any tramway, or with respect to the amount of any compensation to be made by or to the promoters or lessees, or on the question whether any work is such as ought reasonably to satisfy the local authority, road authority, body, company, or person concerned, or with respect to any other subject or thing regulated by or comprised in this Act, the matter in difference shall (unless otherwise specially provided by this Act) be settled by an engineer, or other fit person nominated as referee by the Board of Trade on the application of either party, and the expense of the reference shall be borne and paid as the referee directs." And by clause 13th of agreement between the Provost, Magistrates, and Town Council of the city of Edinburgh, and the Edinburgh Street Tramway Company, it was provided, "Wherever any matter or thing is, by the [534] Tramways Act, 1870, appointed to be decided by a referee, to be nominated by the Board of Trade, it shall be in the power of the first party to require that such matter or thing shall be decided by arbitration under the provisions of the Lands Clauses Acts, or of the Companies Clauses Acts, and, in that case, the expense of such arbitration shall be borne and paid as the arbiters or oversman shall decide."

The respondents admitted that at the point specified there was a less space than 9 feet 6 inches between the footpath and the rail, but they alleged that their tramways had been executed according to the plans sanctioned by Parliament, and two agreements, confirmed by their Act, entered into between them and the Provost, Magistrates, and Town Council of the city of Edinburgh, the local authority for the royal burgh, city, and county of Edinburgh, and the City of Edinburgh Road Trust, the local authority for the city of Edinburgh district of roads. They further alleged that the tramways had been certified by the inspector appointed by the Board of Trade in terms of the Act.

The respondents pleaded;—(1) The complainer have no title insist to in the persent application. (2) All parties interested have not been called. The complainers are not entitled to insist in the present application without making the said local authorities, viz., the Provost, Magistrates, and Town Council of the city, and the City of Edinburgh Road Trustees, parties thereto. (3) The application is excluded by the clause of reference contained in the said statutes and agreements, and above referred to, or one or other of them. (4) The works having been executed in strict conformity with

the parliamentary plans, and to the satisfaction of the local authorities under the said agreements and schedules, and also to the satisfaction of the engineer to the Board of Trade, the application ought to be refused, and the respondents assoilzied.

The Lord Ordinary (Ormidale) pronounced this interlocutor:—"The Lord Ordinary having heard counsel for the parties on the respondents' first three pleas in law, and having considered the argument and proceedings, repels said pleas, and, under a reservation in the meantime of all questions of expenses, appoints the case to be called in the motion-roll of Tuesday first, the 20th instant, that parties may be heard on the question, whether, before further procedure, the process ought or ought not to be intimated to the local authority and the road authority referred to in the Tramway Acts, that they may have an opportunity of compearing for their interest, if so advised." *

---

* "NOTE.—Both parties were satisfied that no investigation into facts was necessary previous to or with a view to the disposal of the respondents' pleas which have now been repelled.

"It is expressly admitted (*vide* article 6 of the petitioners' statement, with the answer thereto for the respondents), that there is for a short distance at the place in question less width between the outside of the footpath and the nearest rail of the tramway than 9 feet 6 inches, and it was also expressly admitted at the discussion before the Lord Ordinary that there was no passing place such as is required by section 8th of the Edinburgh Tramways Act at the place referred to, although it is by the Act, in very distinct and unambiguous terms, enacted that in such a case 'the company shall, and they are hereby required to, construct a passing place or places connecting the one tramway with the other, and by means of such passing place or places the traffic shall when necessary be diverted from the one tramway to the other."

"It is in this state of the matter that the present petition has been presented to the Court for an order on the respondents to construct a passing place or places in terms of section 8th of their Act. But the respondents have stated and maintained, as preliminary pleas or bars to further procedure,—1st, That [535] the petitioners have no title to sue: 2d, That all parties interested have not been called; and, 3d, That the application is excluded by the clauses of reference in the Tramway Acts and relative agreements. The Lord Ordinary, being of opinion that these pleas are ill founded, has repelled them.

"1st, In regard to the respondents' first plea, it cannot be doubted that as citizens of Edinburgh, and as proprietors of omnibuses and cabs having occasion daily to pass along the street at the place in question, the petitioners have a material interest to see that it has not been rendered unsafe, in consequence of the refusal or neglect of the respondents to comply with the statutory obligation incumbent on them in regard to passing places. And if so, it seems to follow that the petitioners must be held to be also *in titulo* to enforce that statutory obligation incumbent on the respondents in regard to passing places, unless it can be shown that the right and title of doing so have been exclusively vested in some other party. But the Lord Ordinary has been unable to find, in the statutes or elsewhere, any authority for holding that such is the case. There is certainly nothing to that effect in section 91 of the Court of Session Act, 1868, in virtue of which the present application has been made. According to that statutory provision power is simply conferred on this Court, 'upon application by summary petition, to order the specific performance of any statutory duty,' without any mention of the party or parties by whom such application requires to be made, that matter being apparently left to be governed by the general law and practice as previously established. This being so, and as there is nothing to the contrary in the Tramway Acts, the Lord Ordinary thinks there is ample authority to be found, in varying circumstances, in the cases of Guild and Others *v.* Scott and Ross, 21st December 1809, F. C.; Tait *v.* Earl of Lauderdale, 10th February 1827, 5 Sh. 330; Martain *v.* Easton and Others, 18th June 1830, 8 Sh. 952; Christie and his Trustee *v.* The Caledonian Railway Company, 18th December 1847, 10 D. 312; and Stewart and Others *v.* The Greenock Harbour Trustees, 8th June 1864, 2 Macph. 1155, for sustaining the title of the petitioners in the present application. It may be that the corporation of Edinburgh and others might also have been entitled to complain, but the Lord Ordinary was referred to no authority, statutory or otherwise, for holding that they alone had the right and title to do so, and that the petitioners had no such right and title.

[535] The respondents reclaimed.

They argued;—The petitioners had no title to insist in the petition; the local authorities alone had such a title. They were the parties appointed by Parliament to protect the interest of the public. At all events, the local authorities ought to have been called as respondents. The petition was excluded by the statutory clauses of reference.

[536] The petitioners argued;—Any member of the public had an interest to enforce the statutory obligations which lay on the respondents; in particular, the petitioners, who were large omnibus and cab proprietors, and were put to much inconvenience by the breach of the statutory obligation of which they complained. Because, under the statute, the local authorities could have interponed, that did not make them the only parties entitled to do so; and it was not necessary to call them as respondents. The complaint here made was not such a "difference" as was contemplated by the arbitration clauses. At all events, the jurisdiction of the Court was not excluded.

LORD JUSTICE-CLERK.—The plea of all parties not being called is out of place here. It amounts to no more than this, that other parties than the complainers had a title to prevent the Tramways Company from doing the acts complained of. Unless that can be pleaded to the effect of resisting the title of the complainers it is no answer to the action.

On the question of title I have no doubt. The complainers have a right to use the road in question, subject to the rights of the Tramways Company under the Act of Parliament. If that Act of Parliament has been violated it is the right of the party injured to complain against the party committing the injury; nor is it of any relevancy to allege that the public had under the statute the further protection of the powers given to certain public bodies to enforce the statutory provisions. If the company have not complied with the statute they cannot plead the benefit of it.

They plead, however, that we cannot take cognisance of the alleged breach of the statute, in consequence of the provisions contained in the clause of arbitration. This, no doubt, is a more narrow question. It may be that under this clause the Board of Trade might, had they been applied to, have had power to adjudicate between the parties, and had the question related solely to the details according to which the statutory powers were to be carried out the plea would have had more weight. But here it is admitted that the statute has not been complied with, and although the Legislature might, by express words, have excluded our jurisdiction even in such a case, there is no such provision in the Act; and I cannot doubt that we are entitled to entertain the action.

LORD COWAN.—I am of the same opinion on the three points which have been argued. I consider the first two very clear, and entirely concur with your Lordship. On the third point I shall merely observe that it would require a very explicit clause in an Act of Parliament to induce us to give effect to the respondents' contention, that the clause of reference in the Act excludes the jurisdiction of this Court in a question with third parties whether the statute has or has not been obeyed by the defenders. It may be true that the Board of Trade is not excluded from taking cognisance of such

---

"2d, As it appears to the Lord Ordinary that the only parties whom it was necessary or essential to call as respondents to the application, viz., the Tramway Company, have been called, he has repelled the second plea in law for the respondents, to the effect that all parties interested have not been called. At the same time, it rather appears to the Lord Ordinary that before further procedure it would be well to have the process intimated to the corporation of Edinburgh and the Road Trust, who are referred to in the Tramway Acts as the local and road authorities, in order that they may compear for any interest they may think they have, if so advised. But as nothing was said as to this at the last debate, the Lord Ordinary has thought it right to give the parties an opportunity of speaking to the point, before deciding whether such intimation ought or ought not to be made. He does not anticipate that the petitioners can have any objection to the intimation referred to being made.

"3d, As the Lord Ordinary can find nothing in the Tramway Acts sufficient to exclude the present application, in respect of the reference clauses on which the respondents' third plea is founded, he has repelled that plea. It appears to him that the clauses referred to are applicable to other and different matters from that now in question."

a matter. That point does not arise, and I express no opinion on the matter; but I have a clear opinion that the jurisdiction of this Court is not excluded by the clause under consideration.

As to the objection that the Town Council and Road Trust have not been called, I think that the Tramways Company may put themselves in safety by giving these parties intimation that they shall not be entitled to object to the procedure taken in the cause as in their absence, and by notarial protest to that effect, in the event of their non-appearance.

LORD BENHOLME and LORD NEAVES concurred.

This interlocutor was pronounced:—"Having heard counsel on the reclaiming note for the respondents against Lord Ormidale's interlocutor of 16th February 1872, refuse said note, and adhere to the interlocutor complained of, with expenses from date of said interlocutor, and remit," &c.

D. F. BRIDGEFORD, S.S.C.—LINDSAY, PATERSON, & HALL, W.S.—Agents.

No. 101. X. MACPHERSON, 537. 7 March 1872. 1st Div.—Lord Ormidale, P.

JAMES HALDANE, C.A. (Speirs' Factor), Pursuer.—*Shand—Maitland.*
DR. DOUGLAS SPEIRS, Defender.—*Lord-Adv. Young—Scott.*

Proof—Loan—Bank Cheque.—In an action for repetition of an alleged loan, the pursuer produced in proof of the loan a bank cheque in favour of the defender, and indorsed by him. The defender admitted that he had received payment of the cheque, but with the qualification that the cheque had been received by him in payment of a debt. *Held* (*alt.* judgment of Lord Ormidale), by four to three of seven Judges (*diss.* Lords Deas, Ardmillan, and Kinloch), that the loan had not been instructed by the cheque, and that it was incompetent for the pursuer to prove by parole evidence the circumstances in which the cheque had been granted.

Question, Whether a bank is entitled to require the holder of a cheque payable to bearer, to indorse it.

The judicial factor on the estate of the deceased Rev. Alexander Speirs, minister of Kilsyth, brought this action against Dr. Douglas Speirs, brother of the deceased, for £750 and interest from 14th October 1870. The pursuer averred,—(Cond. 2) "Previous to the death of the said Reverend Alexander Speirs, the defender had acquired certain valuable superiorities of lands situated in Glasgow at a price of about £6725, and on or about the time of the purchase of these superiorities it was arranged between them that the said Reverend Alexander Speirs should advance in loan to the defender the sum of £750 to assist him in paying the price of the said superiorities; and accordingly, on or about this date (14th October 1870), the said Reverend Alexander Speirs, in terms of the said arrangement, signed a cheque on his bank-account, kept with the Royal Bank of Scotland at Glasgow, for the amount of the said loan of £750, and he delivered the said cheque to the defender, who indorsed the same to the said bank, and received from them the said sum, which was put to the debit of the said Reverend Alexander Speirs' account with them, and was appropriated by the defender for his own uses. The cheque, signed by the said Reverend Alexander Speirs, and delivered to the defender, is herewith produced. The explanation in answer is denied." (Ans. 2) "Admitted that the defender received from the late Reverend Alexander Speirs the cheque which has been produced, and cashed it with the Royal Bank of Scotland at Glasgow. *Quoad ultra* denied, and explained that the said cheque was handed to the defender and accepted by him in payment of a debt of a larger amount due to him by the said Reverend Alexander Speirs for moneys advanced to and for him, and for professional services rendered, and medicines furnished to him during the time he was minister of Kilsyth."

The cheque bearing the defender's indorsation was produced in proof of the alleged advance.

The defender pleaded;—The defender not having received in loan from the said

Alexander Speirs the said sum of £750, and not having been at the time of the death of the said Reverend Alexander Speirs, and not being now, justly addebted in and resting owing the said sum, he is not liable in payment thereof to the pursuer as judicial factor, and is entitled to be assoilzied, with expenses.

The Lord Ordinary pronounced this interlocutor:—"Before answer allows to the parties a proof of their respective averments, the pursuer to lead in the proof: Appoints the proof to take place before the Lord Ordinary, within the Parliament-House, Edinburgh, on Friday the 22d day of [538] December current, at half-past ten o'clock forenoon; and grants diligence to each of the parties for citing witnesses and havers."*

The defender reclaimed, and argued;—Loan of money beyond £100 Scots can be proved only by writ or oath; and mixed proof in such a question is incompetent.† The cheque founded on is not the defender's writ. Certain kinds of documents have been held sufficient to establish loan against the granter, unless they are shown to have been granted for some other purpose,—that is to say, they satisfy the rule of law, while the defender may produce evidence to show a different purpose in granting from that alleged. But a cheque indorsed by the payee does not raise any presumption of loan against him. If any inference or presumption can be deduced from such a document it is that the cheque was granted, as most cheques are, for the payment of a debt.‡

The pursuer argued;—The cheque produced is the defender's writ, proving the receipt of money by him. The onus lies on him of showing that it was received on some other footing than as a loan. The pursuer is entitled at least to a proof to instruct *quo animo* the money was paid. It is established by writing and by admission that money was paid, and it is competent to show *prout de jure* the quality and conditions of that payment.§ The English authorities do not apply, because in England a proof at large is always allowed.

[539] After the debate, the Lords appointed the case to be argued before the Judges of the First Division, with the assistance of three Judges of the Second Division.

At advising,—

---

* "NOTE.—Had there been clear and distinct evidence, independently of the defender's statement in the record, of the pursuer's alleged advance of money to the defender, the *onus probandi* might be wholly on the latter. But in the circumstances of this case, and as nothing can as yet be held as established on the part of the pursuer —not even the payment to, and receipt by, the defender of the money sued for through the medium of the bank cheque libelled—except by the defender's statement, and as that statement can only be taken subject to all its qualifications, a proof has been allowed, in terms of the prefixed interlocutor. The pursuer will thus have an opportunity of proving, independently altogether of the admission in the defender's statement, that the bank cheque referred to is indorsed by the defender, and that the contents were drawn and received by him. Whether the pursuer will require, or think it necessary to do more, in the first instance at least, so as to shift the onus over on the defender of proving his defence, will be for himself to judge.

"The course adopted by the Lord Ordinary, of allowing a proof before answer, appears to have been that which was followed in analogous circumstances in the recent case of Kyle's Executors *v.* Williamson, 28th January 1871, 15 vol. Journal of Jurisprudence, p. 155; and also in the older cases of Ross *v.* Fidler, 24th November 1809, F. C.; and Fraser *v.* Bruce, 25th November 1857, 20 D. p. 115."

† Stair, iv. 43, 4; i. 8, 2; Ersk. iv. 2, 20; cases in Dickson on Evidence, vol. i. sec. 592; Sidey *v.* Sim, March 15, 1866, *ante*, vol. iv. 578; Stewart *v.* Syme, Dec. 12, 1815, F. C.; Ross *v.* Crawford, July 9, 1847, 19 Jur. 639; Gibb *v.* Craig, Dec. , 1835, 8 Jur. 421.

‡ Macdonald *v.* Union Bank, March 29, 1864, *ante*, vol. ii. 977; Gow's Executors *v.* Sim, March 15, 1866, *ante*, vol. iv. 578 (and Session Papers); Byles on Bills, 435; Taylor on Evid. p. 182; Ramchurn Mullick *v.* Suchmeechund Radakissen, 9 More P. C. 69.

§ Ross *v.* Fidler, Nov. 24, 1809, F. C.; Martin *v.* Crawford, June 4, 1850, 12 D. 960; Fraser *v.* Bruce, Nov. 25, 1857, 20 D. 115; Thomson *v.* Geekie, March 6, 1861, 23 D. 693; Kennedy *v.* Rose, July 8, 1863, *ante*, vol. i. 1042; Brodie *v.* Muirhead, Feb. 1, 1870, *ante*, vol. viii. 461; Kyle's Executors *v.* Williamson, Jan. 28, 1871, 15 Journ. of Jur. 155; Nicolson's Erskine, p. 1114.; Allan *v.* Murray, 15 S. 1130.

LORD PRESIDENT.—This is an action at the instance of the judicial factor on the estate of the late Rev. Alexander Speirs. The defender is a brother of the deceased, and the object of the action is to recover a sum of £750, alleged to have been advanced by the deceased to his brother in loan, for the purpose of assisting him in paying the price of certain superiorities. The defender admits that he got the money, but explains that the cheque by which it was paid was handed to him in repayment of a debt of larger amount due to him by his brother for money advanced and professional services.

The record having been closed on these statements and defences, the Lord Ordinary pronounced the interlocutor now under review, by which he, "before answer, allows the parties a proof of their averments, the pursuer to lead in the proof." It appears to me that this being an action to recover repayment of a loan, and being met by the defence that the money was not given in loan, but for the extinction of a previous debt, the Lord Ordinary's interlocutor is in direct violation of one of the best-established rules in the law of Scotland, and laid down by all our institutional writers, viz. that a loan of money can be proved only by the writ or oath of the alleged borrower. This is to my mind so clear that I should not think it necessary to enlarge upon the point had it not been for my knowledge of the difference of opinion that exists among your Lordships. That must be my apology for propounding principles and citing authorities which may give my opinion somewhat of an elementary character.

The rule I have quoted, as laid down by the institutional writers, is a strict rule, and to be strictly and literally enforced. I shall illustrate this by reference to two or three of the best known and most instructive cases on the point. I cite first Stewart *v.* Syme, 12th Dec. 1815, F. C. In that case an action was raised against the children of the deceased Alexander Syme, and their facter *loco tutoris*, for repayment of £130, contained in a bill alleged to have been for the accommodation of Syme, and, in order to show that the proceeds had been applied for Syme's behoof, the pursuer founded on a missive letter. Lord Pitmilly, Ordinary, found "that the written document, dated 6th April 1813, bearing to be an acknowledgment of debt to the amount of £130 by the late Alexander Syme to the pursuer, and which both the defender and pursuer state to have been written by the defender James Fraser, is destitute of the legal solemnities, and not actionable; and finds that the attempt to connect this informal document with the bill produced, which is drawn by a person of the name of John Fraser on the pursuer, and on which the name of the late Alexander Syme does not appear, by the parole testimony of the persons said to have been present when these transactions were completed, is irrelevant and inadmissible; therefore assoilzies the defender from the conclusions of the libel." The Court adhered. That appears to me a very plain and instructive application of the general rule.

The next case is that of Hamilton *v.* Richmond, decided in the House of Lords 8th March 1825, of which the best report is in 1 Wilson and Shaw, 35. In that case a proof had been allowed in the Sheriff-court, although the action was both in substance and in form an action for repayment of a loan. The defender advocated, and the Court, in respect the libel, concludes "for payment of a sum of money, alleged to have been given in loan to the defender, which was not capable of being proved by witnesses," assoilzied the defender, without prejudice to the pursuer insisting in any other action which he might be advised to raise. A new action was raised, and the defence was that the money was not given in loan, but to retire a bill for a special purpose in which the pursuer was interested. The Lord Ordinary, "in respect of the judgment in the former action, and that the pursuer makes no reference to the oath of the defender," sustained the defences, and assoilzied the defender. The Court adhered, and [540] remitted to the Lord Ordinary to receive a reference to oath. There was a reference, and a judgment on it, by which the deposition was found not to instruct the loan, and the defender was assoilzied. After a variety of procedure, an appeal was taken to the House of Lords, where the whole interlocutors were affirmed. This also is another excellent illustration of the application of the rule.

The next case is that of M'Master *v.* Brown, 28th January 1829, 7 S. 337. This was an action for money lent. Certain documents were produced in support of the allegation of loan, which were objected to as unstamped. The Lord Ordinary, thinking the case one of suspicion unfavourable to the defender, allowed a judicial examination of the defender, his wife, and his agent, and afterwards assoilzied the defender. The pursuer reclaimed, and the Second Division quashed the whole proceedings, considering the judicial examination altogether irregular—Lord Glenlee remarking, "It would be very

dangerous to allow proof of a loan otherwise than by writ or oath, and I always understood that there could not be a judicial examination on points which can only be proved by writ or oath."

Lastly, there is the very remarkable case of Birnie's Assignees *v.* Darroch, 12th January 1842, 4 D. 366. General Darroch had for a course of years, during a long active service, and afterwards in London, done his whole business with Greenwood, Cox, and Company, the well-known army agents. Birnie was their confidential clerk, and was in the habit of making pecuniary advances on his own account to some of their clients, who required accommodation beyond what was the rule of the house in regard to overdrawing accounts, and, amongst others, to General Darroch. These advances were sometimes made from Birnie's own pocket, and sometimes the money was raised on joint acceptances of General Darroch and Birnie. After a long course of such dealings, during which no settlement was made, Birnie died, and his assignees raised an action against General Darroch to recover a large balance of advances said to be due by him. Lord Jeffrey, Ordinary, before answer, remitted to an accountant to examine the accounts, and to report what appeared to him to be the true state of accounts between the parties. General Darroch objected to this order, and maintained that each entry against him must be proved by his writ or oath. The Lord Ordinary's reasoning, in refusing to give effect to the defender's objections, is very strong, and at first sight very plausible, being founded on the very peculiar circumstances of the case, which seem to make it exceptional. But the Court took a different view, and as the report bears—"The Court not coinciding with the general view taken by the Lord Ordinary on the whole matter, but holding that the rule of law must be strictly applied, and that every advance and payment must be specially instructed by the writ of the debtor, or other written evidence connecting therewith," pronounced a detailed interlocutor, in which they dealt with the different items separately. That seems to me as strong and strict an enforcement of the rule as could well be; and therefore I refrain from any further citation of authorities for the purpose of showing that the rule has been strictly and literally applied.

But it is contended in the present case that there is writ of the defender, or at least a writing, sufficient to overcome the rule of law, and to let in parole evidence for the purpose of eiking out the defective proof, and establishing a loan. Now, the document produced is a bank cheque, the bank cheque which, according to the admission of the defender, was given him by his brother for the purpose of drawing the money. The money was admittedly drawn from the bank, and the defender was asked to indorse the cheque according to the usual practice, which he did—*i.e.* he wrote his name on the back, which is indorsement in a popular, though not in any legal sense. I have considerable doubt whether a bank is entitled to require the holder of a cheque payable to bearer to put his name on the back as a condition of obtaining the money. The name is merely put there for the satisfaction of the bank, to show, if any question should arise, who it was that actually obtained payment of the cheque. Now, it appears to me that this bank cheque proves nothing but the passing of the [541] money from the deceased to the defender, about which there is no dispute. But the mere delivery of money will not prove loan, or any other contract. The purpose of the delivery is a different question, to be proved by different evidence, according to the allegation of parties. The notion that the bank cheque is a writ of the defender, in a question of loan, I have never been able to understand. I cannot see that it makes the least difference when the money passed whether it passed in the shape of a cheque, or of notes, or of gold. The fact is just the same in all—the passing of money from one hand to another. Does the fact of the passing of money from one hand to another create any presumption of the purpose for which it passes? I apprehend not. If payment by cheque were to import something more than payment by gold or bank notes, I suspect the practice of payment by cheques would be much curtailed, because it would be regarded as dangerous. When a man sends money to another in the shape of a cheque, is it to be therefore presumed that there was any kind of contract between the parties? A cheque is nothing more than a convenient way of passing money. Most cheques—I should say ninety out of every hundred—are drawn for the purpose of paying debts, and therefore, if any presumption at all is to arise from the drawing of a cheque, the reasonable presumption would be that it was drawn for the purpose of paying a debt. But I do not see that any presumption whatever necessarily arises from the drawing of a cheque, any more than from the delivery of money.

All this appears to me so plain that I think it not immaterial to inquire what the law and practice in England is on a point of such great practical importance; and there is no doubt about the view taken there regarding the office and meaning of a cheque. The rule is very well stated by Starkie (vol. ii. p. 79, 3d ed.):—"The mere circumstance of the defendant having received money from the plaintiff is *prima facie* evidence of the payment of an antecedent debt, and not of the loan of money. So the receipt of money by the defendant, on a cheque drawn by the plaintiff on his banker, *prima facie* imports a payment, and not a loan." If that is so, how is the production of this cheque to have any effect in limiting the rule of law? I cannot see it. If it create any presumption, it is not the presumption of loan, but of something inconsistent with loan. I think, therefore, and I go no further, that the case stands precisely as it would have done if the money had been paid in coin or notes, and admitted by the defender to have been so paid.

But it is necessary carefully to distinguish between such a document as this and documents held to constitute proof of loan,—I mean acknowledgment of receipt of money. Many such cases have occurred, in which the alleged loan was held as proved, where the acknowledgment was held as constituting the lender's document of debt. But I am not aware of any case where a document not in the hands of the lender was held to prove a loan. It is its being in the hands of the lender that gives point and meaning to the document. I refer to that class of documents known as I O U's, where the writer states in his own handwriting, and under his own signature, that he has received so much money, and gives that document to the lender to hold as his writ. That is held to constitute a loan. Such a document requires no evidence to support or explain it. The words are sufficient, and the Court construes it as not only a receipt of money, but an implied obligation to repay. If it were otherwise, and the money had been received in discharge of a debt, it would have been in a different form, and have borne to have been in payment of such debt, and would have required a stamp. In advances of money it is not uncommon to grant a bill or promissory-note, and that is a good document of debt, but it requires a stamp of a different kind. But simple acknowledgments, or I O U's, are very frequent between parties who do not wish to use a negotiable document, and prefer a more simple way of evidencing the loan; and the Court has very properly given effect to that class of documents. But they are not taken as part of the evidence, but as themselves proving the loan. No doubt you may require to set them up in this sense, that it may be necessary to prove the handwriting, or the fact of delivery; but beyond that parole evidence is utterly incompetent.

[542] But I think that the view which has been taken of cheques is not to be left out of account. It appears to me that if we were to give effect to the Lord Ordinary's interlocutor in the present case we should be going counter to the opinions of the whole Judges of the Second Division in the case of Gow's Executors *v.* Sim, 15th March 1866, *ante*, vol. iv. 578. I find that I myself and my two brethren Lords Cowan and Neaves, expressed views precisely in accordance with those which I have now stated, and Lord Benholme said nothing inconsistent with them. It is true that in that case it was not absolutely necessary to pronounce on whether the cheque was of any value in proving the loan, but it was very natural for the Court in the circumstances to indicate their opinion, as the Sheriff had expressed his opinion upon it in the Court below, and embodied it in a well-framed interloctuor. Another case in the Second Division, Rutherford's Executors *v.* Marshall's Executors, 12th July 1861, 23 D. 1276, is also very instructive on the general doctrine.

It only remains to notice certain cases which were cited to show that the rule of law was relaxed in certain cases like the present. The first is Ross *v.* Fidler, 24th November 1809, F. C., which is worthy of all the more attention as the decision was pronounced in the time of Lord President Blair. Certain documents were produced in that case for the purpose of instructing a loan—(1) A letter by the defender asking for money; (2) a cheque in answer, drawn by the pursuer, payable to the defender or bearer, and cashed by the defender; (3) another letter, holograph of the defender, to the cashier of the bank, asking him to send the money with the messenger. It appears to me that the judgment proceeded entirely on a construction of these writings. A proof was allowed—improperly, as I think—in the inferior Court. The reporter says that "the proof contained nothing material," and his remark is justified by the import of the proof as it appears in the Session Papers. All the witnesses, with the exception of one, deponed to the receipt of the money, which was not disputed. One witness

alone deponed to a statement by the defender of some debt due by him to the pursuer, not this particular debt. The Lord Ordinary (Armadale) pronounced this interlocutor:—"Finds it instructed by the letter of 23d of May 1807, and subsequent order by the pursuer on his cash account at Aberdeen, and other evidence in process, that the deceased Thomas Fidler received £30 from the pursuer, and that the defender has not instructed the same to have been in extinction of a debt due by the pursuer; therefore advocates the cause, and decerns against the defender for payment of the said sum." This interlocutor is cited to show that Lord Armadale proceeded on parole evidence, and the words, "other evidence in process," are founded on in support of this view. That seems a very rash conclusion. There was another letter produced by the pursuer, which is not specially mentioned in the interlocutor of the Lord Ordinary. The Court adhered, but said nothing about the other evidence. There are no detailed opinions given in the report, but it is perfectly obvious from the argument which is given that the whole contention in the case was on the construction of the writings. Not a word is said about parole evidence. To infer that the Court, with President Blair at its head, seriously intended, by this circuitous and ambiguous route, to discharge from the law of Scotland one of its best established rules, is very difficult to believe. If it was the intention of the Court in 1809 to do so, I apprehend that they would have embodied the result of their deliberations in a very distinct and well-considered judgment. I find it utterly impossible, therefore, to give to the decision in Ross *v.* Fidler any such meaning and effect as is contended for by the pursuer.

The case of Allan *v.* Murray, 13th June 1837, 15 S. 1130, was a case of a holograph acknowledgment in these terms:—"Received from Mr. David Herriot £186. (Signed) DAVID MURRAY,"—which was held *in dubio* to constitute a general obligation to repay. It appears to me that this was nothing more than one of the class of cases in which a writing in general terms, or an I O U, is held to import an obligation to repay. Lord Jeffrey was Lord Ordinary in the case, and there is a paragraph in his note which deserves particular attention. He afterwards decided Birnie's Trustees *v.* Darroch, and was disposed in that [543] case, on account of special circumstances, to relax the rule. But that he did not take the view of Ross *v.* Fidler which the pursuer contends for is demonstrated from his citing it as one of the cases which turned entirely upon the construction of written documents.

In Fraser *v.* Bruce, 25th November 1857, 20 D. 115, the signature of the defender in the pass-book of a savings bank was held to prove a loan. The circumstances were peculiar, and it was undoubtedly a narrow case. But it is easy to see that it was dealt with by the Court exactly in the same way as the two last-mentioned cases, viz., as turning upon the construction and effect of writing, and not of parole evidence. No proof was allowed, any more than in the case of Allan *v.* Murray. That which appeared on the face of the savings bank book, in the circumstance of the parties, was held sufficient to prove a loan. The interlocutor of Lord Benholme bears—"Finds that the pursuer has proved *scripto* the loan of £40 libelled." The real contention was in regard to the repayment of the loan, or a portion of it, and the difficulty of the case chiefly dealt with was the impossibility of proving the payment otherwise than by writing. The Court adhered, and the judgment, therefore, was a finding of proof *scripto*. That is certainly very different from what the Lord Ordinary has done in this case, which is not to find the writing sufficient to prove a loan, but to allow a proof *prout de jure*.

I am, therefore, of opinion that we should recall the interlocutor of the Lord Ordinary; find that the pursuer has failed to prove *scripto* the alleged loan; but allow him to refer it to the oath of the defender, if so advised.

LORD COWAN.—As I concur generally in the exposition of the principles and authorities, applicable to the question before us, given by your Lordship, and in the result at which you have arrived, I shall confine myself to a statement of the general views which have led me to the same result.

This action is for repayment of money alleged to have been lent by the deceased, on whose estate the pursuer is judicial factor, to the defender. It is not doubtful that by the law of Scotland the only admissible proof in such a case is writ or oath. The sole question thus is, whether there exist specialties in the circumstances of this case, as set forth in the record, to exclude the operation of the general rule.

There is an admission in the record to the effect that the money was received by the defender, but qualified by the statement that it was received in payment of a debt

of larger amount due to the defender, for moneys advanced to and for the party represented by the pursuer, and for professional services rendered, and medicines furnished to the deceased. This admission, being thus inherently qualified, can be of no avail to the pursuer. He must, notwithstanding, establish by competent and admissible evidence his claim for repayment, on the ground of the money having been lent by the deceased to the defender.

The attempt is to assimilate the present case to a class of cases, commencing with the decision in Ross *v.* Fidler, 24th November 1809, and the earlier decisions there referred to, and terminating with the decisions of more recent date, in which proof *prout de jure* or parole has been held competent and admissible. The principle which pervades all those cases is this—that where a document or writing, admitting the receipt of money, is given to the party advancing the amount by the party who receives it, it will be presumed that an obligation to repay is thereby constituted—unless the party who has received the money shall establish that it was paid to extinguish some counter obligation, or to satisfy some other demand which he had against the advancer. On a careful consideration of all the authorities that were referred to in the argument I am satisfied that this is the principle which pervades one and all of them. I will not enter on the examination of those decisions in support of the conclusion at which I have thus arrived. This has been satisfactorily done by your Lordship, and it would be a waste of time for me to offer further observations on the import and effect of those decisions. Some acknowledgment there must be on the part of the alleged debtor, to which the creditor can appeal, as the basis of his demand [544] for the repayment of money, and presumably a written constitution of his claim, so as to throw the onus of destroying that presumption on the receiver of the money. One observation I may make on the case of Fraser, that the signature in the bank pass-book was an acknowledgment directly to the owner of the pass-book; and this was held to bring the case within the operation of the principle.

Taking this view to be correct, the inquiry on which the result of the present argument depends is, whether any such writing exists as entitles the pursuer to maintain that his claim for repayment of lent money can be established otherwise than by writ or oath. The only writing founded on is a bank cheque given by the deceased to the defender, which, on receiving the money from the bank, was indorsed by the defender. This is alleged to be a writing, from which it may be presumed that the money was received, subject to an obligation to repay, and subjecting the defender to liability for the amount, unless it shall be proved that it was received in satisfaction of debt or prior obligation exigible by him from the pursuers' cedent. But it is a mistake to view the indorsation on a bank cheque in any other light than a discharge or voucher to the bank of the amount having been paid by them to the indorser. In this case the cheque bore to be payable to the bearer, and there was no necessity for an indorsation at all to enable the holder of the cheque to get the money. The indorsation was a voucher to the bank, but nothing more. It was not a writing given to the deceased, or to any one on his behalf, in acknowledgment of the money, which could be the basis of a demand for repayment, as in those cases to which reference was made, and in respect of which an obligation to pay is presumed. The case stands no otherwise than if the bank had given the amount to the defender, without requiring his indorsation. The defender has certainly got an advance of money from the deceased, which is maintained by him to have been given in loan, but no written document has been taken from the defender to support the allegation, either in express terms or by presumption, that it was given and received in loan. And there being thus no writing to support the pursuer's demand, he can have recourse only to the defender's oath. The case is not one which permits of parole proof. A loan of money cannot be established otherwise than by writ or oath of party; and it would, in my opinion, be of dangerous consequence were any other rule applied to such a case as the present. The transactions in which money is paid by means of bank cheques are innumerable. It seems to me impossible to infer from the mere indorsation of a bank cheque an obligation to repay against the receiver, unless he establishes that it was paid to him for an onerous consideration. A demand for payment may be made after both giver and receiver of the cheque are dead, and when it has become impossible for the representatives of the latter to show on what ground the money was paid. But it is unnecessary to enlarge on the legal character and effect of a bank cheque. I concur in what your Lordship has stated. The advancer of the money ought to have

taken a written acknowledgment of its having been given in loan, or, at all events, to have taken some writing in his own favour from which the obligation to repay might be presumed, if not redargued by evidence that it was received for an onerous consideration. There being no such writing in this case yet produced, the only course open to the pursuer is reference to the defender's oath,—unless other writing can be recovered under any commission and diligence which they may apply for and obtain from the Court. I shall only add that, in stating these views, I do no more than give renewed expression to the principles given effect to in the opinions delivered by the Judges of the Second Division of the Court in deciding the case of Gow's Executors *v.* Sim, 15th March 1866, from which I have found no sufficient ground in the recent argument to depart.

LORD DEAS.—The late Rev. Alexander Speirs, minister of the parish of Kilsyth, and the defender, Douglas Speirs, doctor of medicine in Glasgow, were brothers. On 14th October 1870 the deceased gave the defender a cheque on his account with the Royal Bank of Scotland in Glasgow for £750, payable to the defender or bearer. The defender presented the cheque at the bank, and [545] having signed his name on the back of it, according to usual practice, he received the money, and appropriated it to his own purposes. Thus far all is clear, and there is no dispute about it.

The Rev. Alexander Speirs died on 24th January 1871, unmarried and intestate, survived by the defender and three other brothers and a sister, whose interests are represented by the pursuer, who has been appointed judicial factor for the realisation of the deceased's estate, and who, in that character, has brought the present action for repayment of the £750, on the allegation that it was given as a loan to the defender to assist him in making up the price of certain valuable superiorities he had purchased for the much larger sum of £6725 or thereby.

The defender's whole defence to the action is stated in these words—"Admitted that the defender received from the late Rev. Alexander Speirs the cheque which has been produced, and cashed it with the Royal Bank of Scotland at Glasgow. *Quoad ultra* denied, and explained that the said cheque was handed to the defender and accepted by him in payment of a debt of a larger amount due to him by the said Rev. Alexander Speirs for moneys advanced to and for him, and for professional services rendered and medicines furnished to him during the time he was minister of Kilsyth."

The defender does not state what the amount of the alleged larger debt due to him by the deceased was. He does not say how much of it consisted of advances to the deceased himself,—how much of it was advanced for the deceased to others, or who those others were. He does not say when or under what circumstances he rendered professional services and furnished medicines to the deceased, nor what the charges for these services and medicines were. He produces no medical account, no vouchers for sums advanced either to or for behoof of the deceased; and he does not say whether such account and vouchers do or do not exist.

I am not at this moment considering whether the defender may or may not be entitled to exercise this reticence. I am merely observing that such is the way in which he states his defence, and I am not surprised that it does not encourage his brothers and sisters, or the factor who represents them, to trust their case implicitly to his candour and veracity. On the other hand, it must be observed for him that he does not, on the record, attempt to take shelter under the plea that the loan can only be proved by his writ or oath. His only plea in defence is this,—"The defender not having received in loan from the said Alexander Speirs the said sum of £750, and not being at the time of the death of the said Rev. Alexander Speirs, and not being now justly indebted in and resting owing the said sum, he is not liable in payment thereof to the pursuer as judicial factor, and is entitled to be assoilzied, with expenses."

His defence, therefore, when his plea in law is taken in connection with his statement already quoted, just comes to this,—that, in respect the money was received by him in payment of a larger debt made up in the way already mentioned, he is entitled to absolvitor. That is the ordinary mode of pleading in this Court when the result is to depend upon a general investigation by proof on both sides; and why the defender should have the honour thrust upon him by his advisers and the Court which he does not claim for himself in the record, of having the whole matter perilled on his oath of reference, I do not well see. I shall not, however, on this account evade considering the legal question which the plea now maintained at the bar would raise.

The Lord Ordinary's interlocutor under review is in these terms:—"Before answer allows to the parties a proof of their respective averments,—the pursuer to lead in the proof"; and his Lordship, in his note, makes some observations pertinent to the question of onus, which it is sufficient to refer to without quoting them.

I need hardly say that the words "before answer," used in this interlocutor, imply, by our practice, important reservations, leaving it open afterwards to deal with all questions of law as freely as they might have been dealt with before the proof was allowed. This practice has been found a most convenient one, and I should be sorry to see it circumscribed. Such a reservation does not imply that the Judge or commissioner who takes the proof may receive evidence which is not legal evidence at all—such, for instance, as hearsay evidence; but it does, I [546] think, imply, when such appears from the nature of the case, or the observations made on the bench, to have been the intention of the Court, that the question how far parole proof is or is not admissible, on particular points, is to be open for future consideration. I have no doubt that the Lord Ordinary so meant it in the present case; but, if this could be thought doubtful, it would be easy, while adhering *quoad ultra*, to introduce into the interlocutor such an understanding as was expressed from the bench in the recent case of Stuart, 16th January 1869, *ante*, vol. vii. 366. One advantage of such a course is this—facts and circumstances of real evidence may sometimes be admissible in a case in which direct oral testimony as to verbal acknowledgments, or as to what passed verbally between the parties, may not be admissible. Facts and circumstances of real evidence can always be competently proved by parole; and it is often not easy or safe to attempt to fix beforehand what portion of the parole testimony shall fall within the one category or the other.

In the present case, supposing the proof allowed by the Lord Ordinary had been led, it is quite possible that a distinction might have been taken by some Judges between the competency and effect of that part of it which went to establish facts and circumstances of real evidence and that part of it which related to verbal acknowledgments or conversations between the parties; and a question might thus have arisen, to what extent the evidence was to be considered of the one character or of the other,—a question which could be much more safely considered with the whole proof before us than it could possibly be by anticipation.

Your Lordships are, of course, familiar with the difference between the real evidence of facts and circumstances and direct oral testimony, and no instances are therefore necessary to illustrate that distinction. That no such real evidence can be adduced in this case is more than we are entitled to assume. It is neither necessary nor regular for parties to condescend upon their evidence in the record; and the proposed exclusion of all evidence, except two specified kinds, must proceed on the footing that every other kind of evidence (although it may exist) is incompetent.

Suppose that in the present case the pursuer were to prove to demonstration that the defender never had the means of making advances to or for his late brother—that, in point of fact, he never did so—that the defender never attended him professionally—never prescribed for or furnished him with any medicines—that, in fact, the deceased was never ill, and so neither got nor required either attendance or medicines while the defender was living or practising within reach of him—it would be a strong thing, I think, to say that, although the whole defence was thus negatived by the real evidence of facts and circumstances, the pursuer's case must fail, because the indorsed cheque was not to be regarded as the writ of the defender. Yet such must be the result of a judgment finding that the indorsed cheque cannot be supported as the defender's writ, in the sense of law, be the facts and circumstances what they may. To justify such a judgment all the facts and circumstances I have just supposed, or others equally favourable, must be assumed to be true, and yet held altogether irrelevant.

Again, suppose that, in the course of the proof, writings are recovered and produced—such as do not, *ex facie* and in their terms, prove the debt, but capable of being construed and explained by such proof as the Lord Ordinary has allowed—these, of course, would be valueless under such an interlocutor as is now proposed by your Lordship, whereas, under the Lord Ordinary's interlocutor, the result might have been conclusive in favour of the pursuer.

In deciding beforehand, and in the dark, against the admissibility of certain kinds of evidence, we are bound to assume the most favourable view possible of the nature of that evidence for the party who is excluded from adducing it. There is great risk of

injustice in that course, which by the course contemplated by the Lord Ordinary would have been avoided.

Your Lordship, however, as I understand, is of opinion that the evidence allowed by the Lord Ordinary is so clearly incompetent that it ought not to be allowed, even before answer. I cannot concur in that opinion.

It is a rule of our law, or rather of our practice—for the rule rests on practice [547] merely—that a loan of money must be proved either by the writ or by the oath of the debtor. But that does not mean that the writing must, in all cases, be, in its terms, an acknowledgment of the loan, or an obligation to repay. If the writing be in these terms, it is, of course, of itself, conclusive. But, although not in these terms, it may be proved by other evidence, and, particularly, by the real evidence of facts and circumstances, that such is the true construction and effect to be attached to it.

If there be no writing at all under the hand of the alleged debtor, to the support or explanation of which the proof can be directed, then of course the rule applies, and parole evidence is excluded. The cases quoted by your Lordship were all dealt with as cases of that kind, and I agree with your Lordship in describing them as affirming a trite and familiar doctrine, which, however, I must add, is not here called in question, and has no application to this case.

I shall notice these cases in their order. In Stewart *v.* Syme, &c., Dec. 12, 1815, F. C., the action was against pupil children and their factor *loco tutoris* for payment of a bill, said to have been for their deceased father's accommodation, but on which his name did not appear in any capacity. The only other document was an acknowledgment, which did not mention the bill, and which it was held could not be looked at, as it was neither holograph nor tested. It is not surprising that in these circumstances parole testimony was held inadmissible to connect the inept acknowledgment with the bill.

The case of Hamilton *v.* Richmond, &c. (Lindsay's Trustees), Jan. 21, 1823, 2 S. and D. 132, and H. of L. March 8, 1825, 1 W. and S. 35, was a case in which it was not pretended that there was any writ whatever, either acknowledging or implying a loan. The question simply was the import of an oath of reference.

In M'Master *v.* Brown, Jan. 28, 1829, 7 S. and D. 337, the Lord Ordinary, holding that the only documents produced could not be looked at, as being unstamped, appointed the defender, his wife, and agent, to be judicially examined, but "the Court," as the report bears, "holding that the case was not yet fit for decision, and that the judicial examination had been irregular, without deciding anything on the merits, recalled the Lord Ordinary's interlocutor; found that the whole proceedings since the defences were given in were irregular and inept, and remitted the case again to his Lordship, reserving all questions of expenses." That is obviously nothing to the present purpose.

The rubric of the case of Birnie's Executors *v.* Darroch, Jan. 12, 1842, 4 D. 366, is in these words—"In an action for repayment of money advances the rule of law strictly applied that cash advances and payment must be specially instructed by the writ of the debtor, or other written evidence connecting therewith." There is nothing in this doctrine to affect the present case. And still less will anything bearing upon it be found in the elaborately detailed interlocutor of the Court, which, on the contrary, shows how very peculiar and circumstantial the whole case was.

The question here is, not whether there is a rule of practice requiring that there shall be writ of the debtor in an action for loan, but whether that rule, which I assume to exist, has been satisfied in the sense in which it has been understood throughout the same practice which established the rule. Upon that question the above cases humbly appear to me to be valueless.

I pass on therefore to observe that it is not essential that the writing which satisfies the rule of law should have been intended as a document of debt. It may be a letter soliciting time to pay the particular debt, or making excuses for not having yet paid it.

Neither is it essential that the writing should have been addressed or delivered to the creditor, or that it should even have come into his custody. It may be an entry in the debtor's handwriting, in his own books, of the specific loan, with day and date, of the very existence of which entry the creditor was ignorant till he recovered it under a diligence against havers.

In the present case the cheque libelled on, with the defender's signature on the back of it, constitutes, in my opinion, a writing under the defender's hand, whatever may be

held to be the effect of that writing. The signature is undoubtedly referable to the contents of that cheque, and the document with that [548] signature upon it was left with the defender's bankers, who were his hands and instruments, and fell to be given up, and was given up, by them to him, as his own document; and the question now is, whether it is incompetent to prove by the real evidence of facts and circumstances, or otherwise than by oath of reference, that the transaction to which the cheque relates was truly one of loan.

That it is proved by the defender's signature on the back of the cheque that he received the money cannot be disputed. Whether it was necessary or not for the bank to take that signature, as it certainly would have been if the cheque had been payable to order, is not material. The undoubted object of taking the signature was to show that the defender got the money. How the case would have stood if he had got the money without endorsing the cheque is a question which may be left for decision when it arises. It is not the present question.

Now, the general rule laid down in the books, and sanctioned by the decisions, is, that when it is competently proved that one man has received a certain amount of another man's money, the recipient must account for and repay that money, unless he can establish that he received it on some other footing than that of loan or obligation to repay. That rule, however, I readily admit, requires modification in a case like the present, so far as the onus of proof is concerned; because a bank cheque is used for so many different purposes that, until some inquiry has been made, and the relative position of parties admitted or proved, there is little presumption as to its purpose one way or the other. But that, I think, raises only a question of onus, and does not at all affect the well established and more important rule of practice, that when there is written evidence that one man has received the money of another, inquiry is competent *prout de jure* to ascertain *quo animo* or on what footing he so received the money.

That this rule is applicable to the case of money received under a bank cheque is directly established by the well-known case of Ross *v.* Fidler, Nov. 24, 1809, F. C. That is a case of the highest authority, decided unanimously by the First Division of the Court, under the presidency of President Blair. The soundness of the judgment has never been questioned. On the contrary, it has been referred to and quoted as a leading authority, in this branch of the law, ever since its date, now considerably more than sixty years ago. It proceeded on the principle laid down in the much older case of Ogilvie *v.* Alexander, Jan. 7, 1703, M. 11,510, the report of which bears—"The Lords were clear that receipt of money did, in the general case, imply repayment"; that is to say, an obligation of repayment. Also in the case of Donaldson *v.* Walker, June 11, 1711, M. 11,511, in which Walker's holograph receipt, which simply bore that he had received 400 merks from Boag, acting for Donaldson, was held a good ground of debt against Walker, "unless," as the report bears, "they would produce some evidence that Walker was creditor in that sum to Donaldson."

The peculiar importance of the case of Ross *v.* Fidler is, that the principle of these more ancient cases was there held applicable to money received under a bank cheque, after proof had been allowed and led of the purpose for which the cheque had been granted, and the money drawn. There was no writing whatever which specified that purpose. The terms of the cheque were—"Pay to Thomas Fidler or bearer £30 sterling, which place to my debit in my cash account." The letter written by Fidler, and sent by his carter (George Kirkton) to Ross, simply bore—"Please give me an order on your cash account for £30"; and the letter sent by Fidler to the cashier of the bank two days afterwards simply asked the cashier to send the contents of the cheque by Kirkton—the object obviously being to accredit the country carter, Kirkton, to the bank agent in Aberdeen, as a duly authorised messenger.

After Thomas Fidler's death Ross brought an action against his representative, George Fidler, before the Magistrates of Aberdeen, for the £30 as money lent. The report bears that "the defender pleaded that the money was not a loan, but a payment in extinction of debt." The reporter adds—"After various proceedings, wherein a proof was taken, in which there was nothing material, the cause came before the Court of Session by advocation." But this last is a mere loose statement by the reporter—inaccurate in both its branches, as we find from the [549] Session Papers preserved in the Advocates' Library, which enable us to see what the proof was, as well as the opinion which was entertained of the competency of that proof, and the importance which was attached to it.

From the terms of the report it would naturally be inferred that the allowing of a proof had been the act of the magistrates, in accordance with their own views, and that the case did not come to the Court of Session till after that proof had been led. But the reverse is the fact, as the Session Papers show. The magistrates, on 12th March 1808, had pronounced this judgment:—"Having advised the process, find that the vouchers founded on do not instruct the libel, and that the proof offered by the pursuer is incompetent; assoilzie the defender, and decern."

Against this judgment the pursuer presented a bill of advocation, followed by answers and replies, on advising which Lord Polkemmet, Ordinary, on 3d May 1808, remitted "to the magistrates, with this instruction, in the present very doubtful case, to allow excerpts from account books and any other written evidence, on either side, to be produced, and any witnesses to be examined who shall be suggested by either party, whose evidence may tend to instruct, one way or other, whether the draught for £30, asked by the deceased Thomas Fidler, and given to him by the complainer, was a loan, or was in payment of a debt by the complainer to the said Thomas Fidler; and after such production shall have been made, and witnesses examined, that the magistrates shall do farther as they shall see just."

When the case went back to the magistrates, the only additional productions made by or recovered from either party, applicable to their transactions with each other, were some entries in the pursuer Mr. Ross' rental book, of transactions between him and the deceased Thomas Fidler in the previous year 1806, on which a balance of £5, 4s. 7d. was brought out as having been due and paid to Fidler. There were no entries whatever applicable to the year 1807, in May of which year the loan was said to have been made, and consequently it is clear that no additional writings were got or produced in aid of the pursuer's case.

The parole proof was short, but far from immaterial. George Kirkton (the deceased's messenger) proved that he drew the £30 from the bank for the deceased, and handed it over to him. James Calder proved "that he was present when the preceding witness (Kirkton) delivered to the deceased Thomas Fidler the sum of £30 sterling, which the defunct mentioned to the company present was given to him by the laird from his cash account." Robert Moir, the teller of the bank, proved that he paid the contents of the cheque to Kirkton; and William Mitchell, who was well acquainted with the deceased, proved "that he heard the defunct mention several times, some little time before his death, that the pursuer had been a very good friend to him, and had given him money, but did not mention the precise sum. Depones that the defunct also mentioned that the pursuer had been so very good as not to ask any voucher for the money, nor to limit him to any precise term of payment." The same witness further deponed to his belief of having been present when Kirkton delivered the money to the deceased in spring 1807, and although, as to this, he said he was not exactly certain, the circumstances he was able to mention showed that he had been present; for he added that "this was in the afternoon, and James Calder, a preceding witness, was also present. That a girl mentioned that George Kirkton wished to see him, upon which the defunct asked Kirkton to come ben, as there was no secret in the business, as it was money he had brought from Aberdeen that day, and was getting from the pursuer's cash account."

The magistrates, on 3d December 1808, pronounced this interlocutor:—"Having advised the proof adduced, and productions made by the parties, and whole process, find no sufficient evidence brought forward to instruct the claim libelled; adhere to the decree of absolvitor of 12th March last, and decern."

A second advocation was then brought, upon which Lord Armadale, Ordinary, on 23d May 1809, pronounced the interlocutor quoted in the report, by which he found "it instructed by the letter of 23d May 1807, and subsequent order by the pursuer on his cash account, and other evidence in process, that the deceased Thomas Fidler received the sum of £30 from the pursuer, and that the [550] defender has not instructed the same to have been in extinction of a debt due by the pursuer; therefore advocates the cause, and decerns against the defender for payment of the said sum and interest, conform to the original libel."

To this interlocutor his Lordship, on advising a representation and answers, adhered by interlocutor,—not mentioned in the report,—of date 4th July 1809.

The defender then presented a reclaiming petition to the Inner-House, in which the case was fully argued, both as to the competency and sufficiency of the proof. It was

contended that, "wherever the debt exceeds £100 Scots nothing short of written evidence will suffice"; and it was strongly insisted on that the pursuer, who was a landed proprietor, and had been bred to the law as a writer to the signet, would have taken a formal voucher or obligation for repayment of the money had it been really a loan. I do not, however, enter into the merits of the proof, because what we have to do with here is not the sufficiency but the competency of that proof, which the interlocutors show to have been unequivocally sanctioned by two successive Lords Ordinary, and also by the Inner-House, who not only concurred with Lord Armadale in the result, but also in the grounds of his judgment. The report accordingly bears—"The Court concurred in opinion with the Lord Ordinary on the grounds expressed in the interlocutor, and therefore refused the petition, without answers."

Now, Lord Armadale's interlocutor, it has been seen, proceeded on the letter asking the cheque, the cheque itself, and the "other evidence in process." If the letter accrediting Kirkton to the bank cashier had been thought of much weight in the case, his Lordship would naturally have mentioned it specifically, as he did the other letter and the cheque. But, however that may be, it is obvious that the letter to the bank was not the only other evidence, besides the first letter and the cheque, on which his Lordship and the Court proceeded. On the contrary, both letters, as well as the cheque, had been in the process all along, and had been before Lord Polkemmet when he remitted to the magistrates with express instructions to allow witnesses to be examined whose evidence might tend to instruct whether the cheque for £30 was given as a loan or in payment of debt; and it was only on considering the depositions of these witnesses, along with the letters and cheque, that Lord Armadale and the Court held the loan established, and decerned accordingly.

I have gone thus carefully and minutely into the case of Ross *v.* Fidler, because it is a case substantially on all fours with the present as regards the competency of the proposed proof, and the more it is examined the more authoritative it will be seen to be. It has been cited and relied on, both at the bar and on the bench, in all analogous cases since its date. For instance in the cases of Allan and Others, Heriot's Trustees, *v.* Murray, June 13, 1837, 15 S. and D. 1130; Martin *v.* Crawford, June 4, 1850, 12 D. 960; Robertson *v.* Robertson, Jan. 9, 1858, 20 D. 371, and Thomson *v.* Geekie, March 6, 1861, 23 D. 693.

In the first mentioned of these cases, Allan, &c. *v.* Murray, the document mainly relied on was a holograph writing in these terms:—"May 29, 1815.—Received from Mr. David Heriot £186 stg. (Signed) DAVID MURRAY, Brockholes." It is obvious enough that this document did not, in its terms, import a loan. On the contrary, it was in words appropriate to the discharge of a sum due. But it was a case between an uncle and his nephews (as here it is a case between brothers). It was established that the uncle had been in use to make loans to his two nephews, who were tenant farmers, to assist them in their embarrassments. A state (not, however, in the handwriting of either of them) had been made up by their creditors at a meeting called by the nephews, in which state the uncle was entered as a creditor for the £591, and, in a trust-deed, subsequently executed, this larger sum was stated to be due, coupled with a qualification in the body of the deed that the mention of sums as due should not import that they were actually due, unless otherwise sufficiently instructed. The Sheriff, after investigation, the extent of which does not appear, found that £400 of the £591 had been repaid, and that the balance had not been established by legal evidence to be due. The Lord Ordinary (Jeffrey) recalled the judgment, found the debt sufficiently instructed, and decerned accordingly; observing in his note that "he holds it to be settled by the cases of Ogilvie, Jan. 7, 1703, M. [551] 11,510; Donaldson, June 12, 1711, M. 11,511; and Ross *v.* Fidler, Nov. 24, 1809, F. C., that such a naked acknowledgment of the receipt of money does, *in dubio*, import the constitution of a debt and a general obligation to repay, while it is undeniable that all the circumstances of this case tend most strongly to corroborate this conclusion."

A reclaiming note was presented, but the report bears—"The Court, holding the balance of £191 instructed not merely by the holograph acknowledgment above mentioned, but by the whole circumstances of the case, pronounced as follows—Adhere to the interlocutor so far as complained of by the note for Thomas Murray," &c.

The points to be noted in this case are the judicial reliance on Ross *v.* Fidler as a precedent, and the fact that both Lord Jeffrey and the Court took into view all the

circumstances ascertained in the Sheriff-court as explanatory of the writings, which were not of themselves explicit.

In the case of Martin *v.* Crawford, June 4, 1850, 12 D. 960, and 22 Scot. Jur. 426, three holograph writings were founded on, all in the form of receipts, and all in *verbatim* the same terms, except that each of the two first was for £20, and the third was for £10. It is sufficient, therefore, to quote one of them, which ran thus:—"Paisley, 9th April 1845.—Received from Mr. William Martin the sum of £20 sterling. (Signed) JOHN CRAWFORD."

The action was laid as for money lent. The defender denied the loan, and alleged that the sums were paid to him to account of his share in a partnership concern. The Sheriff-substitute and Sheriff found "it incumbent on the pursuer to prove by the defender's writ or oath that the said advances were in loan." But the Lord Ordinary (Wood) pronounced this interlocutor:—"Recalls the interlocutors complained of; remits the case to the Sheriff with instructions to allow the respondent to prove his defence—that the sums in question were not received in loan, or under any obligation to repay; but in extinction of a claim which he had against the complainer, arising in the way and manner alleged by the respondent." In a note to this interlocutor Lord Wood referred to the cases cited by Lord Jeffrey in Allan, &c. *v.* Murray, viz., the case of Ross *v.* Fidler, and the two older cases already mentioned, as deciding that acknowledgments in writing of the receipt of money, "*in dubio*, import the constitution of a debt and a general obligation to repay," and observed that he did not think the course taken in the Sheriff-court consistent with the law as laid down in Allan's case. On advising a reclaiming note the Lord Justice-General and Lords Mackenzie, Fullerton, and Cuninghame successively expressed their concurrence in the law as laid down by the Lord Ordinary. Lord Mackenzie further observed that there was a presumption in favour of the obligation to repay; and Lord Fullerton said, "a person who has granted such acknowledgments is bound to give some statement in explanation of them. Here the defender has explained that they were paid to him in extinction of debt under this alleged copartnery, and he is bound to prove that statement."

The interlocutor of the Court was in these terms:—"Adhere to the interlocutor of the Lord Ordinary reclaimed against—it being understood that, in taking the proof allowed by the said interlocutor, the Sheriff is to allow the advocator, William Martin, conjunct probation."

I think this case of Martin of great importance in the question of procedure and proof we are now discussing. No Judge had more practical experience of such matters than Lord Wood, both as Sheriff and Lord Ordinary. The question came before him in a shape calling for the most direct and deliberate consideration. For the Sheriff-substitute and Sheriff had both found "it incumbent on the pursuer to prove by the defender's writ or oath that the said advances were in loan." The documents libelled on instructed, on the face of them, nothing more than is instructed in the present case by the defender, and admitted by him, viz., that he received the money of the deceased to the amount sued for. By reference to the decisions cited by Lord Jeffrey, the case of money received under a bank cheque, which was the case of Ross *v.* Fidler, was obviously regarded by Lord Wood, as it had been by Lord Jeffrey, as a leading case of the class in which proof at large was competent, and the result was a judgment, both [552] by Lord Wood and the Inner-House, in the strongest of all forms, viz., that of an absolute allowance of proof, and not merely, as the Lord Ordinary has allowed here, a proof before answer. The Court construed Lord Wood's interlocutor as sanctioning probation on both sides, and accordingly adhered to that interlocutor, "it being understood that, in taking the proof allowed by the said interlocutor, the Sheriff is to allow to the advocator, William Martin, conjunct probation."

The somewhat complicated case of Fraser *v.* Bruce, November 25, 1857 (20 D. 115, and 30 Scot. Jur. 70), is only of importance here as showing the effect which the Court attached to the mere signature of the borrower in the savings bank pass-book, as showing that he got £40 of the lender's money, and consequently bringing in what, as Lord Cowan observed, is "a settled principle, that when money belonging to one party is proved to have been given to or received by another, the receiver must *in dubio* show that he received it on some footing other than under an obligation to repay." The mere presentment of the pass-book was, by the Savings Bank Act, sufficient authority to the bank to pay to the person who presented it. Accordingly the Lord Justice-Clerk Hope said—"The book which is produced is used between the savings

bank and the pursuer for the safety both of the bank and the depositor. The bank so far recognises it that entries made in it of payments into the bank are good against the bank, with the signature of their clerk; and, on the other side, entries of repayments made to a depositor are, with his signature, or the signature of the party who presents the book at the bank, good vouchers that the money has been repaid to the depositor. The depositor gets this book, and the bank pays to him a sum of money, for which he is required to sign the book. That is a good voucher for the bank, and I think it good proof of receipt by the defender of the pursuer's money." The applicability of these remarks to the defender's signature on the back of the cheque now in question is clear enough without any remark from me, and it is for that only that I refer to this case of Fraser *v.* Bruce.

The case of Thomson *v.* Geekie, March 6, 1861 (23 D. 693, and 33 Scot. Jur. 340), deserves attention, because there a proof before answer was allowed and led in the Sheriff-court; and although the majority of the Court seem ultimately to have thought that the acknowledgment of the receipt of the money would, of itself, have been sufficient to infer loan, the proof was not dealt with as incompetent, but, on the contrary, was made the subject of findings, both by the Lord Ordinary (Kinloch) and the Court.

Lord Kinloch, indeed, while he embodied these findings in his interlocutor, expressed doubts in his note of the admissibility of parole evidence in the case, and so brought that point specially under the notice of the Court. But their Lordships not merely commented on that evidence as confirmatory of the pursuer's claim, but they adhered *simpliciter* to the interlocutor of the Lord Ordinary, without giving any effect to the doubt expressed in his note, as to whether he was right in throwing "the interlocutor into the shape proper to the case in which proof has been allowed."

The question, whether the onus lay on the pursuer or defender to prove the footing on which the money was received, was fully discussed, involving, of course, the question whether any proof was, in the first instance, necessary on the part of the pursuer, in addition to the document. On that point there was a difference of opinion, as well as on the sufficiency of the evidence, to clear up the ambiguity, if there was one, in the words of the document. But the competency of the evidence is, of course, quite different from its necessity or sufficiency, and, in place of repudiating the competency of the parole evidence, it seems only to have been because the limited extent of that evidence was attributable to the fault of the parties themselves that the Court did not order more of it to be led, and the fact of its being so limited was regretted to the end, particularly by Lord Wood, whose opinion is throughout of great importance as bearing upon the present case.

The document there was written upon a receipt stamp—a specialty which did not occur in any of the prior cases, and which I should have regarded as adding weight to the ground in respect of which your Lordship in the chair, then Lord [553] Justice-Clerk, desiderated further evidence, namely, the terms of the document, which were these—"Received from Mr. Geekie the sum of £30 sterling, as per agreement." But the fact that these specialties did not prevent the majority of the Court from deciding as they did only shows the great importance they attached to the presumption of loan arising from the mere receipt of money.

That is the presumption which is the basis of the case we are now dealing with, although it is a presumption which, looking to the variety of purposes for which bank cheques are used in the present day, ought not, I think, to go the same length in relieving the pursuer from all onus whatever as it has been sometimes held to do where the document founded on was a receipt for money. It is more reasonable to deal with a bank cheque, as presenting a case for inquiry, such as the case of Thomson *v.* Geekie would apparently have been held to be, had the majority of the Court concurred with your Lordship in thinking that the words "as per agreement" so far lessened the presumption arising from receipt of the money as to lay some onus on the pursuer which might not have been upon him otherwise. It is essential, however, to keep in view that in these cases of receipts for money the presumption of loan was held to arise from the fact—which equally occurs in the case now before us—that the money of the one party had passed to the other, there being nothing in the terms of the receipts equivalent to the acknowledgment of a debt. In this respect such receipts stand in direct contrast to an I O U, which expressly acknowledges a debt to be owing of the amount which it specifies, whereas mere receipts rather import in their terms that a

debt has been paid, and it must, therefore, have been entirely upon the fact of the money having passed that the presumption of a debt being created was held to have arisen.

The case of Hilson and Others (Rutherfurd's Executors) *v.* Marshall, July 12, 1861 (23 D. 1276), was a case in which the claim was for £31 of borrowed money; but the only writings were two letters, the latest of them dated some ten years before the action, in which the defender apologised for being so long in paying his debt, but no sum nor specific debt was mentioned; and, in these circumstances, I am not surprised that the Court should have held that the pursuer's only course was a reference to oath. The letters did not prove that the money sued for was received, and consequently there was no room for the presumption which that fact implies.

As to the recent case of Kyle's Executor *v.* Williamson, January 28, 1871, which appears to be reported only in the Journal of Jurisprudence (vol. xv. p. 155), I have looked carefully into the Session Papers, which are now before me, and I find it was of this nature: The summons was for "payment to the pursuer of the sum of £150 sterling, advanced in loan to the defender by the said deceased James Alexander Kyle, by cheque granted by the said James Alexander Kyle to the defender on the agent for the Bank of Scotland, Aberdeen, and dated 26th February 1867, and the amount of which cheque was paid to the defender by the said bank, together with interest on the said sum of £150 sterling, at the rate of 5 per cent. per annum from the said 26th day of February 1867 until payment." There was nothing libelled on but the cheque, and no conclusion in the summons except the conclusion just quoted, for repayment of the loan given by the cheque, with interest.

The defence was that the defender had drawn a bill upon the deceased, dated 7th December 1866, payable two months after date, for value received, which bill was accepted by the deceased, and discounted at the North of Scotland Bank, where it was noted when it fell due, and notice of the dishonour sent to both parties; whereupon the deceased gave the defender the cheque in dispute, to enable him to apply the contents to pay the bill, which he did. The pursuer's reply to this was, that although the deceased was acceptor of the bill, it was truly for the defender's accommodation, to enable him to buy a stallion, which he accordingly did, with the contents, and that the cheque was not connected with that transaction, but was given as a loan.

The pursuer's plea in law was that the deceased having advanced the £150 in loan to the defender by the cheque libelled, the pursuer, as the deceased's executor, was entitled to repayment. The defender's pleas were in these terms:—[554] "(1) The pursuer's averments can only be proved by the writ or oath of the defender. (2) The statements of the pursuer being unfounded in fact, the defender is entitled to absolvitor, with expenses."

There was nothing, either in fact or in law, beyond what I have now stated, in the closed record. Upon that record, Lord Jerviswoode, Ordinary, on 3d March 1870, pronounced this interlocutor:—"Having heard counsel, allows to the parties a proof of their respective averments on record, and that before answer; and appoints said proof to proceed before himself, within the Parliament-House, on a day to be afterwards named." His Lordship afterwards granted diligence for recovery of writings; and on 8th July 1870 a long proof, by witnesses, was taken and concluded before him. Thereafter, on 27th July 1870, his Lordship pronounced the following interlocutor:—"Having heard counsel for the parties on the proof by them respectively, and made avizandum," &c., "Finds, as matter of fact, that on or about 26th February 1867 the now deceased James Alexander Kyle of Binghill, in Aberdeenshire, to whom the pursuer has been decerned executor, advanced to the defender the sum of £150 in loan, by means of a cheque for said sum, granted by the said James Alexander Kyle on the agent of the Bank of Scotland, Aberdeen, and cashed by the defender, and the amount of which was received by him, or applied for his behoof: And finds that the said sum is resting owing by the defender to the pursuer, as executor of the said deceased James Alexander Kyle: Therefore finds the defender liable in payment to the pursuer, as executor foresaid, of the said sum of £150 sterling, with interest thereon, in terms of the conclusions of the summons, and decerns," &c.

On advising a reclaiming note the Court pronounced this interlocutor:—"Recall the interlocutor complained of: Find that, upon an accounting between the parties, there is a balance due by the defender to the pursuer, as executor of the late James Alexander Kyle, of £52, 18s.; therefore decern for payment of said balance by the defender, with

bank and the pursuer for the safety both of the bank and the depositor. The bank so far recognises it that entries made in it of payments into the bank are good against the bank, with the signature of their clerk; and, on the other side, entries of repayments made to a depositor are, with his signature, or the signature of the party who presents the book at the bank, good vouchers that the money has been repaid to the depositor. The depositor gets this book, and the bank pays to him a sum of money, for which he is required to sign the book. That is a good voucher for the bank, and I think it good proof of receipt by the defender of the pursuer's money." The applicability of these remarks to the defender's signature on the back of the cheque now in question is clear enough without any remark from me, and it is for that only that I refer to this case of Fraser *v.* Bruce.

The case of Thomson *v.* Geekie, March 6, 1861 (23 D. 693, and 33 Scot. Jur. 340), deserves attention, because there a proof before answer was allowed and led in the Sheriff-court; and although the majority of the Court seem ultimately to have thought that the acknowledgment of the receipt of the money would, of itself, have been sufficient to infer loan, the proof was not dealt with as incompetent, but, on the contrary, was made the subject of findings, both by the Lord Ordinary (Kinloch) and the Court.

Lord Kinloch, indeed, while he embodied these findings in his interlocutor, expressed doubts in his note of the admissibility of parole evidence in the case, and so brought that point specially under the notice of the Court. But their Lordships not merely commented on that evidence as confirmatory of the pursuer's claim, but they adhered *simpliciter* to the interlocutor of the Lord Ordinary, without giving any effect to the doubt expressed in his note, as to whether he was right in throwing "the interlocutor into the shape proper to the case in which proof has been allowed."

The question, whether the onus lay on the pursuer or defender to prove the footing on which the money was received, was fully discussed, involving, of course, the question whether any proof was, in the first instance, necessary on the part of the pursuer, in addition to the document. On that point there was a difference of opinion, as well as on the sufficiency of the evidence, to clear up the ambiguity, if there was one, in the words of the document. But the competency of the evidence is, of course, quite different from its necessity or sufficiency, and, in place of repudiating the competency of the parole evidence, it seems only to have been because the limited extent of that evidence was attributable to the fault of the parties themselves that the Court did not order more of it to be led, and the fact of its being so limited was regretted to the end, particularly by Lord Wood, whose opinion is throughout of great importance as bearing upon the present case.

The document there was written upon a receipt stamp—a specialty which did not occur in any of the prior cases, and which I should have regarded as adding weight to the ground in respect of which your Lordship in the chair, then Lord [553] Justice-Clerk, desiderated further evidence, namely, the terms of the document, which were these—"Received from Mr. Geekie the sum of £30 sterling, as per agreement." But the fact that these specialties did not prevent the majority of the Court from deciding as they did only shows the great importance they attached to the presumption of loan arising from the mere receipt of money.

That is the presumption which is the basis of the case we are now dealing with, although it is a presumption which, looking to the variety of purposes for which bank cheques are used in the present day, ought not, I think, to go the same length in relieving the pursuer from all onus whatever as it has been sometimes held to do where the document founded on was a receipt for money. It is more reasonable to deal with a bank cheque, as presenting a case for inquiry, such as the case of Thomson *v.* Geekie would apparently have been held to be, had the majority of the Court concurred with your Lordship in thinking that the words "as per agreement" so far lessened the presumption arising from receipt of the money as to lay some onus on the pursuer which might not have been upon him otherwise. It is essential, however, to keep in view that in these cases of receipts for money the presumption of loan was held to arise from the fact—which equally occurs in the case now before us—that the money of the one party had passed to the other, there being nothing in the terms of the receipts equivalent to the acknowledgment of a debt. In this respect such receipts stand in direct contrast to an I O U, which expressly acknowledges a debt to be owing of the amount which it specifies, whereas mere receipts rather import in their terms that a

debt has been paid, and it must, therefore, have been entirely upon the fact of the money having passed that the presumption of a debt being created was held to have arisen.

The case of Hilson and Others (Rutherfurd's Executors) *v.* Marshall, July 12, 1861 (23 D. 1276), was a case in which the claim was for £31 of borrowed money; but the only writings were two letters, the latest of them dated some ten years before the action, in which the defender apologised for being so long in paying his debt, but no sum nor specific debt was mentioned; and, in these circumstances, I am not surprised that the Court should have held that the pursuer's only course was a reference to oath. The letters did not prove that the money sued for was received, and consequently there was no room for the presumption which that fact implies.

As to the recent case of Kyle's Executor *v.* Williamson, January 28, 1871, which appears to be reported only in the Journal of Jurisprudence (vol. xv. p. 155), I have looked carefully into the Session Papers, which are now before me, and I find it was of this nature: The summons was for "payment to the pursuer of the sum of £150 sterling, advanced in loan to the defender by the said deceased James Alexander Kyle, by cheque granted by the said James Alexander Kyle to the defender on the agent for the Bank of Scotland, Aberdeen, and dated 26th February 1867, and the amount of which cheque was paid to the defender by the said bank, together with interest on the said sum of £150 sterling, at the rate of 5 per cent. per annum from the said 26th day of February 1867 until payment." There was nothing libelled on but the cheque, and no conclusion in the summons except the conclusion just quoted, for repayment of the loan given by the cheque, with interest.

The defence was that the defender had drawn a bill upon the deceased, dated 7th December 1866, payable two months after date, for value received, which bill was accepted by the deceased, and discounted at the North of Scotland Bank, where it was noted when it fell due, and notice of the dishonour sent to both parties; whereupon the deceased gave the defender the cheque in dispute, to enable him to apply the contents to pay the bill, which he did. The pursuer's reply to this was, that although the deceased was acceptor of the bill, it was truly for the defender's accommodation, to enable him to buy a stallion, which he accordingly did, with the contents, and that the cheque was not connected with that transaction, but was given as a loan.

The pursuer's plea in law was that the deceased having advanced the £150 in loan to the defender by the cheque libelled, the pursuer, as the deceased's executor, was entitled to repayment. The defender's pleas were in these terms:—[554] "(1) The pursuer's averments can only be proved by the writ or oath of the defender. (2) The statements of the pursuer being unfounded in fact, the defender is entitled to absolvitor, with expenses."

There was nothing, either in fact or in law, beyond what I have now stated, in the closed record. Upon that record, Lord Jerviswoode, Ordinary, on 3d March 1870, pronounced this interlocutor:—"Having heard counsel, allows to the parties a proof of their respective averments on record, and that before answer; and appoints said proof to proceed before himself, within the Parliament-House, on a day to be afterwards named." His Lordship afterwards granted diligence for recovery of writings; and on 8th July 1870 a long proof, by witnesses, was taken and concluded before him. Thereafter, on 27th July 1870, his Lordship pronounced the following interlocutor:—"Having heard counsel for the parties on the proof by them respectively, and made avizandum," &c., "Finds, as matter of fact, that on or about 26th February 1867 the now deceased James Alexander Kyle of Binghill, in Aberdeenshire, to whom the pursuer has been decerned executor, advanced to the defender the sum of £150 in loan, by means of a cheque for said sum, granted by the said James Alexander Kyle on the agent of the Bank of Scotland, Aberdeen, and cashed by the defender, and the amount of which was received by him, or applied for his behoof: And finds that the said sum is resting owing by the defender to the pursuer, as executor of the said deceased James Alexander Kyle: Therefore finds the defender liable in payment to the pursuer, as executor foresaid, of the said sum of £150 sterling, with interest thereon, in terms of the conclusions of the summons, and decerns," &c.

On advising a reclaiming note the Court pronounced this interlocutor:—"Recall the interlocutor complained of: Find that, upon an accounting between the parties, there is a balance due by the defender to the pursuer, as executor of the late James Alexander Kyle, of £52, 18s.; therefore decern for payment of said balance by the defender, with

interest at the rate of 5 per cent. from 26th February 1867 until payment: *Quoad ultra* assoilzie the defender from the conclusions of the summons, and decern."

The summons on which these interlocutors were pronounced was laid, as we have seen, exclusively upon an allegation of a loan of £150, by a cheque on the lender's bank account for that sum. The only difference between the interlocutor of Lord Jerviswoode and that of the Court was that his Lordship held the whole sum lent to be still due, while the Court held a balance of £52, 18s. only to remain due. Both went equally upon the proof establishing the loan, and differed only as to how much of it remained due. The £52, 18s. could have been nothing else than the balance of the £150 loan given by the cheque, for there was nothing else libelled on or concluded for. Explanation of that case, therefore, consistently with holding proof in this case incompetent, seems to me impossible.

There are cases of a different class from any I have yet alluded to, which, although not direct precedents here, deserve attention, for the law laid down in them as to the admissibility of parole evidence where there is a writing of such a nature as might be granted or used for a variety of purposes, and the question arises *quo animo*, or for what purpose was that writing granted or used in the particular case. I allude to cases of donation *inter vivos* by the intervention of deposit-receipts or of bank cheques. Two of these cases in particular are important,—The National Bank of Scotland *v.* Bryce, Jan. 20, 1866, *ante*, vol. iv. 312, and 38 Scot. Jur. 161; and British Linen Company *v.* Mackenzie, &c., June 15, 1866, *ante*, vol. iv. 820, and 38 Scot. Jur. 435.

In the first of these cases Matthew Young, when living in lodgings kept by Miss Bryce and her sister, to the latter of whom he had been engaged to be married, gave to Miss Bryce a cheque on his bank account, dated 4th February 1863, for £321, 8s., payable to "Miss Bryce or bearer." She presented the cheque at the bank on the afternoon of 5th February, but as the balance due to him was only £281, 8s. the cheque was returned to her to get that sum filled in in place of the larger sum. She then explained that Young had died that morning, whereupon the bank declined to honour the cheque. In a multiplepoinding raised by the bank she claimed the £281, 8s. upon the ground that Young had [555] given her the cheque in payment of board and lodging due to herself and her sister, with a request to keep and divide the balance between them. The Lord Ordinary reported the case, and the Court ordered a proof before answer. The proof consisted entirely of parole evidence, which it is unnecessary to notice farther than to say that the Judges were all satisfied of the truth of Miss Bryce's case, provided the parole proof was competent; and upon that point likewise they were all agreed, upon the ground that the basis of the case was the cheque, which, as it might have been given on various footings or for various purposes, must always leave the question open to proof *prout de jure* on what footing and for what purpose it was given in the particular case under consideration.

These opinions were given without deciding whether donations could in any case be competently proved otherwise than by oath of reference, if there was no writing.

Accordingly, it will be seen that, in that case of Bryce, Lord Curriehill said—"This action involves questions of nicety. But I do not think that among these is the question whether a donation can be proved by parole evidence. The very basis of the rule is taken away in this case, because we have here a written document granted by the owner of the fund directing the holder of it to pay to Miss Bryce. The basis of the case, in short, is writing, and the question is, *quo animo* was that writing delivered? There may be a presumption in the circumstances that this money was meant for Miss Bryce's own use, but that presumption is open to inquiry by evidence of every kind, and therefore I think parole evidence was competent. The question is, what is the effect of that evidence?" and this his Lordship held to be to establish the claim of Miss Bryce.

In the same case Lord Ardmillan said—"It is quite true, as a general rule, that a donation cannot be proved by parole testimony. But we are not dealing here with a case in which that is the exclusive, or even the most prominent feature, but with a case in which all the questions cluster round the written document." And then his Lordship goes on to say, with reference to the position of a party who receives a cheque—"I do not think an inquiry is excluded, for I think his position is examinable."

The Lord President (M'Neill) observed—"The document given to Miss Bryce was

a cheque apparently in her own favour, and I think presumably in her favour in ordinary circumstances. The presumptions, however, are different, according to the position of circumstances. Where a merchant is in the position of sending a clerk with cheques to the bank to draw money, there is no presumption that he intends the clerk to keep the amount of the cheques to himself, but the contrary. It may, however, be generally otherwise, especially if the person to whom the cheque is given is a stranger, and particularly if there is any reason for holding that he is entitled to get the money, or for its being given to him." But all this his Lordship held to be open to inquiry, and accordingly he proceeded to detail the circumstances proved in the case, which led him to the conclusion that Miss Bryce was entitled to keep the money. I do not go into my own opinion, which, as regards the varying presumptions arising from getting a cheque and drawing the money, is very much an amplification of such illustrations as were given by the Lord President, and which he gave still more fully in the subsequent case of the British Linen Company *v.* Mackenzie and Others, June 15, 1866, *ante*, vol. iv. 820, 38 Scot. Jur. 435. That case related to an alleged donation by delivery, not of a cheque but of a bank deposit-receipt, but it is nevertheless important with reference to the competency of parole testimony when the basis of the claim is a written document.

The Lord Ordinary (Kinloch) had in that case repelled the claim of the alleged donee, on the footing that parole evidence was incompetent. But the Court recalled that interlocutor, and allowed a proof before answer.

On advising the case with the proof, Lord President M'Neill said—"The basis of the case here is the possession of the deposit-receipt, which is a basis in writing." Then he said, the question is important whether the indorsation of a deposit-receipt transfers the contents. "I have already suggested cases in which it may not be so. Still I think, with reference to a deposit-receipt indorsed by a party and put by him into the possession of another, that the farther question, [556] *quo animo*, is a matter which may be inquired into, and as to which our conclusions may be ascertained from facts and circumstances to be ascertained by parole evidence. The doctrine that donation cannot be proved by parole is often quoted rather more widely than the law authorises. The putting into a party's power the uplifting of funds, whether by means of a draft on a bank or a deposit-receipt, will generally raise the question with what purpose that was done, and what were the facts and circumstances to indicate the intention of the party."

Lord Curriehill expressed his entire concurrence in all that had been said by the Lord President, and observed—"The point is of great importance, and after giving it great consideration I concur with your Lordship in holding that the *animus* with which the actual delivery of the document, with the indorsation on it, was made, is provable by parole evidence, or by facts and circumstances. And I think that in some of the cases, and particularly in Heron *v.* M'Geoch, Nov. 13, 1851 (14 D. 25), in which the question was very deliberately considered by the Court, the principle was deliberately so laid down, and it was stated that the older doctrine, that donation cannot be proved by parole testimony, had been carried too far. I think that, both on principle and authority, parole evidence is competent to show the *animus* with which delivery was made."

My own opinion, and that of Lord Ardmillan, were much to the same effect. His Lordship observed that the indorsation, whether blank or special, "does not of itself convey the right to the money, and it creates no presumption of gift. But the question remains, *quo animo* was the receipt indorsed? or perhaps it may be as accurately put, on what footing did Mr. Muir obtain possession of the receipt?" And he further observed—"All the cases in which proof was allowed, or inquiry ordered, are practical confirmations of the rule that in the case of the holder of an indorsed deposit-receipt or a bank cheque the investigation of the facts and circumstances is not excluded."

I think the opinions in these cases embody a general doctrine, of great importance, applicable to bank cheques, which it would be most inexpedient to go back upon. Our law is jealous of the risk of allowing a loan to be proved by witnesses; but that risk, it is obvious, is greatly diminished whenever the vital fact is established by writing that the one man's money passed into the pocket of the other. The risk of injustice, if inquiry is excluded, is then all the other way. Accordingly the practice of holding such a writing to satisfy the rule requiring writ or oath, and so to open up the case to general inquiry, has grown up with the rule itself, and has obviated the reproach to

which the rule, if it had been otherwise construed, would have been subject. The rule is severe enough as it stands, often leading, on the death of the debtor, to the inevitable loss of a just debt, which he would have admitted on oath. But to exclude the light by putting upon the rule, in the present day, a construction which has never yet been put upon it, would, it appears to me, be extremely unfortunate, even if the opposite construction had not been stamped upon the rule by a series of cases, and more particularly by the direct precedent of Ross *v.* Fidler, concurred in by seven Judges (including the two Lords Ordinary), sixty-two years ago,—sanctioned by every Judge who has considered it since,—and which, if it is now to be disregarded, will certainly be so in circumstances which contrast strongly with the unanimity with which that judgment was pronounced.

I have only to add, that even if the defender's signature on the back of the cheque were not to be regarded as proof by the defender's writ that he had received the money, I should be disposed to hold that the defender's statement on the record was of itself sufficient to render evidence *prout de jure* competent, to the effect of, at all events, entitling the pursuer to disprove the truth of that statement.

The statement, it will be recollected, is in these words—"Explained that the said cheque was handed to the defender, and accepted by him in payment of a debt of a larger amount due to him by the said Rev. Alexander Speirs, for moneys advanced to and for him, and for professional services rendered and medicines furnished to him during the time he was minister of Kilsyth."

The rule against taking an admission in the record without its qualification may prevent the pursuer from at once claiming decree in respect of the presump-[557]-tion attaching to an admission that he had received the money. But, surely, when the qualification consists, as here, of allegations on point of fact, on the truth of which the whole defence is perilled, the pursuer must, in the least favourable view for him, be entitled to prove *prout de jure* that these allegations are untrue. The issue raised on the record is simply whether the advance, admittedly made, was a loan or payment of a debt incurred in the three different ways specified by the defender, viz., advances to the deceased; advances for him to others; and charges for medicines and medical attendance. If the negative of any one or more of these three things can competently be proved by parole, that seems to be of itself enough to necessitate a proof at large; and then the observation would apply which I had occasion to make in the case of the Lord Advocate *v.* M'Neill, Feb. 6, 1864, *ante*, vol. ii. 626 (and House of Lords, March 23, 1866, *ante*, vol. iv. 20), that although you cannot take an admission in the record without its qualification to the effect of dispensing with proof, yet, "when you have a concluded proof, you take the admission as part of the proof, and give to the qualification no more weight than it deserves."

In every view, I am of opinion that the Lord Ordinary's interlocutor should, in its substance, be adhered to.

LORD BENHOLME.—In this case it is contended, on the one side, that, by the law of Scotland, as fixed by undoubted authority, loan cannot be proved by parole evidence, but must be instructed by writ or oath of the alleged borrower. The contention on the other side amounts to this: Wherever there is anything in the shape of writing, however unsatisfactory, it is competent to supplement it by parole. That appears to me to be the foundation of the interlocutor under review. Now, it has always appeared to me that the remedy of allowing a proof "before answer" is inapplicable where an objection to the competency of the proof is taken. That objection can never be done away by the abundance of the evidence. So looking at this case, if we are to hold by the rule that loan cannot be proved by parole, we cannot allow a proof at large.

As to the observations of Lord Deas, most of which struck me as new, especially his elaborate investigation of the case of Ross *v.* Fidler, I may say that, whilst that case has been often cited, it has never been given effect to, so far as I know, as a precedent, in cases of this kind. One remark only of a special kind I would make, in reference to Lord Deas's observation, that, wherever money has passed from one to another, there is a presumption of loan; and I think he referred to the remarks of Lord Wood in Thomson *v.* Geekie in support of that view. But how different a case was that from the present. The writing there was an acknowledgment of receipt of money by the defender. That required explanation, as the nature of the payment gave its complexion to the transaction. To assimilate the case to which Lord Wood's observations apply, in which a party puts his name to a receipt for money, to the case of a

bank cheque, the ordinary way of paying debts, and to suppose that it has the same effect in raising a presumption of loan against the granter, only shows me how dangerous it would be to interfere with the well-established rule, by which parole proof is excluded in such cases.

I have only to add that I entirely agree with the explanations which your Lordship in the chair has given of the most important cases which establish this doctrine beyond all doubt.

LORD NEAVES.—I concur in the opinions of your Lordship and Lords Cowan and Benholme. The question submitted to us is, whether the Lord Ordinary has done wrong in pronouncing an interlocutor by which, before answer, he allows the parties "a proof of their respective averments, the pursuer to lead in the proof." The main averment to which reference is there made is that of the pursuer in condescendence 2, the substance of which is, that the late Rev. Alexander Speirs agreed to advance, and did advance, the sum of £750 in loan to his brother, the defender. This is plainly an averment of loan, and being so, the question arises, whether proof *prout de jure* can be allowed? The proof has been allowed "before answer," the only correct meaning of which, according to [558] Lord Stair, is, before deciding as to the relevancy of the averments. It is or was the custom of the Court to determine questions of relevancy before proof, but in some cases a proof is allowed before judging of the relevancy. But a proof before answer as to the relevancy is here out of the question, because there is no doubt of the relevancy of the pursuer's statements. The pursuer avers that a loan was made, and that it has not been repaid. In whatever way these averments are to be proved, there is no doubt of their relevancy, if true, to support the action. The words "before answer" then must mean here, before answer as to competency. But to allow proof said to be incompetent before answer as to its competency seems an illogical proceeding, and would require very special reasons to justify it. I think the Lord Ordinary has been led into that course partly by looking at the defender's averments. That might be right enough when the time came for doing so, but the first thing to look to is the pursuer's averments. The pursuer must prove, *habili modo*, whatever that be, a loan of money to the defender. The issue he takes is loan or no loan, and if he went to a jury on that question with the further question of "resting owing," no counter issue would be needed. The case is not going to a jury, but it is equally necessary, when the pursuer is going to proof here without a jury, that we should know exactly the issue he takes. This, then, being an averment of a loan of money, what is the rule of law? Is it competent to prove the affirmative of an allegation of such a loan *prout de jure*? I think it impossible to maintain that plea in the face of the authorities. Many contracts of commodate and even of *mutuum* may be proved *prout de jure*, but Stair distinctly says (iv. 43, 4) that the loan of money cannot be proved otherwise than by writ or oath. Erskine (iv. 2, 20) states the law to the very same effect. The question is, is that rule to be dispensed with in this case, or is it satisfied by something already produced in the cause? The specialty founded on as a ground for relaxing the rule is the existence of a cheque which has the defender's name on the back of it. Now, I understood my brother Lord Deas to say, that wherever a document of that kind is delivered, with or without signature, the question would always be *quo animo* it was given.

LORD DEAS.—I said the law as to writ or oath was satisfied by the indorsed cheque, and that the question how the case would have stood without the defender's signature on the back of the cheque did not arise here.

LORD NEAVES.—The question then was waived. But I do not suppose the existence of the cheque is founded on to the effect of maintaining that this is not a loan of money, but a loan of a cheque; that would be a mere quibble. How then does the matter stand? I presume the majority of your Lordships, if not all, would agree that the mere giving of the cheque, and nothing more, would not dispense with the rule of law I have referred to. Supposing it only appeared that one party gave another a cheque for a sum payable to bearer, I suppose that fact would not abrogate the rule of law so as to admit a proof *prout de jure* that the transaction was a loan. The giving of the cheque of itself seems to afford no proof or presumption of a loan, supposing the rule of law away, and if the case rested on the cheque alone, that could never be conclusive of a loan? On the contrary, the presumption rather would be that the payment was made in extinction of a debt. Then, if the giving of the cheque does not prove or presume a loan, how can the defender's putting his name on the back

of it prove anything more than that he drew the money? His writing of his name raises no greater presumption than his getting of the cheque did, nor makes him more a debtor than he was before. That plainly is the only writing that exists in the case. If the pursuer could allege that there was any other, he had it in his power to ask for a diligence to recover it; but I presume no other exists besides this, as evidence of the alleged loan. The Lord Ordinary's interlocutor allows a parole proof, for that is the obvious meaning of the interlocutor, while the law says that there can be no proof in the case of loan save by writ or oath. I could better understand the Lord Ordinary if he said that the name on the cheque raised the presumption of loan. But that is not what he says; he [559] thinks that nothing is proved, and he allows a proof, and asks the pursuer to begin, that is, to prove the loan, which the law says may not be done save by writ or oath. It is said that the proof is to be by facts and circumstances. But if parole proof is not to be allowed, I confess I cannot see how there can possibly be a proof by facts and circumstances without directly violating the rule of law which expressly forbids any mode of proof but by writ or oath.

I think the mistake on which the opposite view is founded arises from confounding this case with those, such as that of Ross *v.* Fidler, where the evidence of loan consisted not only in the existence of writing to show that money had passed, but in the granting of an acknowledgment or chirographum constituting or inferring an obligation to repay. That is an entirely different case from what we have here. The case of Ross *v.* Fidler is said to be a great authority, and so it is. But the doctrine which it establishes is this, that where a party gives a document under his hand, importing the receipt of money, if he does not ascribe it to another cause when he has the opportunity, he is to be held as having received a loan, and is bound to repay it. The Lord Ordinary does not take the view that such a document exists here, nor is it maintained in this case that the cheque here stands in the same position as the document founded on in the case of Ross *v.* Fidler. There is nothing here but the cheque with the defender's name put on the back of it, and showing it was cashed, and to regard that writing as in any proper sense proof of a loan appears to me to be quite untenable.

LORD ARDMILLAN.—This case, which, in point of fact, so far as yet ascertained, is one of the simplest and shortest which has been brought into Court, is in point of law one of the most important and most delicate with which we have had to deal.

The question raised in regard to the competency of parole proof lies on the boundary-line between the scope or province of a rule of law on the one hand, and the scope or province of a principle of equity on the other hand. The rule and the principle are both, in my opinion, well settled. But the border marches require to be cleared and defined. The rule is, that a loan of money beyond £100 Scots can only be proved by the writ or oath of the alleged debtor. The principle of equity is, that where the receipt of a sum of money is instructed by writing there arises a presumption that the receiver is bound to account—in some circumstances to repay—in all to explain.

In the present case, where we have a writing proving receipt of the money, and also an admission of the receipt, and where the facts, so far as yet ascertained, are few and simple, the difficulty arises in the ascertainment of the true relation and bearing on the case which, under the circumstances, exists between this principle of equity and this rule of law. To what extent does the rule of law here exclude the principle of equity? or, on the other hand, to what extent does the principle of equity here qualify the rule of law? We do not yet know the true state of the facts. Is there not a case for inquiry?

The action is brought by Mr. Haldane, judicial factor on the estate of the late Rev. Alexander Speirs, against Douglas Speirs, the brother of the deceased. It is alleged that Alexander Speirs lent £750 to Douglas Speirs, and handed to him a cheque, payable to Douglas Speirs or bearer, on the Royal Bank of Scotland. That this cheque was received by the defender, and presented by him at the bank, and that he received the money and indorsed the cheque, is not matter of dispute. It is admitted on record by the defender. But, apart from that, it is instructed by production of the cheque bearing the indorsation of the defender. It is clear in point of fact, and not disputed.

Donation is not alleged by the defender, and is never presumed. The statement of the defender on record is that the cheque was given in payment of "a debt of a larger amount," due for moneys advanced, and "for professional services rendered, and medicines furnished to the late Alexander Speirs during the time when he was minister of Kilsyth." This is all the explanation which the defender gives. He has received,

and he retains, the money; and he stands upon the legal plea that the cheque, taken by itself, is not sufficient proof by writ of the [560] loan, and that all investigation into the actual state of the facts, and into the verity of the averments of the parties, except by reference to the defender's own oath, is excluded.

The Lord Ordinary has allowed the parties a proof before answer of their respective averments—the pursuer to lead in the proof. I am of opinion that this interlocutor is sound, and ought to be adhered to. I think that it rightly maintains the rule of law, and yet justly recognises the principle of equity to which I have adverted.

In support or explanation of the general rule of law I need not again refer to authorities. They have been already mentioned. That a loan of money cannot be proved otherwise than by writ or oath is clearly laid down by our great institutional writers, and has been recognised as law since the days of Lord Stair (Stair, iv. 43, 4; Erak. iv. 2, 20). I have no intention of challenging or of doubting this rule.

The principle of equity is, in my opinion, no less clear, and is no less firmly settled, though it has been more gradually evolved in the course of judicial decisions. That it is a just and equitable principle is beyond doubt,—I am now speaking of its recognition. The trace of it is to be found in very early judgments, and as our jurisprudence became more and more affected by the great moral and equitable considerations suggested and necessitated by commercial relations, the principle has been more fully developed, and more clearly recognised.

Without going back to any earlier date, I find that in the case of Ogilvie *v.* Abercromby, Jan. 7, 1703, M. 11,510, it was decided that a receipt for money implies an obligation to repay. The same principle was recognised in the case of Donaldson *v.* Walker, June 11, 1711, M. 11,511. After the lapse of a century we find the same principle yet more clearly and emphatically recognised in the case of Ross *v.* Fidler, Nov. 24, 1809, F. C., which, like the present, was a case of loan. That was an action brought for payment of a loan of £30. The evidence of the loan was (1) a letter from Fidler requesting from Ross an order on his cash-account for £30. The letter did not bear, in terms, to be a request for a loan. It might, or it might not, have been so. It might have been a request for a gift, or for payment of a debt. (2) A bank order or cheque in exactly the same terms as the present. (3) A letter from Fidler, the payee, to the cashier of the bank, requesting payment of the money, which may be held equivalent to the indorsation of the cheque, which we have in this case. I have looked into the Session Papers, and can confirm the statement of Lord Deas. A proof was taken, and facts not without some importance were ascertained. The Lord Ordinary, on considering the proof and these documents, found it instructed by the letter and the cheque, and the other evidence, that Fidler received £30 from the pursuer, and that the defender (the representative of Fidler) had not instructed the same to have been in extinction of a debt due by the pursuer. Therefore he decerned against the defender. To this judgment the Court adhered, on the grounds therein expressed. In almost every particular the circumstances of this case of Ross *v.* Fidler are the same as in the present case. In one respect, however, it was less favourable to the pursuer than the present case. Fidler, the receiver of the money, and the man to whom the loan was said to have been made, died before the action was brought. The defender in the action was not the receiver, but only the representative of the receiver, of the money. He might not, and probably he did not, personally know the facts. In the present action the receiver of the money, the man to whom the loan is said to have been made, is himself the defender; and he must personally know the whole truth in regard to the facts and circumstances of the transaction. Having that personal knowledge, he has offered no intelligible explanation of the footing on which he received this very considerable sum. But, apart from this distinction, the case of Ross *v.* Fidler is directly applicable here. Accordingly, the Lord Advocate evidently felt it to be so; and he scarcely attempted to distinguish between the two cases; and, for my part, I am quite unable to perceive any sound distinction, except indeed the one to which I have alluded, —a distinction which is favourable to this pursuer.

Of course it was open to the Lord Advocate to contend that the judgment in [561] Ross *v.* Fidler is wrong, and he has done so, not I think with success. I shall endeavour to show that it has to a large extent received important confirmation, but that it has been accepted and recognised as authority I have no doubt. It was a judgment pronounced by the Court, with President Blair at its head. It was given unanimously, and without hesitation, and it was in accordance with the judgment of

the Lord Ordinary. Sixty years and more have passed since it was pronounced; it has been repeatedly quoted and founded on by counsel, and referred to by the Court, and, until the remark of Lord Benholme to-day, I have been unable to discover any expression of judicial disapproval of that decision. It remains, I think, to this day a recognised authority on the very point before us—an authority not so old as to be out of date, yet old enough to have been fortified by long-continued recognition.

Coming down to a more recent period, we have the case of Allan *v.* Murray, June 13, 1837, 15 S. and D. 1130. This also was an action for payment of a loan, or advance of money. An acknowledgment in the briefest and simplest form of receipt of the sum claimed, and containing no obligatory words, was held as instructing, in the absence of evidence to the contrary, the constitution of a debt, and a general obligation to repay. Lord Jeffrey, whose interlocutor was adhered to by the Court, held that "a naked obligation of receipt of money does *in dubio* import the constitution of a debt, and a general obligation to repay"; and his Lordship refers to the decisions in the three cases which I have mentioned, viz., the cases of Ogilvie, of Donaldson, and of Ross *v.* Fidler. The same principle was applied in the case of Martin *v.* Crawford, June 4, 1850, 12 D. 960, so well explained by Lord Deas. Lord Wood, as Ordinary, pronounced judgment in that action for repayment of loan, in respect of a bare receipt for money, and he allowed to both parties a proof of facts and circumstances. His Lordship refers expressly to the decision of Lord Jeffrey in the case of Allan, and to the authorities there quoted by him, including, as I have already said, the case of Ross *v.* Fidler.

So also in the case of Fraser *v.* Bruce, November 25, 1857, 20 D. 115. This was an action for repayment of a loan. The receipt of the money was proved by the defender's signature in the pass-book of the savings bank, and the Court held that, where receipt of the money is instructed by such a writing, the receiver must prove that he received it on some footing other than under an obligation to repay. There was in that case some irregularity in the procedure in regard to the position and effect of the defender's deposition. But, apart from that irregularity altogether, it cannot be doubted that the principle recognised in the previous cases was again accepted and enforced.

Then we have the case of Thomson *v.* Geekie, March 6, 1861, 23 D. 693. In that case there is a specialty, viz. that the written receipt for the money was qualified by the words "as per agreement." Your Lordship now in the chair, then Lord Justice-Clerk, was of opinion that these words were important, and qualified the receipt, and on that ground your Lordship differed from the rest of the Court; but I do not understand that your Lordship expressed any dissent from the judgment on the assumption that these words had not been in the receipt. Now, the Court found, adhering to Lord Kinloch's interlocutor, 1st, that receipt of the money was proved by the document; and 2dly, that it was not proved that the sum was received otherwise than in loan, and under obligation to repay. The previous cases which I have mentioned were again referred to in this cause. I observe that your Lordship in the chair did, in the recent case of Christie's Trustees *v.* Muirhead, in referring to the decision in Thomson *v.* Geekie, say —"There is nothing better settled in our law—the case of Thomson *v.* Geekie is conclusive on the point—than that a receipt for money in absolute terms is sufficient evidence of a loan." Yet it is not conclusive, but only sufficient till the facts are ascertained, for a receipt for money in such terms may be given where there has been no loan. But there must be inquiry.

From this series of decisions, which might be further extended if necessary, I feel that I can safely hold it to be settled that a written receipt or acknowledgment of payment of money implies an obligation to repay, or at least to account; that this is the presumption arising from the receipt; and that the receiver, if he resists an action for payment, must instruct that, in point of fact, he received [562] the money on some footing other than an obligation to repay. Had there been in this case a receipt or acknowledgment in general terms for this sum of £750—a receipt paid by the defender to his deceased brother—I should have held that, unless the defender instructed a gift to him, or instructed the existence of some debt to him by his brother, in payment of which the money was received, an obligation to repay must be presumed, and repayment enforced. Donation is not here alleged or suggested by the defender, and is never presumed. The receipt of money admitted, and proved by written acknowledgment, and without even any counter averment of donation, cannot, without inquiry into the facts and circumstances under which it was received, be set aside or ignored, in the manner maintained by the defender. Cases where the receipt of money is not instructed

by writing are not in point. There is no case in which inquiry has been refused where a direct receipt was given in such circumstances. In most cases where there is a written receipt the burden of instructing facts sufficient to relieve from the obligation to repay has been laid upon the defender. The onus may be easily shifted. In all such cases there must be inquiry.

I am not doubting the general rule. But we must take care that we do not extend its scope and effect beyond what has been recognised by decision.

The proof of a loan of money is proof of a composite transaction, of which the component parts are—the payment or delivery of the money, and the quality of the payment, involving the footing on which it was paid, and the constitution or the exclusion of an obligation to repay.

If there is no writing there can be no proof of the loan of money except the oath of the defender. The decisions mentioned by your Lordship in the chair, including the case of Birnie *v.* Darroch, do not, in my opinion, go further than this. But if there is written proof of payment, especially when confirmed by admission of payment on record, then the composite character of the transaction is broken up. It is not then, after the writing has been produced, correct to say that a loan of money requires to be proved. What really remains to be proved is the quality and the condition of a payment which has been instructed by writing. Of that quality, of these conditions, real evidence may be furnished by the surrounding facts and circumstances; and I venture to repeat that there is no sufficient authority for excluding the investigation of these facts and circumstances.

The clearing up of the question, *quo animo* was the payment made, is manifestly necessary to the ascertainment of the true meaning and effect of the written document by which the fact of payment is instructed. Such inquiry into surrounding facts and circumstances has been repeatedly sanctioned and directed by the Court in cases of alleged donation, as explained by Lord Deas.

The same inquiry has been directed in cases falling under the law of triennial prescription (Act 1579, c. 83), where writing being produced to instruct the debt evidence to clear up what was left unexplained was directed. I may refer to the cases of Stevenson *v.* Kyle, Feb. 5, 1850, 12 D. 673, and Fife *v.* Innes, Nov. 17, 1860, 23 D. 30. So, also, in cases to which I need not particularly advert, falling under the sexennial prescription.

In the present case we have not a direct receipt for the money given by the defender to his brother, and intended to be retained by the brother as a voucher of debt. That however, is not always necessary. An admission in a letter addressed to another, or an entry in the books of the defender, if clear in import, would be sufficient. We have here a cheque by the late Mr. Speirs in favour of the defender, by name or bearer; we have the defender's indorsation of that cheque; and we have what was perhaps scarcely necessary, but which, being here, cannot be easily got rid of, the admission on record of the receipt of the money by the defender. The defence is that the money was received, and received through the medium of that cheque, though not in loan.

I appreciate fully the very able argument of the Lord Advocate, especially on the distinction between the production of a receipt granted by the receiver to the payer, to be held as a voucher, and the production of an indorsed cheque on a bank, payable to the defender. That distinction is of great weight and importance, and it was earnestly and powerfully pressed on us. There is no doubt [563] that the mere production of a bank cheque, even when indorsed by the payee, does not raise the same presumption of obligation to repay as is raised in the case of a direct or even of an indirect receipt. A very large amount of the payments made in ordinary life, particularly above £5 or £10, is made through the medium of bank cheques. These cheques may be in general terms, or may be specially to a payee named, or to a payee or bearer. Even in the latter case, where the payee is named, and where he indorses the cheque, I do not think it conclusive of the obligation to repay. It cannot be at once taken for granted or be reasonably presumed that he has received the money in loan. He may have got the money on a different footing. He may have immediately expended it for behoof of the granter of the cheque, or have immediately returned the money to the granter of the cheque, and taken no document to instruct such return. The observations made by Lord Neaves in the case of Gow *v.* Sim, March 15, 1866, 4 Macph. 578, on this point are important:—"When a party holds a document acknowledging receipt of money, and not bearing to be in discharge of a debt, he is not driven to refer the question of loan to the oath of his adversary.

The law presumes the obligation to repay from the possession of such a document. Here we start with a document, but a document of a kind which does not acknowledge anything, and does not therefore import or infer an obligation to repay." It is, however, to be observed that that case arose out of a reference to oath, and the point now before us did not there arise. The chief question argued in that case was, whether the statements in the deposition were intrinsic or extrinsic. The observations of Lord Neaves are certainly favourable to the distinction,—sound, I think, in itself, and so well urged by the Lord Advocate. To that extent, and as affecting the question of onus, I do not differ from Lord Neaves' opinion in the case of Gow *v.* Sim. I recognise the distinction, and I am not prepared to say that in this case of a bank cheque the same presumption, or an equivalent presumption, either in its nature or in its force, arises, as in the case of a direct receipt for money. I do not think that such a weighty presumption arises. The obligation to repay does not, I think, so arise from an indorsed cheque as to throw at once upon the defender the burden of clearing himself of obligation by proving the footing on which he got the money. So far the argument of the Lord Advocate has great weight.

But the question still remains, shall inquiry into the circumstances—into the real evidence supplied by the facts—be excluded? Can the defender, without giving explanations, and without inquiry into the facts, retain the money, of which he admits the receipt, and of which, unquestionably, the receipt is proved? Is this matter not examinable? Are the facts and circumstances under which the cheque was given and the money received to be ascertained by proof? Or is the pursuer now limited to proof by reference to the defender's oath?

I am humbly of opinion that inquiry cannot justly be denied. The basis of the pursuer's case is writing. The question is, on what footing did that writing pass? *Quo animo* was that writing delivered? I think that the Lord Ordinary has come to a sound result, and has rightly allowed to both parties a proof of their respective averments—the pursuer to lead in the proof. I think that, receipt of the money being proved by writing, and admitted, the matter is examinable, and that inquiry cannot be excluded; but I also think that the onus does not primary rest on the defender, as it does in the case of a distinct and direct receipt.

I agree in the views on this point now fully explained by Lord Deas; and indeed I concur generally in his opinion, which is, I think, in accordance with the opinions of the Court in the case of the National Bank *v.* Bryce, Jan. 20, 1866, and other similar cases.

I have no doubt that we should best reach the truth and justice of this case by allowing a proof, and thus ascertaining the real evidence—the facts and circumstances—under which this cheque was granted and used, and this money was received.

The competency of particular questions would be reserved if we adhere to the Lord Ordinary's interlocutor, as the proof would be before answer. We have here a writing and a signature, and we have an admission—the import of both [564] is the same. I am of opinion that inquiry into the surrounding facts and circumstances is not excluded by law, and is essential to the ascertainment of truth and the doing of justice. We must hold that this money was received by the defender from his brother. It is admitted, and it is proved. It is impossible to doubt it, and nobody does doubt it. Around the writing which instructs the receipt of the money, and which is confirmed by the admission on the record, there cluster the facts and circumstances of real evidence, which, when ascertained, will lead us to the truth, by explaining the transmission of the writing which is produced, and the nature and purpose of the payment which is admitted.

It is said that to permit this inquiry would be dangerous to the law. I do not think so. The equitable principles evolved in the progressive jurisprudence of this country have, in several instances, been, with great advantage and great propriety, applied in construction and application of the stricter and narrower rules of our older law. The restrictions of evidence, when not statutory, have yielded to the demand for light, as the *metus perjuriæ* has yielded to the desire for truth. The exclusion of inquiry is now less favoured than in former days. The weight and value of the real evidence afforded by facts and circumstances is more highly and more truly appreciated now than in former days.

There is no danger to the law so great as the danger of doing injustice.

I agree so entirely with Lord Deas that I have nothing further to add.

LORD KINLOCH.—It is admitted on both sides in this case that, on or about the 14th October 1870, the defender, Mr. Douglas Speirs, received from his brother, the late Rev. Alexander Speirs, a cheque or draft on his, the Rev. Alexander Speirs', cash-account with the Royal Bank at Glasgow for £750. The cheque was made payable "to Dr. Douglas Speirs or bearer." Mr. Douglas Speirs received the money from the bank, and handed over to them the cheque, with his signature written by him across the back.

The pursuer, as representing the estate of the Rev. Alexander Speirs, now sues the defender for this sum as belonging to his constituent's estate. His averment is that the sum was given to the defender by his brother in loan, in order to enable him to pay the price of certain superiorities. The defender alleges, on the other hand, that the cheque was handed to him "in payment of a debt of a larger amount due to him by the said Rev. Alexander Speirs for moneys advanced to and for him, and for professional services rendered and medicines furnished to him during the time he was minister of Kilsyth."

The Lord Ordinary has, "before answer," allowed to the parties "a proof of their respective averments." The question is, whether the Lord Ordinary has done right in allowing this proof.

It is impossible to dispute that it is the general rule of the law of Scotland that a loan of money can only be proved by the writ or oath of the alleged borrower. But the writ of the borrower is not necessarily a formal receipt, or a document of any one kind more than any other. The debt may be proved by written evidence of any sort, provided only it be what the law will regard as the writ of the party. Thus, it may be proved by entries in books kept by the party or under his direction, and considered by the law as his writ. It may be proved by jottings, memoranda, or accounts, provided they come under the same category. There is no limitation or qualification as to the writings by which the debt may be established, except simply that they must be what the law will consider the writ of the party.

In the present case there is proof, by the writ of the defender, of at least one fact of great importance, viz., that he, the defender, received from the Royal Bank of Scotland a sum of £750 out of the funds in that bank belonging to the Rev. Alexander Speirs. I put aside the defender's admission of the fact, because this may be held given under the qualification that the money was received in payment of a debt, and so be not admissible except subject to this qualification. I consider the indorsement by the defender of the cheque on which he received the money as a receipt for the amount under the hand of the defender. Such is the meaning which, according to the invariable practice of banks, is attached to [565] the indorsement. The cheque being payable to bearer, such indorsement might not have been necessary to obtain the money. If the money had been obtained without it, all that can be said is, that the written evidence now existing would have been wanting. But, as matters stand, I consider the indorsement to be as much evidence of the receipt of the money under the defender's hand as if he had written and signed a formal receipt, bearing "Received by me, of this date, from the Royal Bank of Scotland, the sum of £750, out of funds in their hands belonging to the Rev. Alexander Speirs."

It is said that the document thus indorsed was only a voucher to the bank, not to the Rev. Mr. Speirs. I cannot admit this. I think it was a voucher to both. It fell to be given up to Mr. Speirs by the bank on a settlement of his account, and to be thereafter retained by Mr. Speirs. Such a voucher is often in practice retained as corroborative evidence of payment of money. But I think the point immaterial. It is not necessary to constitute a document the writ of a debtor that it should be formally given to the creditor. Entries in books and the like are illustrations directly to the contrary. It is not the less the writing of the defender, proving against him the receipt of £750 out of the funds of the Rev. Mr. Speirs.

The importance of this piece of written evidence is made manifest by the consideration that by several decisions of our Courts it is settled, as appears to me, that where money is proved, by written evidence under the hand of the receiver, to have been received by one man from another, and nothing else appears than the receipt of the money, the legal presumption is that it was received in loan. It is unnecessary on this point to do more than to refer to the case of Thomson *v.* Geekie, March 6, 1861, 23 D. 693, in which a document running thus—"Received from Mr. Geekie the sum of £30 sterling, as per agreement," was held presumptively to import a loan. Some difficulty

was created by the insertion of the words "as per agreement," which created a division of three to one in the Court. But, except for these words, all were agreed as to the legal import of the document. The general principle thus laid down by Lord Wood was on all hands acquiesced in—"A writing simply acknowledging receipt of money by the granter, taken by itself, is law enough *prima facie* to entitle the grantee to repayment; it being, however, competent to the granter to rebut the legal presumption by competent evidence, instructing that the money was paid on a different footing—what is competent evidence depending on the nature of that which is proposed to be established.'

If the case at present had been that £750 had been paid over in bank notes by the Rev. Alexander Speirs into the hands of the defender, and the fact of this payment was set forth in a written minute signed at the time by the defender, though not addressed to any one in particular, the principle of Thomson *v.* Geekie would, I think, directly apply, and the payment be held a loan, unless the defender proved the contrary. It is not easy to draw a distinction between money paid over in bank notes and money paid by a cheque on the bank. If the receipt of the money is established, the legal presumption may be fairly said equally to follow in both cases. It is not the form of the document proving the receipt of the money which is material; it is the fact of the receipt of the money, nothing else appearing by which the presumption is raised.

The difficulty in the present case is supposed to arise out of the peculiar nature of a bank cheque. It is said that, in practice, to grant a bank cheque is the common way of performing, not one, but many different cash transactions. It is not merely the way of granting a loan; it is as much, if not more, the way of paying an account, sometimes the way of granting a donation, often the mere method of expressing a mandate to a clerk or other official to receive and bring back the money. With all this in view it is said that it would be against principle and against justice to hold a debt presumptively fixed against the person getting the cheque and receiving the money. The case of a clerk or cashier has been particularly referred to; and it has been asked how it was possible to hold such an one fixed with the money, unless he could prove that he got it as a mere hand, and faithfully accounted for it.

I fully admit the force of these considerations, though I consider them to go [566] but a short way towards the solution of the present case. It does not, with all deference, seem very logical to argue that, because the money might be received on many different accounts, therefore it is to be held in the same position as if not received at all. It seems more consistent with reason to hold that there should be an inquiry into the precise account or consideration on which it was received, which is in substance what the Lord Ordinary's interlocutor proposes. The argument, I think, throws out of view that the receipt of the money only raises, *ex hypothesi*, a presumption that it was received in loan. This presumption may be redargued by proof; may, indeed, be redargued by other presumptions equally strong, or stronger. Thus, in the case of the clerk, the proved fact of his going, day by day, to draw money for his employer on his employer's cheque, and bringing that money back and paying it, may, in the ordinary case, set aside any persumed liability to account, although even here extraordinary circumstances may occur to maintain this liability. So in a great many cases. The circumstances may be such as to take from the receipt of the money all force of presumption against the receiver. In the present case the receipt of the money may lose all weight when the circumstances of the case are established. The question is, whether these circumstances can be competently inquired into, or whether the defender is at once to be assoilzied, or the whole matter to be put within the arbitrament of his own oath? My opinion is in favour of the former alternative.

The proposed proof is not to establish a loan by parole evidence. There is already the defender's writ establishing the fact of that receipt of money which ordinarily presumes loan. The object of the proof is to clear presumptions, and this very especially in the interest of the defender, the presumed debtor. I consider it to be quite competent, where the general rule of law confines the evidence to writing, to allow parole evidence to clear ambiguities in the writing; and the best that the defender can say is, that the writing is ambiguous in its import. I perceive nothing in the general rule to exclude evidence of facts and circumstances explanatory of the writing, and showing *quo animo* the cheque was given and taken. I say "the evidence of facts and circumstances," because it is these which I have mainly in view in the contem-

plated proof. It may be fairly made matter of controversy whether it would be competent to call the defender as a witness, and put to him the direct question, whether he received this money in loan. I reserve my opinion on that point, whether abstractly or in connection with the special circumstances which may give competency even to that question. But I am clearly of opinion that it is competent to lead evidence as to the surrounding circumstances of the parties at the time of delivering the cheque, and I think that such evidence would not improbably afford a very easy solution of the case. If, for instance, it was established that the very day the defender received the money he went straight from the bank and paid it as the price of the superiorities bought by him, and there was no pretence of evidence that any debt was due him by his brother, there could be very little doubt as to how the case should be decided. For my own part, I should have been content that the interlocutor had in its terms simply allowed "a proof of all facts and circumstances tending to show whether the said sum of £750 was received by the defender as a loan or in payment of a debt." But the same end would be attained by the interlocutor, which is "before answer,"—being understood, or declared, to reserve all objections to particular questions, or lines of inquiry.

I conceive that the proof at which I am now pointing has been allowed by the Court in cases having, as here, the basis of a writing by the defender, and this so frequently as to constitute overruling authority in the present case. I cannot, in point of principle, distinguish the present case from that of Ross *v.* Fidler, decided so far back as 24th November 1809, now more than sixty years ago. In that case there was no writing of the alleged debtor which proved more than is proved in the present case, viz., that on a certain date a certain sum of money was received by him out of the funds of the alleged creditor by means of a bank cheque. A proof was allowed; and the Court, proceeding on [567] that proof, along with the written documents, found that a loan was constituted, inferring repayment by the party receiving the money.

Since the date of Ross *v.* Fidler several cases have occurred in which a written document was produced, proving receipt of money, but not formally expressing it to have been received in loan, and in which, before deciding, the Court allowed a proof. In some the Court found themselves compelled, from defect of proof, to proceed ultimately on the legal presumption attached to the document. But they did not do so until they had exhausted all the means of information which a proof would supply. I find that such a proof was allowed in Martin *v.* Crawford, 4th June 1850, 12 D. 960; Allan *v.* Munnoch, 30th January 1861, 23 D. 417; Thomson *v.* Geekie, 6th March 1861, 23 D. 693; Kennedy *v.* Rose, 8th July 1863, 1 Macph. 1042; Bryce *v.* Young's Executors, 20th January 1866, 4 Macph. 312; Muir *v.* Ross' Executors, 13th June 1866, 4 Macph. 820. In some of these cases the question which arose was whether money received on an indorsed deposit-receipt, or on a bank cheque, was to be held a donation, or money to be accounted for. But they are not the less authorities in the present case, because the general rule of law that proof is limited to writ or oath applies as much in the case of a donation as of a loan. If the allegation of the defender in the present case had been that the money received on the bank cheque was given him as a donation by his now deceased brother, the question whether it was so given, or whether he was bound to account for it to his brother's representatives, would on these authorities have been resolvable by a proof *prout de jure*. But I cannot conceive the principle varied merely because the question is not about donation, but loan. The principle is that laid down by Lord Curriehill in the case of Bryce *v.* Young's Executors, already referred to by Lord Deas, which I would apply *in terminis* in the present case. "This action (said his Lordship) involves questions of nicety. But I do not think amongst them is the question whether a donation can be proved by parole evidence. The very basis of the rule is taken away in this case, because we have here a written document, granted by the owner of the fund, directing the holder of it to pay to Miss Bryce. The basis of the case, in short, is writing; and the question is, *quo animo* was that writing delivered? There may be a presumption in the circumstances that this money was meant for Miss Bryce's own use; but that presumption is open to inquiry by evidence of any kind, and therefore I think parole evidence is competent."

My conclusion is that this case ought not to be decided without a proof. If such a proof were allowed I should reserve my opinion as to its effect, and also as to the competency of any particular evidence tendered. I should reserve my opinion as to what I should find to be the effect of this document, if the proof afforded me no further

light. All that I at present say is, that I cannot assoilzie the man who is proved under his own hand to have received £750 of his deceased brother's money, without some further inquiry, by means of evidence taken in Court, and other than the defender's own oath, into the ground or consideration on which he received it. To refuse such inquiry, on the plea of the rule excluding all proof of loan except writ or oath, appears to me, with all deference, to strain a principle to an inequitable application, and beyond its just legal scope.

LORD COWAN.—An unreported decision of the Second Division—Kyle's Executors *v.* Williamson, in 1871—to which reference has been made by Lord Deas, may require explanation. The action was for payment of money advanced in loan by a cheque given to the defender by the deceased, in whose right as executor the pursuer stood. In defence, the receipt of the money was admitted, but it was alleged to have been received on account of debt, and to retire a bill of which the deceased was acceptor. The Lord Ordinary, before answer, allowed proof to both parties of their respective averments, and under that interlocutor, which was not reclaimed against, parole proof was led. The first witness called for the pursuer was the defender himself, and his deposition, which extends to upwards of nine printed pages, embraced the whole circumstances of the case, and especially had reference to certain letters which passed between the parties [568] and the bill transaction, on which the defender had founded in his defence. The Lord Ordinary, on the proof, decerned against the defender for the full sum libelled. A reclaiming note was presented to the Second Division, and the defender then attempted to get quit of the parole proof on the rule of law that loan could only be established by writ or oath. But, after what had occurred, it was considered that the defender could not in this way get quit of his deposition, and that, having submitted to be examined as a witness, the case must be determined on the proof which had been taken; and under it effect was given so far to the defender's oath, in regard to his having sold cattle to the deceased Mr. Kyle for the price of £84; and decerniture was pronounced only for the balance of the £150. The case was thus quite special, and the decision cannot be regarded as having in any respect touched the important question at issue under this record, and for that reason I presume it has not been reported.

This interlocutor was pronounced:—"Recall the interlocutor of Lord Ormidale of 5th December 1871 reclaimed against: Find that the loan libelled can be proved only by the writ or oath of the defender: Find that the said loan is not proved *scripto* of the defender by the bank cheque with the defender's signature thereon, No. 7 of process; but allow the pursuer to produce any writ of the defender which he possesses or may recover: Find the defender entitled to expenses," &c.

ALEX. HOWE, W.S.—WEBSTER & WILL, S.S.C.—Agents.

[*Distinguished*, Duncan's Tr. *v.* Shand, 1873, 11 M. 254; Nicoll *v.* Reid, 1878, 6 R. 216. *Commented upon*, Macvean *v.* Macvean, 1873, 11 M. 506. *Questioned*, Williamson *v.* Allan, 1882, 9 R. 859. *Referred to*, Anderson's Trs. *v.* Webster, 1883, 11 R. 35. *Commented upon and distinguished*, Robb *v.* Robb's Trs., 1884, 11 R. 881. *Commented upon*, Dunn's Tr. *v.* Harvey, 1896, 23 R. 621; Paterson *v.* Paterson, 1897, 25 R. 144; Thiem's Trs. *v.* Collie, 1899, 1 F. 764.]

No. 102. X. MACPHERSON, 568. 8 Mar. 1872. 1st Div.—Lord Mure, M.

RIGBY AND BEARDMORE, Pursuers.—*Sol.-Gen. Clark—Lancaster.*
ROBERT DOWNIE, Defender.—*Watson—Reid.*

River—Nuisance—Acquiescence.—In an action of declarator and interdict brought by a lower against a superior heritor on a private river, for the purpose of preventing the pollution of the stream by the discharge from a chemical work recently erected by the defender,—*held* that the alleged acquiescence of the lower heritor in a previous pollution by a chemical work on the same site, which had ceased to exist for twenty-eight years, did not bar him from objecting to the pollution caused by the defender's work.

Rigby and Beardmore carried on an extensive business as engineers and iron-founders at Parkhead Forge, near Glasgow, their works being situated on ground partly belonging in property to them, and partly held in lease. Carntyne Burn flowed through their property, and its water was used by them for supplying their boilers.

In 1869 Robert Downie erected a chemical work on land acquired by him for that purpose, also adjoining Carntyne Burn, but above the ground occupied by Rigby and Beardmore.

In an action raised by Rigby and Beardmore against Downie in August 1870, the pursuers concluded for declarator that they "have good and undoubted right to have the water of the Carntyne Burn or stream, so far as it flows through or by their property, transmitted to them in a state fit for the use and enjoyment of man and beast, and for all the primary purposes of water, or at least that they are entitled to have it transmitted to them in the state in which it flowed prior to July 1869, and unpolluted by any material which renders it unfit for use in their steam-boilers, or for ordinary manufacturing purposes, and that the defender has no right to pollute the said water, or to use it or the bed of the said stream in any way so as to render the said water unfit for its natural primary purposes, or for use in the pursuers' steam-boilers for the ordinary manufacturing purposes for which it was fit prior to the said date"; and for interdict [569] against the defender discharging noxious matters from his dye-works into the river.

The pursuers averred that since the erection of the defender's work in July 1869 the defender had discharged into the burn large quantities of alkaline and highly putrescible refuse, and other noxious and offensive liquids or substances, the effect of which was to make the water of the burn a nuisance, to unfit it for the primary uses, and to deprive the pursuers of the use of the water for their steam-boilers and other purposes, for which it was rendered unfit.

The defender averred, *inter alia*, that the water had forty years before been polluted by chemical and manufacturing works on the same ground, and that for forty years the burn had been dedicated to and used for the purposes of manufactures without objection on the part of the pursuers or their predecessors.

The pursuers pleaded;—(1) The water of the said burn having from time immemorial flowed in its natural state, and fit for the primary uses of water, the operations of the defender are unwarrantable and illegal. (2) The water of the said stream being by and through the operations of the defender polluted and rendered unfit for any of the primary purposes of water, the pursuers are entitled to decree as concluded for. (3) The defender is not entitled to pollute the water of the said burn by the discharge into it of noxious material or otherwise, so as to render it unfit for the ordinary purposes of manufacture to which it has heretofore been applied.

The defender pleaded, *inter alia*;—(4) The action is excluded by the acquiescence of the pursuers or their predecessors in the use made of the said burn by the pursuers and their predecessors and authors. (5) The said burn or stream being from its source mixed with deleterious substances, and having for time immemorial, or at least for more than forty years previous to the date of this action, received the aforesaid sewage, drainage, and refuse, and also refuse of the chemical work situated on the ground now belonging to the defender, and being an urban stream, the defender was entitled to the use and benefit of the said burn for the processes carried on in his work. (6) The defender and his predecessors having acquired a prescriptive right in the use of the water for chemical and similar purposes, the present action is unfounded. (7) The said burn having for time immemorial, or at least for upwards of forty years previous to the raising of this action, been dedicated to and used for purposes similar to or identical with those now complained of; and, *separatim*, the water therein having for said period been so much polluted as to be unfit for the primary uses, the action is unfounded. (8) The pursuers are barred from challenging the defender's operations by prescription, or by the long lapse of time during which the river has been dedicated to manufacturing purposes.

A proof was led, in which it appeared that from 1841 to 1869 there was no manufacture of any kind on the stream higher up than the pursuers' works; that sewage from a farm-yard, and water pumped from a colliery, entered the stream above their works, but did not unfit the works for the primary uses. A vitriol-work had existed above the pursuers' works from an uncertain date subsequent to 1801, was suspended for some time in 1827, and finally ceased in 1841. It rather appeared that

the pollution caused by this work was not great or permanent. The proof conclusively showed the noxious character of the water below the defender's works.

At the close of the proof a minute was lodged for the defender, consenting that it should be found that he was not entitled to discharge into [570] the burn any material which might render the water of the burn unfit for use in the pursuers' steam-boilers, and to interdict to that extent; and that the defender was willing, and offered, in implement of such decree of declarator and interdict, to make such alterations on his works as were necessary, at the sight of Dr. Stevenson Macadam, or such other skilled person as should be named by the Court. The pursuers did not consent to take decree in terms of the minute.

The Lord Ordinary pronounced an interlocutor (17th June 1871) finding "(1st), That at the date of the erection of the defender's works in the year 1869, the Carntyne Burn, where it flows between the property of the defender and that of the pursuers, was well adapted for use in steam-boilers, and was also fit for most of the ordinary primary purposes of river water: Finds (2d), that immediately after the erection of the defender's works the water of the said burn became unfit, and, down to the date of the present action, continued to be unfit for the ordinary uses of river water, and in particular for use in steam-boilers, in consequence of refuse water of a noxious character which was discharged into it from the dye-works of the defender: Finds (3d), that since the present action was raised certain experiments have been made by the defender by means of a tank and other apparatus for the purpose of removing impurities from the water used by him in the works before it is discharged into the burn, and which it is alleged by him are calculated to have the effect of rendering the water so discharged safe for use in steam-boilers; and before further answer, remits to Mr. Alexander Crum Brown, Professor of Chemistry in the University of Edinburgh, to inspect the defender's said dye-works and manufacture, and the discharge of refuse water therefrom into the burn by means of the said tank and other apparatus; and to report whether, in his opinion, the water so passed into the burn is in a condition to be used with safety in the steam-boilers belonging to the pursuers; and, if not, whether there is any other, and, if so, what process to which he would recommend that the refuse water at the defender's works should be subjected before being restored to the Carntyne Burn, in order to render it safe for use in steam-boilers; and reserves all questions of expenses." *

---

* "NOTE.—It is, in the opinion of the Lord Ordinary, pretty clear upon the evidence that since the erection of the defender's works the water of the Carntyne Burn has, owing to the discharge of refuse water from those works, been rendered quite unfit for the purposes to which it was in use to be applied by the pursuers. As at present advised, however, the Lord Ordinary is not satisfied that the case can be dealt with on the footing that the water of the burn had for time immemorial, before the erection of the defender's works in the year 1869, been fitted for all the primary purposes of river water where it flows past the property of the pursuers. At and for some years prior to that date, there is, he thinks, evidence sufficient to instruct that the water was so used. But there is a considerable body of evidence, on the other hand, to show that from about the beginning of this century down to about the year 1841 there was a chemical manufactory carried on upon the ground now occupied by the defender, in which the water of the burn was used, and thereafter returned to the burn in such a state as to render the water of the burn, during that discharge, unfit for its primary uses. And assuming that to be the fact, the case may, it is thought, require to be dealt with as being under the category referred to in the decision in the case of Cowan, December 21, 1866, *ante*, vol. v. p. 217, where a stream has been to a considerable extent devoted to secondary purposes.

"In these circumstances, the Lord Ordinary has thought it better, before pronouncing any operative decree, and having regard to the offer made in the minute for the defender, to remit to a neutral person of skill to report upon the defender's works, and the condition of the water as now discharged therefrom. [571] If it shall appear from the report that, by means of some process recommended by the reporter, the water when discharged from the defender's works may be made quite fit for use in the pursuers' boilers, and the defender undertakes to adopt and carry out that process, an interdict of the nature suggested in the minute may suffice to meet the circumstances of the case. If it shall appear, on the other hand, that there is no process the application

[571] The pursuers reclaimed, contending that the remit was unnecessary, and craving decree in terms of the conclusions of their summons.

The Court, on 2d November 1871, before further answer, remitted to Professor Crum Brown to execute the remit contained in the Lord Ordinary's interlocutor, and to report to the Court, reserving, in the meantime, all questions of expenses.

Professor Crum Brown made a report (January 19, 1872), in which, after detailing the experiments and investigations which he had made, he stated — "By these experiments I have been led to the conclusion that the sulphuric acid process (that at present employed by the defender) is incapable, whatever care is taken, of rendering the refuse of the 'scouring-frames' fit for use in steam-boilers. The only other practicable method which I know by which the soap could be removed from the said refuse is the addition of common salt. By this addition the soap is rendered insoluble, and may be removed as a scum. I treated a portion of the refuse in this way, and found that the clear liquid remaining after the removal of the soap still frothed to such an extent as to render it altogether unsuitable for use in steam-boilers. I am, therefore, of opinion that the refuse water as at present discharged from the defender's dye-works, from his tank into the Carntyne Burn, is not in a fit state to be used in steam-boilers, and I am unable to suggest any method by which the said refuse water can be rendered fit for use in steam-boilers."

The defender argued that the report was incomplete, the reporter having examined only the discharge from the defender's works. After mixing with the water in the burn the organic matter referred to by the reporter became innoxious; and a second remit ought to be made to ascertain the state of the water above the defender's works, and as it flowed past the pursuers' works. Upon the merits;—If the defender had been able to show that in 1841 he had acquired a right to use the stream in a certain way, the pursuers could not have deprived him of that right without showing that something had been done by them within the forty years inconsistent with its continuing to be exercised. In the case of a public right of way, acquired by forty years' use, there must be forty years' exercise of the proprietor's right of property, free from the burden of the right of way, to deprive the public of that right.*

The pursuers argued;—The proof conclusively established the case of the pursuers, and they were entitled to decree. The pursuers also founded on the directions of the Lord Justice-Clerk (Inglis) in Duke of Buccleuch *v.* Cowan.

[572] At advising,—

Lord President. — The Lord Ordinary on June 17, 1871, pronounced an interlocutor, with findings which, if affirmed, almost necessarily lead to the decision of the cause in favour of the pursuers. But these were accompanied by another finding, to the effect that, since the action was raised, certain experiments had "been made by the defender by means of a tank and other apparatus for the purpose of removing impurities from the water used by him in the works before it is discharged into the burn, and which it is alleged by him are calculated to have the effect of rendering the water so discharged safe for use in steam-boilers." In respect of the fact so found, his Lordship made a remit to Professor Crum Brown to inspect the defender's dye-works and manufacture, and report whether the water passed into the burn by the tank and apparatus is in a condition to be used in the steam-boilers belonging to the pursuers, and if not, what process he would recommend in order to make the water discharged from the defender's works fit for use in steam-boilers. His Lordship evidently pointed at some adjustment such as might enable the defender to carry on his dye-works without causing an increased pollution of the burn, and so as not to interfere with the use of the burn by the pursuers. The remit to Professor Crum Brown was a very natural course to

---

of which will render the water when discharged fit for use by the pursuers, or if the process recommended is of a description which the defender cannot undertake to carry out, it will still be for consideration whether, assuming the water of the burn to have been fit for the ordinary purposes of river water at the time when the defender's works were erected, the pursuers can now be precluded from insisting in decree of declarator and interdict in the terms concluded for, on the ground that, for a series of years prior to 1840, the water of the burn was rendered unfit, in consequence of the discharge from the chemical works, for any but secondary purposes."

* Rodgers *v.* Harvey, 4 Mur. 36; Duke of Buccleuch, &c. *v.* Cowan, *ante*, vol. v. 217.

adopt; but the pursuers reclaimed, and insisted for immediate decree. We thought it unnecessary to interfere with the course adopted by the Lord Ordinary, which seemed, indeed, to be very much in favour of the pursuers. Accordingly, before farther answer, we remitted (Nov. 2, 1871) to Professor Crum Brown to execute the remit made by the Lord Ordinary, reserving in the meantime all questions of expenses. Professor Crum Brown now reports that "the refuse water as at present discharged from the defender's dye-works, from his tank into the Carntyne Burn, is not in a fit state to be used in steam-boilers," and that he is "unable to suggest any method by which the said refuse water can be rendered fit for use in steam-boilers." This is a complete answer to the remit. But the defender contends that there should be a further remit, to report whether the water before reaching the pursuers' works is in such a state of pollution as to be unfit for use in steam-boilers. That seems to be beyond the remit made to Professor Crum Brown, which was to see whether the water discharged into the burn from the defender's works was restored to a state of purity by certain experiments made since the raising of the action. The report already before us shows that impurities are still discharged from the defender's works, and it is obvious that no device or process resorted to by him since the action was instituted has removed the pollution. It seems, therefore, to be useless to make any further remit. It remains to dispose of the merits of the action. I have read the proof, and I have no hesitation in holding that the pursuers are entitled to the judgment of the Court. The conclusions of the summons, however, are not precisely in the terms in which I should be disposed to give judgment. I should rather be inclined to declare that the pursuers are entitled to have the water of Carntyne Burn transmitted to them in a fit state for the use of man and beast, and for the other primary uses of water, and to have the defender interdicted from putting into it impure or noxious matter, whereby it may be rendered unfit for such primary uses of running water. The condition of Carntyne Burn before the defender's works were erected was just the ordinary condition of a small stream exposed to the atmosphere, and to all the small impurities to which running water is liable. No burn water is absolutely pure; indeed, in the strict sense, no water except distilled water is perfectly pure. Purity in regard to water is a relative term. Even well water is not always pure. But the condition of purity which the law looks to in such a question as this is just the state in which the burn was before the defender's works were erected. It is said that above the defender's works some organic matter is to be found: but so it is in the water of every stream in the country. There is organic matter from the atmosphere itself, and many impurities necessarily combine with water in its progress as a running stream. It is clear that in the sense in which the term purity is applicable to ordinary burn water, this burn was pure before the defender erected his works. It has no doubt been said that the burn was [573] polluted at some previous date, but there is no evidence of any pollution, or any importation of artificial impurities later than 1841, so that we must take it that the burn was pure for twenty-eight years before the erection of the defender's works. The defender thinks that he can rely on improper proceedings which took place at an earlier date, in order to justify his proceedings now. He likens the law in this matter to a doctrine which has been laid down in regard to rights of way. He says, if I can show that for forty years prior to 1841 the water had been used for the purposes of a chemical and manufacturing work on the site of the defender's present works, the right to use the water for similar purposes is not taken away by twenty-eight years' disuse. The analogy relied on is, however, a false one. Properly speaking, no man ever acquires a right to pollute water, in the sense in which the public acquires a right by possession to the use of a line of road. The effect of such use of a stream as is here relied on is, that a person lower down on the stream loses his right of complaint by acquiescence. It cannot be held that a party who had lost his right to complain against an old abuse which has ceased, has lost his right to object to any subsequent abuse of the stream of whatever kind. Moreover, abuse of the water by somebody else does not entitle the defender to abuse the stream as he pleases. But even if we look at the evidence of this earlier abuse, that evidence is of the most imperfect kind. All that can be said is, that we have some evidence of the operation of chemical works for a period of forty years, during part of which they were suspended, and that the pollution so caused by them was never very great, and varied considerably in its amount from time to time. I think, therefore, that this contention must fail. That is the only defence, for the proof of the pollution produced by the defender's works is conclusive.

The other Judges concurred.

THE COURT pronounced an interlocutor, finding "that the experiments or operations of the defender since the institution of this action have not had the effect of preventing the water of the Carntyne Burn from being polluted by the impurities or refuse discharged into it by the defender: Adhere to the Lord Ordinary's interlocutor of 17th June 1871; repel the defences; and find and declare that the pursuers are entitled to have the water of the Carntyne Burn, as it flows by or through their property, transmitted to them in a state fit for the use of man and beast, and for the other primary uses of running water; and interdict and prohibit the defender from discharging into the said Carntyne Burn from his dye-work impure or noxious matter of any kind, having the effect of polluting the said water in its progress by or through the pursuers' property, and rendering it unfit for the primary uses of running water, and decern; Find the pursuers entitled to expenses," &c.

JARDINE, STODART, & FRASERS, W.S.—P. S. MALLOCH, S.S.C.—Agents.

No. 103. X. MACPHERSON, 573. 8 March 1872. 1st Div.—Lord Ormidale, B.

MRS. MARY S. C. HALKETT, INGLIS OR WILSON, Pursuer.—*Sol.-Gen. Clark—Balfour.*

GEORGE JAMES WILSON, Defender.—*Lancaster.*

Husband and Wife — Divorce — Jurisdiction — Domicile. — In an action of divorce raised by a wife against her husband on the ground of adultery the defender pleaded that the Court had no jurisdiction, in respect that he was domiciled in England. After proof that the defender was a Scotsman by birth, and had resided in Scotland, except during five years preceding the date of the action, when he had resided with his mother in England, the Court, holding [574] that the defender had not lost his Scottish domicile, sustained its jurisdiction.

This was an action of divorce at the instance of Mrs. Mary Stuart Craigie Halkett Inglis or Wilson, founded on the alleged adultery of her husband, George James Wilson.

The pursuer averred that she and the defender were born and domiciled in Scotland, although the defender was believed to be out of the country in May 1871 when the action was raised. They were married in the parish of Cramond in the year 1861, and lived together until 1866, when they separated. The pursuer then condescended upon various acts of adultery alleged to have been committed by the defender in Scotland during the period from 1863 to 1870 inclusive.

The defender, who denied the alleged adultery, stated that he was born in Glasgow in the year 1839. From 1851 until 1856 he was resident in England and Germany. In 1858 he accepted a commission in the Lancashire Militia Artillery, and served at Portsmouth and Dover. In 1859 he resigned his commission, and took up his residence in London. From his marriage with the pursuer in 1861 he cohabited with her until 1866, when the facts came to his knowledge, in November of that year, which caused him to withdraw from her society, and he then left Scotland and took up his residence permanently in England with his mother, first at Surbiton, in the county of Surrey, and subsequently at Anerley, in the same county. "He has so resided in England from 1866 until now, and during that time has only visited Scotland three or four times, and only for very short periods, on no occasion exceeding a week. These visits have been altogether incidental, and have in no degree interfered with the continuity of his residence in England, which, since 1866, has been *animo remanendi*. He continues now to be resident in England, and has no intention of returning to Scotland again, and has acquired an English domicile, and lost his Scotch domicile. He has no heritable property in Scotland." (Stat. 2) "The defender believes and avers that the pursuer, since he separated from her in 1866, has resided continuously at Hastings, in

the county of Sussex, in England." (Stat. 3) "Since 1866 the pursuer has been subject to the jurisdiction of the English Court. On the 13th of April 1871, proceedings for dissolution of the marriage between the pursuer and the defender, on the ground of adultery committed by the pursuer, were instituted by the defender in the English Court for Divorce and Matrimonial Causes against the pursuer and one Archibald Howell, the co-respondent. The pursuer has appeared, pleaded, and joined issue in that action. With reference to the answer to this article, it is explained that the pursuer has been ordered to plead to the merits in the English Court, and has done so, and that directions have been issued by the said Court for the trial of the cause. The fact of her having appeared and pleaded, as above stated, has, of itself, according to the law of England, the effect of subjecting her to the jurisdiction of the said Court."

The defender pleaded, *inter alia* ;—(1) No jurisdiction. (2) *Lis alibi pendens.* (3) *Forum non competens.*

After a proof, the import of which is sufficiently apparent from the note subjoined to an interlocutor pronounced by the Lord Ordinary on 15th February 1872, these pleas were repelled, and the cause was appointed to be enrolled with a view to farther procedure.*

---

* "NOTE.—The preliminary pleas now repelled add—1st, No Jurisdiction; 2d, *Lis alibi pendens*; and 3d, *Forum non competens.* As the Lord Ordinary has not felt much hesitation in repelling these pleas, and does not think that any of [575] them are attended with difficulty, a very few observations will be sufficient in explanation of the grounds on which he has repelled them.

"1. In regard to the question of jurisdiction, it is true that the defender is at present, and has since November 1866, a period of about five years, been resident in England. But on the other hand it is unquestionable, and was not disputed, that both he and the pursuer are natives of Scotland, that they were married in Scotland, and that the acts of adultery on which the present action is laid are all averred to have been committed in Scotland. Neither was it disputed, nor could have been disputed, that down till November 1866 the domicile of the parties had been in Scotland, and nowhere else. The question comes therefore to be, whether it has been shown that the defender, in November 1866, or at any subsequent time, abandoned *facto et animo* his Scotch domicile, and acquired an English one? The Lord Ordinary is very clearly of opinion that this question must be answered in the negative. Having regard to the judgment in the House of Lords in Pitt *v.* Pitt in April 1864 (4 Macqueen, p. 627), any such thing as a consistorial or matrimonial domicile must be held to be unknown to the law; and therefore, the only question is, whether or not the real and complete domicile of the defender still continues to be Scotch. Scotland was undoubtedly his domicile of origin; and it is not said, nor is there anything whatever to show, that prior to November 1866 he had intended to cast off his Scotch domicile, and acquire a new one in England; nor can the mere circumstance of the defender having in November 1866 gone to reside in England, and, with the exception of a few casual visits to Scotland since that time, resided there, be held as sufficient to establish a change of domicile. It appears, on the contrary, sufficiently from the proof, the Lord Ordinary thinks, that the residence of the defender in England has never been intended by him to be more than temporary and to serve a temporary purpose—the avoidance of his creditors and the practice of economy,—and that he has never entertained the notion of throwing off his Scotch domicile. Accordingly, all his material and patrimonial interests have continued to be in Scotland since November 1866, as they had previously been. His business and his means of existence and sources of income are wholly and exclusively in Scotland, and there is nothing to show that any change in regard to these important matters has ever been contemplated by the defender. And while, on the one hand, the proof shows that the defender has no establishment whatever of his own in England, being there a mere inmate in his mother's house, it also shows that he has still a residence—Ptarmigan Lodge—in Scotland, although it is at present, and has been for sometime back sublet, which he has always evinced a great partiality for, and a strong desire to retain. But if anything were wanting to demonstrate that the defender has not either by his acts or conduct, or expressions of intention, shown that his domicile has been changed from Scotland to England, his own letters during the period in question appear to the Lord Ordinary to be quite conclusive to that effect. They all show the pecuniary difficulties with which he has been

[575] The defender reclaimed, but the Court, without calling for a reply, unanimously adhered.

---

embarrassed, and that it was very much owing to those difficulties, and for the purpose of economising, and for a time avoiding his creditors, that he broke up his establishment in Scotland, and went to live with his mother in the neighbourhood of London. Thus, in his letter of 17th April 1867 to Mr. French, one of his partners in trade in the extensive ironworks at Kinneill, Linlithgowshire, he says in reference to a fund called 'Knox's debt,'—'I have now to state that I have not touched a penny of it as yet, nor of any other sum since October, with the exception of what you sent me last year, and £17, 18s. of Mr. Story. I mention this merely to shew you how little I have had, also to satisfy my creditors that I have been treating them fairly. I may add that I have sold my furniture, let Kinneill shootings, and the Ptarmigan, paid off all my servants, sent the diamonds to their rightful owner, and thus given no shadow of an excuse to any man that I have been extravagant during the last six months.' In a subsequent letter to Mr. French, of 8th August 1867, he writes with reference [576] to a club in Glasgow of which he is a member—'I wish you to pay my club subscription. It is not an impossibility that I should be in Glasgow again, and to renounce the club would involve, in the event of my ever wishing to become a member again, another subscription and another ballot. I have given up two clubs, one in Edinburgh and one in London, and, without wishing to be extravagant, I have a justifiable determination to pay my £5 subscription, and retain some little hold upon Glasgow society.' Again, in his letter to Mr. French of 27th October 1869, the defender expresses considerable anxiety to have certain arrears due by him, as a member of the Glasgow Club, paid off. And in his letter of 8th April 1870 he writes, 'Walter Mackenzie expects, I believe, to give R. D. money enough in May to pay all my debts, and if that be true I do not see what is to hinder me going back to the Ptarmigan myself, at least so say my law advisers. I hope so.' In his letter also of 16th April 1870 the defender expresses his desire to get back to his Ptarmigan residence, and amongst other things says that 'Mr. Gardner or Alexander, I do not know which, writes that they have heard from Mr. Walter Mackenzie about the matter (his debts), and he says he has hopes of being able to finance for the remainder of my outstandings in May, and thus enable me to realise my desire of returning to the lodge. Now, if this be the case, I shall get from him £350 interest, and if, as you say, you may be able to pay the interest on my full capital in autumn, say that capital to be £8500, that would be £425 added to £350, would allow me £775 to live upon. Now, I have been nearly four years away from the Ptarmigan, and my lease is fast running out, and there is danger of the Duke of Montrose declining to grant an extension if I keep constantly away.' And in his letters of 20th April 1870, and 12th June 1871, he alludes to the same subject in much the same strain. In the latter of these letters he says, 'What a nuisance it is to have to let the lodge again. Am I never to return to the home of my fathers?' The Lord Ordinary thinks it clear, therefore, from these letters, as well as the other circumstances of the case, that the defender has not changed his domicile from Scotland to England, and has never as yet at least intended to do so. On this point the Lord Ordinary may add, that although the defender himself could not competently have been adduced as a witness (Tulloh *v.* Tulloh, February 1861, 23 D. 639), it is strange that his mother, with whom he resides in England, has not been adduced as a witness for him; and if it be really the case that his plea of want of jurisdiction was meant to be seriously insisted in, she would be much more likely to throw some light on the question than her coachman and maid, whose evidence on the point appears to the Lord Ordinary to be of no importance. Finally, on the plea of no jurisdiction, it appears to the Lord Ordinary that there was much more and better ground in the case of Pitt *v.* Pitt than in the present for holding that a change of domicile had taken place, and yet it was decided otherwise in the House of Lords. And the same observation applies to the decision in the case of Jopp *v.* Wood (34 Law Journal, Chancery Reports, p. 212), where it was held that a Scotchman who had gone to reside in India in 1805, and died there in 1830 had not lost his domicile of origin. And in the recent case of Douglas *v.* Douglas (Law Reports, Equity Series, vol. xii. p. 617), where the leading previous cases on domicile were reviewed, principles were enunciated and given effect to inconsistent with a judgment in favour of the defender in the present case.

"2. The defender's plea of *lis alibi pendens* is founded on the proceedings for a

[576] LORD PRESIDENT.—We think it unnecessary to call for any reply from the respondent's counsel. There is only one question of any real importance raised, [577] and that is, whether the defender has lost his domicile of origin in Scotland and acquired a domicile in England? It is not suggested that up to his 29th or 30th year he lost his Scottish domicile, or took any step in that direction. The defender's father was a Scotchman, and the defender was born and brought up and lived in this country till very recently; and now all that can be said against his having a domicile here is that he is living with his mother in England. It is obvious that his domicile is still in Scotland, and therefore that the proper jurisdiction to try the question of divorce between him and his wife is in the Court of this country. It is true that he himself has raised in the Divorce Court of that country a suit against the pursuer, and that she has neglected to plead in time the want of jurisdiction of the English Courts. But what inconvenience the pursuer may have subjected herself to by reason of this omission is not for us to inquire into, and does not alter the fundamental question of jurisdiction. It is a mere matter of procedure; she not having pleaded want of jurisdiction the case goes on. But if it turns out that there is no jurisdiction divorce cannot be given. In cases of divorce jurisdiction depends upon domicile, and the domicile in this case is here. And if the domicile, and consequently the jurisdiction, be here, they can be nowhere else. I have always been of opinion, as I expressed myself in the case of Pitt, and I have never seen any reason to change that opinion, that for the purposes of divorce there may be a matrimonial domicile, differing from the absolute domicile, which will rule succession. I refer to that only for the purpose of saying that no such question could possibly arise in this case, for the defender's domicile is in no respect in England, where he has no residence of his own. This being the case, the Court has no choice but to entertain the action.

The plea of *forum non competens* is also quite inadmissible. Where two Courts in two different countries have each jurisdiction, that plea may be good, but where the jurisdiction is in one only, it cannot be maintained, and that is the case here. I think, therefore, we must adhere to the interlocutor of the Lord Ordinary.

The other Judges concurred.

THE COURT adhered to the Lord Ordinary's interlocutor.*

MACNAUGHTON & FINLAY, W.S.—HAMILTON, KINNEAR, & BEATSON, W.S.—Agents.

---

divorce which have been taken in the Court for Divorce and Matrimonial Causes in England at the instance of the defender against the pursuer. But it is obvious, and is made clear by the testimony of the English solicitors, Mr. Crosse and Mr. Cowburn, who have explained the nature and effect of these proceedings, and the practice of the English Court in regard to them, that the present plea is ill founded. Even were the defender to prevail in his suit in the English Court the pursuer would not in that suit, as the proceedings now stand, obtain a divorce against him; and if it were to turn out that both parties were [577] guilty, there could not, according to the English law and practice, differing in this respect from the law and practice of Scotland, be any divorce at all by either of the parties, the one against the other. In Geils *v.* Geils, 14th December 1850 (13 D. 321), it was held that a wife who had sued and obtained decree of divorce *a mensa et thoro* against her husband in the Consistorial Court in England was not thereby precluded from suing for the fuller remedy of a divorce in this Court.

"3. The observations now made in regard to the defender's second plea are substantially applicable also to his third plea of *non forum competens*, by which, as was explained at the debate, it is meant that the English Court, where the defender has instituted his proceedings, would be more convenient than this Court for trying and determining the disputed questions between the parties. But, for the reasons already adverted to, these questions cannot be tried and determined at all in the English Court —at least to the same effect as in this Court. Besides, it may be remarked in reference to this as well as to the defender's second plea, that, for anything yet known, the defender's suit in the English Court may possibly be ultimately dismissed for want of jurisdiction, without anything whatever touching the merits of the disputed matters between the parties being determined."

* In the action at the defender's instance in the English Divorce Court Lord Penzance subsequently sustained the jurisdiction of that Court, and granted decree of divorce.

No. 104. X. MACPHERSON, 578. 8 March 1872. 1st Div.—Lord Gifford, M.

CHARLES COWAN AND COLIN MACKENZIE, Complainers.—*Sol.-Gen. Clark—Macdonald.*

THE RIGHT HON. WILLIAM LAW AND OTHERS (Edinburgh and District Water Trustees), Respondents.—*Watson—Asher.*

Trust—Powers of Trustees—Parliamentary Expenses.—Trustees are not entitled to expend trust-funds in applying to Parliament for additional powers, unless authority has been given them to do so either expressly or by implication.

Trust—Powers of Statutory Trustees—Parliamentary Expenses—Assessment—Statutes 32 & 33 *Vict. c. cxliv.* (*Edinburgh and District Water-Works Act*, 1869); 10 & 11 *Vict. c.* 17 (*Water-Works Clauses Act*, 1847), *secs.* 35, 36, *and* 43.—The trustees acting under the Edinburgh and District Water-Works Act applied to Parliament for powers to bring in an additional supply of water. This application was opposed by a number of ratepayers. The bill was passed by the House of Commons, but was thrown out by the House of Lords. Great expenses had been incurred in promoting the bill, and the trustees proposed to defray these out of the trust-funds. *Held* (Lord Deas *diss.*) that the above-mentioned Acts did not authorise the trustees to apply to Parliament for the additional powers sought, and interdict granted against paying the costs out of the trust-funds.

Water-Works Clauses Act, 1847, 10 & 11 *Vict. c.* 17, *sec.* 35.—*Held* (*diss.* Lord Deas) that sec. 35 of the above Act, in requiring water trustees "to provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants in the town or district," does not impose an obligation on the trustees to provide additional sources of supply if the existing sources are insufficient.

This was a note of suspension and interdict against the Right Hon. William Law, Lord Provost of the City of Edinburgh, and others, being the whole of the trustees acting under the Edinburgh District Water-Works Act, 1869, with their clerk and treasurer. The complainers were Charles Cowan of Logan House, and Colin Mackenzie, W.S., ratepayers residing within the district over which the respondents have power of levying assessments.

The complainers stated—(Stat. 2) "The respondents, the said trustees, or a majority of their number, have been lately engaged in promoting before Parliament a bill for the purpose of obtaining powers to bring in a supply of water to the towns of Edinburgh, Leith, and Portobello from St. Mary's Loch, but the preamble of the said bill was found not proven by a select committee of the House of Lords to whom it was remitted, on the ground that the scheme was uncalled for, the deliverance of the committee being as follows:—'This case being a very important one apparently, the committee have thought it right to put in writing their opinion, and the reasons for coming to it. The committee are of opinion that it is not expedient to proceed further with the bill. They hold that with better care and regulation as regards waste, and with increased storage for the utilisation of water drawn from the present sources of supply, Edinburgh can obtain all that is requisite for her needs, and they hold further that they cannot sanction so large an expenditure of money, which appears not to be required at present.'" (Stat. 3) "The complainers have reason to believe and they aver that the respondents, the said trustees, or a majority of their number, intend to apply the trust-funds in their hands, or at least that they intend to apply part of said funds, in payment of the costs incurred by the promoters of said bill in connection with the promoting of the same in Parliament. Further, the complainers believe and aver that the respondents intend to borrow money, and to assess the complainers and the other ratepayers aforesaid [579] in rates, and to levy and exact such rates, for the purpose of paying the costs connected with the promotion of the said bill before Parliament."

The prayer of the note was—"to interdict, prohibit, and discharge the respondents from applying the trust-funds in their hands, or any part thereof, in payment of any costs incurred by them or others in promoting a bill in the Parliament of 1870–71 for

the purpose of obtaining statutory authority to bring in a supply of water to Edinburgh, Leith, and Portobello from St. Mary's Loch; and further, to interdict, prohibit, and discharge the respondents from borrowing money, and from laying any assessment upon, or levying or exacting any rates from the complainers or the other ratepayers in the district over which the respondents have powers of assessment under the Edinburgh and District Water-Works Act, 1869, for the purpose of paying in whole or in part such costs as aforesaid."

The respondents stated;—(Stat. 1) "Prior to the 15th of May 1870 the supply of water to Edinburgh, Leith, Portobello, and places adjacent, was furnished by a joint-stock company, incorporated by Act of Parliament, and having statutory powers to levy rates. . . . They were originally incorporated by the Act 59 Geo. III. cap. 116; but, between the date of that Act and the year 1863 they were necessitated no less than five different times to apply to and obtain from Parliament powers to bring in additional and larger supplies of water from new sources, in order to meet the increasing demands of the population." (Stat. 2) "The result of investigation instituted, which was conducted by eminent engineers, was to show that the existing supply of water at the disposal of the company was wholly inadequate to the wants of the three communities, and St. Mary's Loch was recommended as a source of future supply. The corporations of Edinburgh, Leith, and Portobello thereafter, in pursuance of these suggestions, introduced into Parliament, during the session 1868–9, a bill for the purpose of transferring the undertaking of the Water Company to public trustees, to be elected by the corporations, and of sanctioning the scheme of bringing in a supply of water from St. Mary's Loch. The latter part of the bill was thrown out upon purely technical grounds, owing to non-compliance with standing orders; but the bill, so far as regarded the transfer of the undertaking, was allowed to proceed, . . . and passed into law, under the title of 'The Edinburgh and District Water-Works Act, 1869.'" (Stat. 3) "By the said Act, and statutes therewith incorporated, the trustees are laid under an obligation to provide a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants within the limits of the Act, and also to keep such supply constantly laid on at such a pressure as will make the water reach the top storey of the highest houses within these limits. And in default of compliance with these requirements, the trustees are made liable in severe penalties, unless they can show that the want of supply is due to temporary or accidental causes." (Stat. 4) "It was in contemplation of all parties concerned, at the date when the said Act was passed, that the body of trustees thereby constituted should take immediate steps for adding to the then existing sources of water supply, and should carry out some scheme for that purpose under legislative sanction. The trustees accordingly took every means, by the employment of engineers of skill and eminence, and of eminent chemists, to ascertain from what sources an abundant supply of pure and wholesome water for domestic purposes could be most advantageously procured. . . . Proceeding on information received from the professional gentlemen employed by them as aforesaid, and guided by their advice and recommendation, the trustees resolved to apply to the Legislature for powers to bring in a supply of [580] water from the district of St. Mary's Loch, in preference to any of the other sources available." (Stat. 5) "The respondents accordingly, during the session 1870, introduced into Parliament a bill for the purpose of enabling them to bring water from St. Mary's Loch, being the bill referred to by the complainers in the present note of suspension and interdict. This bill was opposed by the complainers and certain other ratepayers, in respect of the expense of the scheme, the alleged inferior quality of the water of St. Mary's Loch, and also on the ground that new and additional supplies of water, sufficient for the wants of the community, might be obtained from sources nearer than St. Mary's Loch." (Stat. 6) "The respondents acted throughout *in bona fide*, and selected and promoted the scheme which was, according to their judgment, best suited to the wants of the community, and best calculated to enable the trustees for the future to fulfil their statutory duties."

The statute under which the respondents acted is entitled "An Act to create and incorporate a public trust for supplying water to the city of Edinburgh, town and port of Leith, town of Portobello, and districts and places adjacent; to transfer to the trust the undertaking and powers of the Edinburgh Water Company; and for other purposes." The preamble sets forth, *inter alia*—"And whereas it is expedient that the supply of water to the said city of Edinburgh, town and port of Leith, and town of Portobello, and places adjacent, should be provided by and placed under the control,

regulation, and management of trustees, as representing, and for, and in behalf of, the communities of the said city, port, and towns, and places adjacent, and that the undertaking of the company of proprietors of the Edinburgh Water Company, and their whole rights and privileges, lands, buildings, streams, reservoirs, water and other property, should be vested in the said trustees: And whereas provisions were inserted in certain of the said Acts for a proposed transfer of the said undertaking, rights, and privileges to a public trust, but the said provisions are unsuited, in certain essential particulars, to existing circumstances, and cannot expediently be carried into effect, and it is expedient that other provisions should be made in regard thereto: But such purposes cannot be effected without the authority of Parliament."

The following are the clauses of the Act which were chiefly referred to in the course of the discussion:—

Sec. 4. "'The Water-Works Clauses Acts, 1847 * and 1863,' except the provisions with respect to the construction of water-works, and with re-[581]-spect to the amount of profit to be received by the undertakers, when the water-works are carried on for their benefit, and except as regards any matter or thing otherwise provided for in this Act, shall be incorporated with this Act, and applied to the water-works, lands, hereditaments, rights, easements, credits, and effects, hereby vested in the trustees, or in, over, or upon which the trustees have, by this Act, any power or right; and the words 'lands' and 'streams' used therein, shall mean the lands and streams by this Act vested in the trustees, or over or in which the trustees have, by this Act, any power or right; and the expression 'the undertaking,' used therein, shall mean the undertaking and works of the company, by this Act vested in the trustees; Provided always that the trustees shall not be bound to have the water constantly laid on under pressure, and that no penalty under the said incorporated Acts in respect of the supply shall attach to the trustees for a period of five years from the vesting of the undertaking in the trustees under this Act."

Sec. 5. "From and after the third Tuesday after the passing of this Act the Lord Provost of the city of Edinburgh," &c., "shall be, and are hereby appointed trustees for carrying this Act into execution, and shall be a body corporate under the name and style of 'The Edinburgh and District Water Trustees,' and shall have perpetual succession and a common seal, with power to sue and be sued, and to purchase, acquire,

---

* The Water-Works Clauses Act, 1847, contains the following clauses:—

Sec. 35, "The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act, who, as hereinafter provided, shall be entitled to demand a supply, and shall be willing to pay water-rate for the same. . . . And such supply shall be constantly laid on at such a pressure as will make the water reach the top storey of the highest houses within the said limits, unless it be provided by the special Act that the water to be supplied by the undertakers need not be constantly laid on under pressure; and the undertakers shall cause pipes to be laid down and water to be brought to every part of the town and district within the limits of the special Act whereto they shall be required by as many owners or occupiers," &c.

Sec. 36 provides, that if "the undertakers shall refuse or neglect to lay down pipes in the manner hereinbefore described, and to provide such supply as aforesaid, or as provided by the special Act, they shall forfeit to each such owner or occupier the amount of the rate," &c., provided always "that the undertakers shall not be liable to any penalty for not supplying water if the want of such [581] supply shall ensue from frost, unusual drought, or other unavoidable cause or accident."

Sec. 42 obliges the undertakers to provide for extinguishing fires.

Sec. 43 bears, that if they neglect to keep their pipes charged under pressure "or neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of £10," &c.

Sec. 53 bears, "Every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water-rate in respect thereof according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

take, hold, and dispose of lands and other property for the purposes of this Act, and all the other powers and privileges of a body corporate; and the Lord Provost of the city of Edinburgh for the time being shall be chairman of the said trustees."

Sec. 20. "On the 15th day of May 1870 the undertaking of the company, and the whole powers, rights, and privileges, lands, buildings, streams, reservoirs, water, and other property of the company, shall be transferred to and become vested in the trustees, subject to the payment of the preferable annuities, and the burdens, debts, and obligations of the company, other than those attaching to revenue, and the several sums payable by the trustees to the company, as after specified, and subject also to all obligations and restrictions whatsoever to which the company may then be subject under any of the recited Acts or otherwise." . . .

Sec. 22 provided for payment of certain sums to the Water Company.

Sec. 56. "The trustees may from time to time extend the existing works, mains, and pipes of the company, or any additional mains and pipes that may hereafter be constructed and laid by the trustees, whenever it shall be necessary, for the purpose of supplying water to the inhabitants within the limits of this Act."

Sec. 57. "In addition to maintaining the public wells now maintained by the company under the recited Acts, the trustees shall put up, maintain, and supply in such places within the limits of compulsory supply [582] as may be arranged between them and the respective corporations of Edinburgh, Leith, and Portobello, a sufficient number of wells, fountains, and stand pipes, from which the poorer classes of the inhabitants shall be permitted to draw water for drinking and domestic purposes, but for such purposes only, and shall keep such wells, fountains, or stand pipes at all times properly charged with water; and the trustees shall be entitled, with the consent of the respective corporations, to alter the position of such wells, fountains, and stand pipes, so as more effectually to suit the convenience of the inhabitants."

Sec. 60. "The limits of this Act for the compulsory supply of water by the trustees shall comprise and include the city of Edinburgh, town of Leith (including the port thereof), and town of Portobello, and the limits last above described shall be termed the limits of compulsory supply."

Sec. 61. "The trustees shall cause pipes to be laid in so far as this may not have been already done, and water to be brought throughout all the streets within the limits of compulsory supply, and shall furnish to every owner or occupier of every house or part of a house, occupied as a separate dwelling-house, and of any shop, office, warehouse, or hotel, situated within the said limits, by means of communication pipes and other necessary and proper apparatus, to be provided, laid down, and maintained at the cost of such owner or occupier, a sufficient supply of water for domestic purposes."

Sec. 65. "The trustees shall and they are hereby authorised and required once in every year to estimate and fix the amount of money necessary to be levied for the purpose of defraying the cost, charges, and expenses of supplying the said city, towns, port, and district with water, for and during the year then current, under which shall be comprehended the payment of the annuities, interest of any money to be borrowed under the provisions of this Act, expenses of management, maintenance of works, repairs, materials, wages, taxes, and other outgoings and charges, and the payment of the sum required to be annually set apart for a sinking fund as hereinafter provided, together with the expense of distributing supplies of water and all other charges and expenses in so far as the trustees may consider the same to be fairly and equitably chargeable against revenue."

Sec. 71. "The trustees may assess and levy the said domestic water rate prospectively in order to raise money to pay charges and expenses to be incurred thereafter, or retrospectively in order to raise money to pay charges and expenses already incurred; and such rate shall be assessed for the period from the 15th day of May in each year to the 15th day of May in the year following, commencing the first assessment of such rate on the 15th day of May in the year 1870 for the year next ensuing; and such rate shall be payable at the offices of the collector, or at such other place or places as the trustees shall from time to time appoint, and at such date or dates as the trustees may fix."

Sec. 79. "It shall be lawful for the trustees, for payment from time to time of the mortgage debt of the company, and the several sums payable by the trustees to the company as hereinbefore provided, with the expense of renewing main pipes and conduits and of laying additional service pipes if it shall be found necessary to incur such

expense, to borrow on mortgage any sums not exceeding £220,000, and to make and grant mortgages and assignations of the property and works vested in and that may be vested in the trustees in virtue of this Act, and the rates to be levied by them under the provisions hereof, and other revenue of the trustees, in security of the payment of the money so borrowed and interest thereon; and if, after having borrowed the said sums or any part thereof, the [583] trustees pay off the same otherwise than by means of the sinking fund hereinafter provided, it shall be lawful for them again to borrow the amount so paid off, and so from time to time; and the mortgages and assignations to be made and granted by the trustees may be partly in writing and partly printed, and shall be executed as aftermentioned: Provided always that until the mortgage debt of the company shall be paid off, the same, so far as unpaid, with the interest thereon, shall be preferable to any sums borrowed under the powers in this clause contained, or borrowed by cash credit for the purposes in this clause mentioned, as well as to the annuities to be granted to shareholders; and the said annuities with interest due thereon, and expenses incident thereto, shall, subject to the preference of the unpaid mortgage debt of the company and interest thereon, also retain the preference by this Act provided over the sums borrowed under the powers of this clause, or by cash credit for the purposes of the same as aforesaid."

Sec. 96. "All the powers conferred upon the company by the recited Acts or any other Act with reference to their undertaking, in so far as not repealed or superseded by this Act, or not superseded by the Acts incorporated herewith, shall and may be exercised and enforced by the trustees in the same way and manner, and as fully in every respect, as the same may be exercised and enforced by the company."

Sec. 100. "All costs, charges, and expenses incurred preparatory to and in applying for, obtaining, and passing this Act, or in any way incidental thereto, shall be paid by the trustees out of the rates to be levied by them under the authority of this Act and other revenues of the trust, or moneys to be borrowed on the security of the same."

The complainers pleaded;—(1) The respondents, the said trustees and their clerk and treasurer, having no right or power to apply the trust-funds in their hands in payment of the costs connected with the promotion of the said bill in Parliament, the complainers are entitled to suspension and interdict. (2) The respondents, the said trustees and their clerk and treasurer, having no right or power to borrow money, or to assess or levy rates for the purpose of paying the costs of promoting the said bill in Parliament, the complainers are entitled to suspension and interdict.

The respondents pleaded;—The present note of suspension and interdict ought to be refused, with expenses, in respect that the acts and proceedings of the trustees to the expenses of which it has reference—(1) were necessary and proper in the administration of the trust now vested in the respondents; (2) were not only in furtherance of the main purpose of that trust, but necessary to its attainment; (3) were done and carried on *bona fide*, and were within the statutory powers of the respondents.

The Lord Ordinary on the Bills (Mure), on 31st August 1871, pronounced this interlocutor:—"On caution, passes the note, recalls the interdict formerly granted, and of new, and in the meantime, and on caution, interdicts, prohibits, and discharges the respondents (1) from applying the trust-funds in their hands, or any part thereof, in payment of any costs incurred by them, or others, in promoting a bill in the Parliament of 1870–71 for the purpose of obtaining statutory authority to bring in a supply of water to Edinburgh, Leith, and Portobello, from St. Mary's Loch, and (2) from borrowing money or exacting payment of any rates from the complainers, or the other ratepayers in the district over which the respondents have powers of assessment under the Edinburgh and District Water-Works Act, 1869, for the purpose of paying any costs of the above description."

Thereafter a record was made up and closed, and parties were heard, and the Lord Ordinary (Gifford) pronounced this interlocutor:—"Recalls [584] the interdict granted *ad interim* by the interlocutor of 31st August 1871: Suspends the proceedings complained of; interdicts, prohibits, and discharges the respondents in terms of the prayer of the note of suspension: Declares this interdict, now granted, to be perpetual, and decerns: Finds the suspenders entitled to expenses, and remits the account," &c.*

* "NOTE.—This is a very important case, involving large sums, and the decision of which adversely to the respondents may give rise to serious questions of personal responsibility.

[585] The respondents (with some exceptions) reclaimed. At advising,—

LORD KINLOCH.—This case appears at first sight as if it occupied a somewhat

---

"The case is also one of very general interest as affecting the duties, powers, and responsibilities of public and statutory trustees. The entire *bona fides* of the respondents in their whole actings was very strongly pressed on the Lord Ordinary, but he has not been able to find that mere *bona fides* on the part of the trustees is sufficient to exclude consideration of the great question, whether the costs and expenses of promoting the bill to obtain a supply of water from St. Mary's Loch are or are not to be defrayed from the statutory funds in the hands of the respondents, as trustees under the Edinburgh District Water-Works Act of 1869?

"The respondents in the present case are the trustees under the Act of 1869—the whole body as a corporation, without any distinction of minority or majority; the statutory trust which, though fluctuating in its members, is permanent in its constitution, appears as respondents, and the question is competently raised by two ratepayers within the district, whether the costs of promoting the bill, which was lost by the decision of the House of Lords' Committee last session of Parliament, can be lawfully defrayed out of the assessments which the trustees are authorised to levy. This question the Lord Ordinary is bound to decide, apart altogether from the ulterior question, upon whom those costs or any part of them will fall, in the event of its being found that they are not chargeable against the assessments.

"The Lord Ordinary has given the question raised in this action the most careful consideration in his power. In his view, it turns entirely upon the construction, meaning, and effect of the statutes held by the respondents, including not only their own Act of 1869, and the statutes incorporated therewith, but also the whole series of prior Acts which were obtained by 'The Edinburgh Water Company,' in whose right and place the trustees now stand. These Acts are very voluminous, and it is not easy to determine the exact import and effect of many of their provisions.

"On the whole, and after the best consideration in his power, the Lord Ordinary has come to the conclusion that the costs of St. Mary's Loch bill, promoted in last session of Parliament, do not constitute a proper charge against the assessments levied or to be levied by the respondents. He has come to this conclusion, however, not without great hesitation and difficulty, and, he is free to add, not without regret and reluctance; but he has felt himself bound to apply a strict rule, which, although it may often be productive of hardship, and may be so in the present case, is still, he thinks, upon the whole, salutary and beneficial.

"In the debate before the Lord Ordinary there was not much conflict between the parties as to the general principle or the general rule of law applicable to cases like the present; the great contest and the great difficulty arises in the application of an admitted principle to the peculiar circumstances of the present case—to the position of the respondents as trustees, and to the duties incumbent upon them as such.

"In general, it may be said that trust-funds can only be applied to trust-purposes, that in every case the powers of trustees are limited by the constitution of the trust, and that they cannot divert the trust-funds or any part thereof to purposes either opposed to or different from the purposes for which the trust was created. Of this principle there are multitudes of illustrations, applicable to every different kind of trust, but it is always in each case a question, what is the real purpose of the trust, and what are the powers incidental thereto, which [585] are either expressly or by implication vested in the trustees; and to determine this question, the nature, constitution, and circumstances of each particular trust must be looked to, and as these vary in each case, the general principle will vary in its application.

"In all cases, besides the powers expressly conferred upon trustees, there are many powers which are held as implied, and which, from their nature and variety, must almost necessarily be left to implication, and the real difficulty often is to draw the line, and determine the limit of these implied powers; and when the power claimed and exercised by trustees is peculiar or abnormal in its character, the difficulty is greatly enhanced, and very careful consideration may be required to determine whether it is or is not fairly within the trust.

"Now, the promoting or opposing a bill in Parliament may be said to be in some respects an extraordinary act on the part of trustees. Not that it is an uncommon or unusual thing for trustees to do, for trustees of various descriptions both promote

[586] wide field. In reality it lies within a very narrow compass. The necessity of much enlargement is greatly obviated by the able and elaborate exposition given

---

and oppose bills in Parliament every day, but the procuring of new legislation, or of powers which the Legislature alone can give, is not, in general, an object for which a trust is constituted; and unless there be express power to go to Parliament it will require in general a pretty strong implication to justify trustees in doing so at the expense of the trust.

"When the object of the bill promoted by the trustees is to obtain an increase or alteration of their own powers, or to change or subvert their own constitution, a strong case must be made out before the expense of such an unsuccessful attempt can be charged against the proper trust-funds. For it can never be presumed that trustees are appointed for the very purpose of altering, amending, or it may be entirely subverting their own powers and constitution. This point will be afterwards noticed when considering the special nature of the respondents' trust.

"It may be useful, before adverting to the specialties of the present case, to consider a few of the leading cases which have been decided relative to the powers of the trustees to promote or oppose Parliamentary measures. These cases are referred to merely as illustrations of the general principle above stated, and which the Lord Ordinary thinks must regulate the present question.

"In the Attorney-General *v.* the Guardians of the Poor of Southampton, 23d May 1849 (18 Law Jour. Chancr. 393), the Guardians of the Poor of Southampton applied for an Act of Parliament to vary the mode of assessment, and to authorise the rates on small rents under £12 to be levied from owners instead of occupiers. The bill was lost, and the Court held that the Guardians could not charge the cost thereof against the poor-rates under their charge.

"In the Attorney-General *v.* Andrews, 24th January 1850 (19 L. J. Chancr. 197), the Commissioners of Water-Works of Southampton applied for a new Act for extending their powers. Twenty of the commissioners were in favour of promoting the Act, and only two opposed it. The Court held that, although the new Act might be very desirable, the costs of promoting it could not be defrayed out of existing rates. This is a strong case, for the existing Act empowered the commissioners 'to increase the supply of water by such means as they should think proper, and to do and execute all such matters and things as should be necessary for that purpose.'

"Attorney-General *v.* Liverpool (1 Myl. and Craig, 171, 7 L. J. Chancr. 51).

"Attorney-General *v.* Norwich (16 Simon, 225).

"Stevens *v.* South Devon Railway Company (16th January 1851, 20 Law Jour. Chancr. 491).

"In Taylor *v.* Chichester Railway Company, 24th June 1867 (Law Reports, 2, Exchequer, 357), a railway company, in order to buy off opposition to an Extension Act, agreed to pay a landowner £2000. The Act passed, but made no provision for this payment. Held by Exchequer Chamber that the £2000 could not be paid from the funds of the company.

[586] "Myles *v.* M'Ewan, 13th January 1855, 18 D. 205.—Here the Commissioners of Police for Dundee applied for an Act to prolong their powers. The Act was opposed, and after incurring about £1000 of expenses was abandoned, and the general Act adopted by a majority of householders. The Court held that although the commissioners had applied for the Act *in optima fide*, the expense could not be charged against the police funds.

"See Brown *v.* Adam, 19th February 1848, 10 D. 744.

"M'Lean *v.* Macintosh, 30th June 1852, 14 D. 928.—Here the Magistrates of Inverness, who were trustees of the Mackintosh Educational Fund, applied for an Act to unite the fund with the funds of the Inverness Academy under a joint trust. The bill was opposed, and the committee of the House of Lords gave an adverse opinion, whereupon it was abandoned. Held that although the expense of opposing the bill had protected the trust-funds, they could not be charged against these funds.

"Brighton *v.* North, 13th February 1847 (16 L. J. Chan. 255).—Here the Trustees of the Banks of the River Ouse were found entitled to the costs of opposing a bill which would have injured the river's banks, the Lord Chancellor, Cottenham, explaining that every trustee is entitled to the fair expense of defending the trust-property.

"The same principle was recognised in Campbell, petitioner, 12th January 1847

[587] in the note of the Lord Ordinary, in whose views I generally concur. I have arrived at the same conclusion with his Lordship, and this without much difficulty.

---

9 D. 397; Mill *v.* Fraser, 25th November 1859, 22 D. 33; Regina *v.* Norfolk Commissioners of Sewers, 20 L. J. Q. B. 121; Vance *v.* East Lancashire Railway, 3 K. and J. 50.

"There are various other cases, most of which will be found referred to in the judgments above quoted.

"The principle fairly to be gathered from these cases appears to be that in each case it must be shown that the Parliamentary costs were incurred in the exercise of powers either expressly or by clear implication conferred upon the trustees. It seems, further, that the expense of opposing a bill will be more easily admitted as a charge upon the trust-funds than the expense of promoting a bill—at least where the opposition to the bill is for the purpose of protecting the trust-estate.

"Applying these principles to the present case, the Lord Ordinary thinks, on a consideration of the whole statutes held by the respondents, that the respondents' trust was not constituted or created for the purposes of obtaining new or additional supplies of water,—that is, new sources of supply,—but solely for the purpose of administering the existing supply,—that is, the supplies and sources of supply which by the statutes are now vested in the respondents. He has consequently felt himself compelled to disallow as a charge against the trust,—that is, against the assessments which the respondents levy,—the costs of the unsuccessful measure which the respondents promoted in last session of Parliament.

"Avoiding all detail and all minute criticism of clauses, the Lord Ordinary will shortly indicate the grounds upon which his opinion rests.

"(1) The Act of 1869, under which the respondents are incorporated, does not by any express provision authorise them either to bring in new sources of supply or to make application to Parliament for powers to do so.

"Of course, this is by no means conclusive, for in such a trust many powers must be implied; but it is, to say the least, very remarkable that if, as was contended, one of the primary duties of the trust was to get more water, not one word about this should be contained in the statute. The getting additional supplies, or the obtaining of statutory powers to do so, were and are very important matters, involving very large costs and expenses; and if it was intended that the trustees should either get new supplies or apply for powers to get them, it is natural to expect that this would be specially provided for in their Acts. But neither in the Act of 1869, nor in any of the statutes incorporated therewith, nor in any of the Acts of the old company, is there any provision authorising the course which the trustees have recently adopted. The preliminary expenses of obtain-[587]-ing a new Act may often be, and in the present case are, very large. Surveys by engineers, and estimates for works more than forty miles long, and of great magnitude, had to be obtained. Numerous conflicting interests had to be provided for, preparations had to be made for opposition, which was sure to be offered, and an expensive Parliamentary contest had to be engaged in. It is strong to hold that all this is to be held as authorised merely by implication, when a single clause or a single sentence in the Act of 1869 would have removed all doubt and all difficulty. In this respect the case of the present respondents is much weaker than that of the Southampton Water Trustees, for in that case these trustees had general powers to increase the supply of water.

"(2) The respondents' Act of 1869 does not even narrate that the supplies or sources of supply thereby vested in the respondents were insufficient or inadequate, or that it was expedient to get farther or additional supplies. Some such narrative as this would have been natural if the intention of the Legislature had been that the trustees should set about getting new supplies, and preparing and promoting bills for that purpose.

"The absence of any allusion to the deficiency of supply is the more remarkable when it is remembered that the bill of 1869 originally contained powers to bring in St. Mary's Loch, and that that part of the bill contained an inductive clause that more water was needed; and it is to be noticed that in all the previous Acts of the old company, whenever powers are granted to bring in new springs, the statutes themselves narrate the necessity or expediency of new supplies.

"(3) It is true that there are some expressions in the Act of 1869 which might

[588] The facts of the case do not require any lengthened detail. Anterior to the passing of the Act 32 & 33 Vict. c. 144, which bears date 26th July 1869, [589] the

point to additional supplies. For example, the title of the Act bears, *inter alia*, to be 'for supplying water.' The inductive clause of the Act bears that 'the supply of water should be provided by' the trustees, &c. These expressions, however, are ambiguous. They may mean either 'supplying' and providing from existing sources handed over to the trustees, or from new sources not yet obtained, and the Lord Ordinary thinks, on a purview of the whole statutes, that the former meaning is that truly intended. It is thought that an ambiguous expression must be interpreted by the unambiguous parts of the statute.

"(4) The vesting clauses of the statute are confined to the estates, subjects, and sources of supply which belonged to the old company, and it is one of the inductive clauses of the statutes that it is expedient to transfer the old undertaking to a new and a public trust. Indeed, the statute expressly refers to the provisions which the old Acts contain for this purpose, and states that the said provisions were 'unsuited to existing circumstances,' and the fair reading of all the statutes seems to be that the old undertaking is simply to be placed under new and better management. Additional powers, no doubt, may be and are expressly conferred upon the new trustees, but all this is only for the administration and management of the old estate.

"(5) And this leads to the remark that the old Water Company had no express power by any of their statutes to promote bills in Parliament, or to get up schemes for obtaining new sources of supply, and no such power seems to be implied in any of the old Acts.

"It is true that the old company had occasion to come very frequently (six or seven times) to Parliament, and on several of these occasions got powers to bring in new supplies, and it was very ingeniously urged that the new trust will just have to follow the same course. But all the old company's Acts specially provide for the costs thereof. It rather appears to be a begging of the question to argue that if the old company had lost any of its bills the expenses thereof would have been a good charge against opposing or objecting shareholders. The Lord Ordinary thinks that if any such question had arisen protesting shareholders might have successfully resisted payment from their funds of the cost of [588] promoting abortive bills brought in by the directors or their majority. Such question would be very similar to that now raised, and there is abundant authority for holding that the directors of a railway or other statutory company cannot charge against resisting shareholders the expense of unsuccessful attempts to promote new and different lines of railway.

"Indeed, the principle restraining directors or trustees from going beyond the powers of their Act, or charter, or contract, is in general of clearer application in the case of a private company than in that of a public trust. It is easily conceivable that a person might be willing to take shares in a company for bringing in the Crawley springs who might shrink from taking shares in a company for bringing in St. Mary's Loch, and it would be most unjust if money subscribed for a limited purpose should be diverted in order to involve the subscriber in the responsibilities of a different, and, it may be, gigantic and hazardous undertaking.

"(6) The respondents by their statutes have no power to make new works for bringing in new supplies, but have merely power to make and maintain works for distributing the existing supplies.

"The 'Water-Works Clauses Act' of 1847 is incorporated with the respondents' Act of 1869, but there is specially excepted 'all provisions with respect to the construction of water-works.' Nothing could more strongly show that the respondents are not to bring in new supplies than that they have no power to make new works for any such purpose. It was said that the construction clauses of the Act of 1847 were not applicable, and that therefore they are excepted. But if this were the only reason, other or substitutional powers would be given. But no such powers are conferred at all, and the inference is irresistible that it was the existing sources of supply, and not new sources, which the statutory trust is to manage and administer.

"(7) The same result follows from a consideration of the funds which the respondents are authorised to raise. These funds consist of—first, sums which the trustees may borrow; and second, sums which they may raise by assessment. The borrowing powers are conferred by section 79, but moneys borrowed are only applicable

supply of water to Edinburgh and the adjacent districts was afforded by a joint-stock company, incorporated by Act of Parliament, and having power to [590] levy statutory

---

to three purposes—first, the mortgage debt of the old company, and the sums payable to the old company; second, the expense of renewing 'main pipes and conduits'; and third, the expense of laying 'additional service pipes.' It was conceded in argument, and seems pretty clear, that the respondents could not apply moneys borrowed either towards bringing in new supplies of water—that is, supplies from new sources—or towards the expense of bills promoted for that purpose.

"The only other funds at the disposal of the respondents are the annual rates and assessments which are authorised by section 65 and following sections. Now, these assessments are only applicable to annual charges and expenses, or, as it is expressed in the Act itself, to sums 'chargeable against revenue.' But the expense of a new Act for bringing in St. Mary's Loch, and of all the engineering and other surveys necessary, can hardly be said to be a proper or equitable charge against revenue. If the Act had passed, these would have been a charge against capital. They would have been part of the expense of the new supply, just as much as the reservoirs or embankments necessary for bringing in that supply, and it would be rather hard to assess the ratepayers of any one year for the costs and expenses of a measure intended to serve all time coming.

"In the bill promoted there was a special clause authorising the expenses of the Act to be paid either out of the rates or out of moneys borrowed. The Lord Ordinary does not attach much importance to this clause, although in some of the decided cases it was founded on as a reason for disallowing the costs of an unsuccessful Act. But it seems a fair subject for consideration whether, apart from any special clause, the costs of an Act, if obtained, or of a bill unsuccessfully promoted, form a charge against capital or against revenue.

[589] "Great stress was laid by the respondents upon the very broad terms of the 65th section, defining the purposes to which the annual assessments are applicable, and no doubt the enumeration is very wide and comprehensive. It must be borne in mind, however, that the costs now in question do not fall under any of the heads specially mentioned in the 65th clause, and general expressions, such as 'other out-goings and charges' and 'other charges and expenses,' must always be interpreted with reference to the charges and expenses specially enumerated.

"But besides this, the general question always returns, Are the expenses now claimed authorised by the Act either expressly or by implication, for no generality of expression occurring in a clause like the 65th can ever authorise the trustees to divert the trust-funds to purposes not authorised by the statute.

"(8) One great difficulty—indeed, it may be said, the great difficulty in the case—arises from the duties imposed on the trustees by statute, and the penalties to which the trustees or the trust-funds may be subjected for failure to discharge these duties.

"By section 35 of the Water-Works Clauses Act the respondents are bound to keep in the pipes a sufficient supply of water 'constantly laid on under pressure,' and to lay down pipes to every district within the limits of the Act, provided an undertaking is given to pay, for three years, rates not less than one-tenth of the expense; and by sections 36 and 43 penalties are imposed for failure or neglect to supply water or to lay down such pipes.

"The force of these clauses is intensified by the provision in section 4 of the respondents' Act of 1869, that no penalties shall attach for a period of five years from the vesting of the undertaking in the present respondents,—that is, for five years from Whitsunday 1870.

"The Lord Ordinary feels that these clauses do create great difficulty and embarrassment. They raise a very powerful argument in favour of the respondents, and they merit the closest and most anxious consideration.

"Taking everything into view, however, the Lord Ordinary has come to think that all these clauses must be held to be conditional, and as having reference to the estate and supply at the command of the respondents. The duty on the respondents as public trustees must be measured by the means at their disposal. They can only discharge the duty in reference to the estate with which they are vested. This is expressed in clauses 36, 42, and 43 of the Water-Works Act, exempting from duty or from penalty when the undertakers are prevented from giving the supply by 'frost,

rates. On the date last mentioned an Act of Parliament was passed constituting a statutory trust for this purpose. The Act proceeded on [591] the preamble that "it is

unusual drought, or other unavoidable cause or accident'; and although it was urged that the expression 'other cause,' when interpreted in reference to the preceding words, will not include permanent deficiency in the sources of supply, the Lord Ordinary thinks that this would be too rigid a construction when applied to the circumstances of the case. The penalties are imposed in the event of 'neglect or refusal' to supply, and it is thought that there can be no neglect or refusal when the statutory means with which alone the respondents have to do prove insufficient.

"It would be a very startling thing to hold that the penalties referred to, which, in their original intention, were directed against private companies, which of course must see to their supply before they undertake statutory duties, apply absolutely and unqualifiedly to a public trust like the present. For the result would be that in the event of a permanent inadequacy in the source of supply—an event which is said to have occurred—every ratepayer without exception would be entitled to penalties, and as the penalties can only be paid out of the rates, all the ratepayers would be assessed to pay penalties to themselves so far as the rates would go. The Lord Ordinary is not prepared to adopt an interpretation which would lead to this result.

"Still further, on the respondents' own showing, they have only five years given them to procure an Act and bring in large additional supplies. But two years have already elapsed, and it is easily conceivable that other three years [590] may pass without the respondents being able to obtain a bill. They may fail in other Parliaments as they failed in the last one; and even when an Act is got, time will be needed to bring in the water; so that, without the least fault on the part of the respondents, the five years might easily elapse without their having the means of avoiding the penalties. It would be a strong thing to hold that penalties are imposed upon a public trust, or rather upon the public, unless statutory powers are obtained, which powers the Legislature in its wisdom may not see fit to grant.

"Without in the least disguising the difficulty, therefore, the Lord Ordinary feels himself compelled to interpret the penalty clauses as only applying to the case of the trustees failing or neglecting to use the means at their disposal.

"This view is confirmed by other clauses, which, in quite absolute and general terms, impose upon the respondents the duty of supplying, for certain maximum rates, water to shipping, water to brewers, distillers, and manufacturers, and water for working machinery, and water for fountains and ornamental purposes. There is no condition expressed, the duty is in terms absolute, and a brewer or manufacturer, tendering the maximum rate, would have action to compel supply. But the Lord Ordinary thinks that the condition must always be held implied 'if there be sufficient water for such purposes.' The trustees are surely not bound to go to Parliament merely to get water to play in fountains or to drive machines, and this seems to be inferred from the expression in the 63d section, that water for shipping, manufacturers, machinery, and fountains, is to be given after the trustees have supplied, from time to time, persons requiring water for dwelling-houses, shops, and offices. The idea of postponement in the order of supply implies possible deficiency, and it seems only fair that this condition should be held to run through the whole enactments.

"The period of five years allowed by section 4 may possibly have reference to the prevention of waste by the respondents. By the Water-Works Act the respondents have very large powers to check and prevent waste. The House of Lords, in throwing out the bill last session, gave their reason thus:—'They hold that, with better care and regulation as regards waste, and with increased storage for the utilisation of water drawn from the present sources of supply, Edinburgh can obtain all that is requisite for her needs.' In the opinion of the committee of the House of Lords, therefore, if waste is prevented, there will be ample supply, and it is not an unreasonable interpretation of section 4 of the Act of 1869 that five years were allowed for the adoption of those measures which would make existing sources of supply ample and sufficient.

"(9) On looking at the bill promoted by the respondents, the Lord Ordinary observes that among numerous new powers, power was asked to impose new and additional assessments. It is an additional reason for holding the promotion of such an Act to be *ultra vires* of the respondents that they were seeking to impose new assessments. The Lord Ordinary cannot hold that the Act of 1869, which empowered

expedient that the supply of water to the said city of Edinburgh, town and port of Leith, and town of Portobello, and places adjacent, should be provided by, and placed under the control, regulation, and management of trustees, as representing, and for and in behalf of the communities of the said city, port, and towns and places adjacent, and that the undertaking of the company of proprietors of the Edinburgh Water Company, and their whole rights and privileges, lands, buildings, streams, reservoirs, water, and other property, should be vested in said trustees." Certain statutory trustees were accordingly appointed, and by section 20 of the Act it is declared—"On the 15th of May 1870 the undertaking of the company, and the whole powers, rights, and privileges, lands, buildings, streams, reservoirs, water, and other property of the company, shall be transferred to and become vested in the trustees, subject to the payment of the preferable annuities, and the burdens, debts, and obligations of the company other than those attaching to revenue, and the several sums payable by the trustees to the company as after specified, and subject also to all obligations and restrictions whatsoever to which the company may then be subject, under any of its recited Acts, or otherwise."

In proceeding to administer the trust constituted by this statute it occurred to a majority of these trustees that it would be expedient to bring in an additional supply of water from St. Mary's Loch, about forty miles distant, as also to make various alterations in the constitution of the trust and powers of the trustees. This they could not do of their own authority, and they proceeded to promote a bill in Parliament for effecting the proposed object. This bill comprehended, in the outset, new enactments as to the constitution of the trust and mode of election of the trustees. It gave power to bring in water from St. Mary's Loch and certain places adjacent, "and to enter upon, and compulsorily take and use such of the lands, lochs, water, and other property delineated in the plans, and referred to in the book of reference, as shall be necessary for that purpose, with such lands and property so delineated and referred to, as may be submerged by the operations of the trustees." It gave authority to execute very extensive works, with a great variety of incident powers. It introduced new enactments as to the mode of supplying the water, and authorised new descriptions of assessment.

---

a limited and fixed assessment, authorised the trustees to use these assessments for the purpose of getting power to lay on extra assessments. This would be assessing the inhabitants for the purpose of getting authority to assess them still farther. It is thought that something very express would be required to authorise this.

"Indeed, this is just a special illustration of the general principle already alluded to, that *in dubio* trustees can never be held empowered to apply trust-funds for altering, enlarging, or overturning their own constitution.

"The Lord Ordinary will conclude with one general observation. It was strongly urged upon him that it was extremely expedient that a public body of trustees like the respondents should be invested with the power of seeking out new sources of supply of water, and of obtaining Acts to bring in new supplies therefrom. To this it is a sufficient reply, that no such power has been conferred upon the present respondents, and that a power so great should not be held as conferred, except by express legislative provision.

[591] "But the Lord Ordinary doubts extremely the expediency of vesting such powers in a public trust. The recent contest affords a very strong illustration of the hardships to which such powers might lead. A very large section of the community, claiming to be the great majority, opposed the bill promoted by the respondents, and what the respondents now seek is, that these opponents shall not only be left to pay the whole expenses of their successful opposition, but shall, in addition, be assessed in order to defray the expense of promoting the very measure which they defeated. Strong reasons of expediency might easily be urged why the expense of legislative proceedings and legislative contests should not be provided for by anticipation, but should be left to the Legislature itself, and to the public spirit and personal responsibility of the promoters.

"The Lord Ordinary's judgment, however, is not rested on grounds of expediency, but on a special consideration of the respondents' statutes. The grounds of the Lord Ordinary's judgment would not in the least apply to bills promoted by town-councils, or by other bodies who hold funds dedicated to general or public purposes. All he has decided is, that the assessments imposed by the respondents are not applicable to promoting bills in Parliament for obtaining water from St. Mary's Loch."

It gave additional powers to borrow, and authorised the creation of a sinking fund to pay off the debt so contracted. It is impossible to deny that a great change was proposed to be effected by this proposed Act, both in the character and extent of the supply of water, and also in the constitution and powers of the trust.

This bill was opposed by a large body of the inhabitants of Edinburgh and its vicinity. It passed the House of Commons, but was thrown out in the House of Lords, on the following report by the committee on the bill:—"The committee are of opinion that it is not expedient to proceed further with the bill. [592] They hold that with better care and regulation as regards water, and with increased storage for the utilisation of water drawn from the present sources of supply, Edinburgh can obtain all that is requisite for her needs; and they hold further that they cannot sanction so large an expenditure of money, which appears not to be required at present."

The question is now raised, whether the trustees are entitled to provide for the expenses of this abortive bill by assessing the inhabitants, under their statute of 1869? The point is brought to issue by a note of suspension and interdict presented by two ratepayers, who pray the Court "to interdict, prohibit, and discharge the respondents from applying the trust-funds in their hands, or any part thereof, in payment of any costs incurred by them or others in promoting a bill in the Parliament of 1870–71 for the purpose of obtaining statutory authority to bring in a supply of water to Edinburgh, Leith, and Portobello from St. Mary's Loch; and further, to interdict, prohibit, and discharge the respondents from borrowing money, and from levying any assessment upon, or levying or exacting any rates from the complainers or the other ratepayers in the districts over which the respondents have powers of assessment under the Edinburgh and District Water-Works Act, 1869, for the purpose of paying, in whole or in part, such costs as aforesaid."

This question as to the power of assessment is convertible with this other—Whether, under their statute of 1869, on any case arising making the course expedient, the trustees possessed authority to go to Parliament for new or varied powers at the cost of the funds of the trust? If such authority was possessed, the expenses even of an abortive bill will properly be claimed out of the trust-funds. If no such authority was possessed, the trust-funds cannot be saddled with the costs of the proceeding. The question before the Court is therefore, whether, under the Act of 1869, the trustees possessed authority to promote a bill in Parliament for obtaining additional and varied powers at the expense of the trust-funds. There is no other question than this.

I am very clearly of opinion in the negative. I think it is a rule applicable to all trusts, without any exception, that the funds of the trust are alone applicable to the existing purposes of the trust, and that these funds cannot be legitimately applied in the acquisition of new or varied powers. The acquisition of such powers may be often of the highest importance, and such as may legitimately invoke the pecuniary aid of those beneficially interested. To apply to those so interested, to the effect of their paying or securing the necessary funds, is the natural and legitimate course. But to take from the funds of the trust in order not to execute the existing trust, but to make a new and different one, is contrary to the very idea of a trust. Of course Parliament always can, and generally will, give power in a successful Act to raise the funds necessary for obtaining it. The very circumstance that this is done is strongly indicative of the impossibility of so applying trust-funds without express legislative sanction. The present question regards the costs of an abortive bill for obtaining additional powers. As to these, I am clearly of opinion that, unless some exception from the general rule can be established, the trust-funds cannot be employed to defray them. I think that this inference is as clear as the general proposition, that the funds of a trust cannot be employed except for the purposes of the trust, and is just that proposition in different words.

The respondents scarcely ventured to dispute the general doctrine. They endeavoured to avoid its force by the plea that the Act of 1869 must be held to have given power to go to Parliament, if not expressly, yet by fair and reasonable implication. This plea must now be considered.

Express power it seems utterly out of the question to maintain. There can be nowhere a clause pointed out by which such power is conferred. The last clause in the statute provides "that all costs, charges, and expenses incurred preparatory to, and in applying for and obtaining and passing this Act, or in any way incidental thereto, shall be paid by the trustees out of the rates to be levied by them under the authority of this

Act, and other resources of the trust, or moneys to be borrowed on the security of the same." The expenses of the then passed bill are thus given out of the rates by the clause in question. But [593] the clause does not include—and so may be held directly to exclude—the expenses of any other bill. It does not say, "the expenses of this Act, and of any other bill promoted by the trustees in the proper administration of the trust." Yet nothing short of this would give the express authority in question.

The respondents claimed to possess this authority under the 65th clause of the Act 1869, which bears—"The trustees shall, and they are hereby authorised and required, once in every year, to estimate and fix the amount of money necessary to be levied for the purpose of defraying the cost, charges, and expenses of supplying the said city, towns, port, and district with water during the year then current, under which shall be comprehended the payment of the annuities, interest of any money to be borrowed under the provisions of this Act, expenses of management, maintenance of works, repairs, materials, wages, taxes, and other outgoings and charges; and the payment of the sum required to be annually set apart for a sinking fund, as hereinafter provided, together with the expense of distributing supplies of water, and all other charges and expenses, in so far as the trustees may consider the same to be fairly and equitably chargeable against revenue." But this clause is still as far as ever from any express reference to the costs of Parliamentary action. In its direct expressions it plainly refers to the ordinary expenses of carrying on the trust. The respondents chiefly rested on the phrase "other outgoings and charges." But to comprehend the costs of the St. Mary's Loch bill amongst "other outgoings and charges" is simply to beg the question at issue. They are not so included, except by the assumption of the respondents that they are so. Clearly, they are not included expressly; and so the respondents are thrown back on implication, and nothing else, in defence of their claim.

With regard to the alleged implication, I doubt altogether whether such powers as those in question can ever relevantly be alleged to be given by implication. The reason is, that however implication may extend the powers and purposes of a trust, it cannot be held to comprehend a right to obtain new powers for new purposes, for this is not to execute the actual trust, but to create a new one. Authority to create a new trust cannot, from the very nature of the case, arise out of implication. It is something wholly beyond the scope of the trust, and so cannot be implied from anything contained in it. Nothing, as I think, short of express authority, would warrant the trustees in not merely executing the trust, but taking proceedings to extend or alter it. This appears to me almost self-evident.

But I would now add that I see no ground whatever for deducing the alleged authority from any fair or reasonable implication. It was said that the previously existing water company had frequently gone to Parliament to obtain extended powers, and therefore the water trustees must be held to have been authorised to do the same, particularly as by clause 96 of the Act of 1869 it is declared—"All the powers conferred upon the company by the recited Acts, or any other Act with reference to their undertaking, in so far as not repealed or superseded by this Act, or not superseded by the Acts incorporated therewith, shall and may be exercised and enforced by the trustees in the same way and manner, and as fully in every respect, as the same may be exercised or enforced by the company." But it is mere fallacy to infer from this any right to go to Parliament for increased powers at the cost of the trust-funds. The statute undoubtedly gives to the trustees all the powers and privileges vested in the prior water company, and, amongst others, the powers and privileges derived from statutory authority. But these only comprehend the powers and privileges actually vested in the company at the time of the transference of their undertaking. The right to go to Parliament for additional powers was not conferred by any of their Acts, and arose from an entirely different source. There was no right in the company to go to Parliament except what the shareholders of the company might confer. Any directors going without this authority would have had a very sorry claim for their costs against recalcitrating shareholders. With such authority, however, they might have undoubtedly have gone. In the case of the water trustees there is no such source of authority as was constituted by the body of shareholders in the prior company. The trustees must act of them-[594]-selves; and must find their authority in the statute under which they act exclusively. Any implication out of the position or proceedings of the prior company is plainly inapplicable, and inadmissible.

The respondents, however, derived an additional implication from a supposed

obligation lying on them to afford a full and adequate supply of water, and, as inferred from this, a correlative power to go to Parliament for additional powers, if this should be necessary towards obtaining that supply. This formed the most feasible, if not the only feasible, argument presented by the respondents.

The argument, it must be observed, was mainly rested on clauses which occur, not in their own Act of 1869, but in the general Water-Works Clauses Acts of 1847 and 1863. By the 35th and 36th clauses of the former of these Acts there is a general obligation laid on the undertakers of any scheme for supplying water to a town to keep in their pipes "a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Acts"; and certain penalties for failure are enacted, estimated at so much a-day till the supply is given. By the fourth clause of the Act of 1869 these Water-Works Clauses Acts of 1847 and 1863 are incorporated with the statute, "except the provisions with respect to the construction of water-works,"—a somewhat significant exception. The respondents plead that by this incorporated enactment they were bound, under penalties, to furnish a full and adequate supply of water. And they jump at once to the inference that this obligation necessarily implies a power to go to Parliament to secure the supply, if not otherwise attainable. By the same fourth clause they are declared exempt from penalties for five years after the commencement of their administration. This exemption the respondents turn into an argument in their own favour, contending that the exemption was specially intended to give them time to obtain the needful Parliamentary authority.

There can be no doubt that the clauses in the general Water-Works Acts are applicable to the case of the respondents. But the question which arises is, what is the meaning of these clauses? And in solving that question it is of some consequence that the clauses occur in statutes having no special application to the case of Edinburgh, but a universal application to every case of water supply to a town sanctioned by Parliament; for the meaning to be put on the clauses must be such as will be universally applicable. Now, I cannot come to the conclusion that in every case of a water supply to a town there is an obligation on the trustees or undertakers, under sanction of a penalty, to afford, in all circumstances whatever, a full and sufficient supply of water. The only rational construction to be put on the clause is to hold the obligation to lie to the extent to which the statute affords the means of fulfilling it. In other words, the trustees or undertakers are liable, under a penalty, to utilise to the utmost the means put within their power. It is very reasonable so to hold. Generally speaking, the provisions of the special Acts are so calculated as to be in fair probability effectual to afford at the time a sufficient supply to the particular town concerned. The obligatory clauses take therefore, naturally, somewhat of a general form. But it is impossible, consistently with reason, to hold that they go farther than to oblige the undertakers to do the very best they can with the sources of supply put within their power. Nothing can be more extravagant than to suppose an obligation where it cannot be fulfilled, unless it be the conception that the redress is to go, under pressure of a daily current penalty, to a Parliament from which there is no certainty of obtaining the requisite powers. The statutes are reasonably satisfied by supposing an obligation to do all which can be done with the means of supply given. But to hold that in every case, and in all circumstances whatever, there lies an obligation to give a full and adequate supply, and to deduce from this, as a necessary inference, a discretionary power to the undertakers to go to Parliament at the expense of the trust-funds, with whatever scheme they consider fitting, is about as wide a jump in logic as I remember to have come across my notice. I cannot take such a leap.

The Lord Ordinary presents an argument of great weight for holding that the respondents had their whole rights of administration confined to the springs and other sources of supply possessed by the prior water company at the time of [595] the transference of the undertaking, and that they had no concern with the acquisition of any additional supply. Speaking generally, and with regard to the primary design of the Act 1869, I concur in the Lord Ordinary's views. At the same time, I do not think it necessary to the determination of the present case to pronounce that the trustees were excluded from obtaining additional sources of supply where the acquisition of these did not require Parliamentary authority, as, for instance, by voluntary contract with a landholder for payment of an annual consideration out of the rates. There is a great difference between making a voluntary contract in the course of administration, and

making application to Parliament for compulsory powers. I desire not to preclude such a question. I equally desire not to prejudge it. I reserve my opinion on the point. I notice it now merely to say that in place of going on the assumption that the trustees were absolutely precluded in all circumstances, and by whatever mode, from additional sources of supply, I prefer resting my opinion on the broad general rule applicable to all trusts, statutory or private, that the trustees have no power to prosecute Parliamentary action for obtaining new or varied powers at the cost of the trust-funds. The application of this principle seems to me sufficient for the determination of the present case.

It appears to me that this principle is not only sound in itself, but stands expressly sanctioned by the authorities. I refer to the cases quoted in the Lord Ordinary's note, which exhibit the principle recognised and acted on in the Courts of England and Scotland equally. I do not think it necessary to enter into the details of the cases. I would only particularly refer to the case of the Attorney-General *v.* Andrews, Jan. 24, 1850, 19 Law Jour. Chancery, p. 197, as especially applicable, in respect of being a case as to a water supply authorised by Act of Parliament. In that case there was a Parliamentary commission appointed for the supply of water to the town of Southampton. The commission had very extensive powers conferred on them, for the report bears that they were not only empowered to maintain the existing water-works, but "to build, erect, construct, and maintain such other reservoirs or water-works in the said common as might be necessary or convenient, and as the said commissioners should think proper for furnishing an additional supply of water, and from time to time to alter, repair, or discontinue the same works or any of them, and to substitute others in their stead; and generally, to do and execute all other matters and things necessary or convenient for constructing, continuing, maintaining, altering, repairing, or using the said works." There seems no reason to doubt that, under this statute, the commissioners were entitled to make voluntary contracts for increased supplies within the Parliamentary sphere. But the commissioners, just as here, thought they would go to Parliament for an Act to give them power to obtain supplies from a greater distance, not contemplated in their statute, and also to extend their sphere of administration and assessment. An injunction was applied for in Chancery to restrain them from "paying, or authorising or causing to be paid, any moneys, being part of, or arising, or to arise, from rates levied under or by virtue of the said in part recited Act, in or towards the expenses incurred, or to be incurred, in or about the promoting or prosecuting the said Act of Parliament, or connected therewith." The injunction was granted. The Vice-Chancellor, Shadwell, said,—"This appears to me one of the simplest of cases." And again, "It appears to me that until Parliament has sanctioned the procuring water by the new means proposed, the commissioners have no power to apply, for the purpose of obtaining a new Act, these rates, which, by the existing Act, are only applicable in a particular manner." This authority is direct and conclusive. On such a point the legal principle is identical at both ends of the island.

There has been much said as to the inexpediency of those vested with a public trust for the supply of water to a large town like Edinburgh being held destitute of power to go to Parliament to obtain authority for acquiring additional supplies. This would not, in any view, be sufficient ground for a judicial determination. But it must not be forgotten that there would be at least as great inexpediency in giving to such a public body the discretionary power of prosecuting every theory which, in however good faith, they may unwisely and dog-[596]-matically maintain, at the cost of the funds under their charge. It is probably, on the whole, safer and more advantageous to throw them, for the cost of any scheme for extending or varying their powers, on the voluntary assistance of those beneficially interested. The public will seldom go long or go far wrong in a matter closely affecting their interests. Their is infinite advantage in possessing a clearly settled rule for the guidance of trustees, public or private, in preference to every case being a matter of speculation and caprice and unprofitable public strife.

I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD ARDMILLAN.—I have very carefully considered the important questions here raised, and the able and ample arguments by which the pleas of both parties have been supported. I cannot say that I have found the question free from difficulty. But I have, at the close of an anxious study of the statutes, and of the law applicable to statutory trusts, arrived at the same conclusion as the Lord Ordinary, and very

much on the same grounds as those explained in his Lordship's note. I do not intend to state at any length the course of thought and reasoning which has led me to this opinion. The elaborate note of the Lord Ordinary, and the opinion now given by Lord Kinloch, renders such explanation unnecessary. The general rule, that the promoters of an unsuccessful bill must pay their own costs, is abundantly clear. In the case of a private company or private parties presenting and promoting a bill in Parliament, this is, I think, beyond doubt. But it is said that a different rule is to be applied, because the respondents are trustees under a public statutory trust, and were acting in what they considered the exercise of their powers, and the discharge of their duties, as trustees.

The bill for bringing in water from St. Mary's Loch is said to have been introduced and promoted under the powers of the trust. There is certainly no express statutory bestowal or acknowledgment of these powers. Neither in the Act of 1869 nor in any of the preceding Acts is there any recognition of the power or the duty of applying as trustees to Parliament for statutory enactment to enable them to bring in new, distinct, and additional supplies of water. If the respondents had succeeded last year, they might, and indeed they would, have got a clause empowering them to lay the costs of obtaining the Act on the funds of the trust, or to charge them against the assessments levied, or to be levied. But since the bill was thrown out, and since no direction or arrangement for meeting the costs was sanctioned by Parliament, the question arises, by what warrant can the costs of the unsuccessful bill be charged on the trust-funds?

There is no express warrant of Parliament for it. That, indeed, has scarcely been contended. I must add that I think there is no implied warrant for the expenditure in any of the Acts of Parliament. It is here that the difficulty of the case arises, for I am not prepared to say that the statutory authority for expenditure by the trustees cannot possibly be implied. But it cannot be easily implied—the implication must be clear. I am of opinion that there is no implication in these Acts so clear as to be safely relied on. The scope and measure of the trust must be found in the statutes. If the respondents went beyond the measure of the trust, and expended money in the attempt to obtain an object which, however desirable, was not within the scope of the trust, and not comprehended in the purposes of the trust, then it is not within the trust, or within the statute creating the trust, that they can find a warrant for the expenditure, and the character of statutory trustees cannot in that case create an exception to the general rule, that the promoters of an unsuccessful bill must meet the costs. Where there is no trust that is the rule. Where the trust powers and purposes have been exceeded the excess is not protected by the trust, and the same rule applies.

Now, I am unable to avoid the conclusion that the respondents have definite and limited duties and powers. They are trustees for the right management and distribution of the supplies, and sources of supply, of water, vested in them by statute, and not for the purpose of acquiring new sources of supply. Throughout the whole series of statutes the word "supply" means the supply which by the [597] existing Acts, and from the existing sources, the water company and then the trustees are empowered and bound to administer and distribute. This supply must be well stored, well guarded, well managed, and well and fairly distributed. To prevent neglect, or carelessness, or unskilfulness, or unfairness, in these respects, there are penalties; but there are, in my opinion, no penalties for failure to supply water when there is no water to give, and yet no neglect of duty. There are no penalties for failure to bring in additional water from new sources of supply not comprehended in any of the statutes. The argument that the trustees were entitled to go to Parliament at the cost of the trust, in order to avoid these penalties, is not well founded.

The clauses relating to the borrowing of money on mortgage, and to the disposal of sums raised by assessments, do not support the respondents' claim. They may afford means of meeting or of recovering payment of legal charges, but they cannot create or sustain the legality of the charge. Unless the acquiring new sources of supply had really been within the contemplation and provision of the empowering and directing clauses, it could scarcely be expected that the clauses in regard to borrowing on mortgages, or in regard to assessments, should have been framed to reach the costs of an unsuccessful attempt to acquire such new sources. I am of opinion that the Act did not contemplate such proceedings; and therefore I am of opinion that no warrant to assess for such costs, or to apply assessments to payment of such costs, can be found in these clauses.

But it is said that, even assuming the absence of any warrant in the statutes to support the respondents' plea, still the costs were incurred in the *bona fide* attempt to increase the supply of water, and to promote thereby the general purposes of the trust.

I do not doubt that the respondents meant, according to their judgment, to discharge what they thought their duty, and to act under what they thought their powers, and to meet an unusual exigency by an unusual effort. I attribute to them no bad faith, or bad motive; but something more than good intention is required to sustain a proposal to assess the citizens of Edinburgh for payment of the costs of a proceeding to which a large proportion of those citizens were strongly opposed, and for which no statutory warrant can be shown.

I need only mention, without explaining, the authorities, English and Scottish, referred to by the Lord Ordinary. These instruct that trust-funds can only be applied to trust-purposes; and in a statutory trust the purposes and powers of the trust must be found within the statutes. The rule which I deduce from these authorities is, that the costs of Parliamentary procedure cannot be charged against a public trust where they are not incurred in the fulfilment of the declared or clearly implied purposes of the trust, or in the exercise of powers conferred expressly or by clear implication on the trustees. The decision of Lord Chancellor Cottenham in the case of Brighton *v.* North, Feb. 13, 1847 (16 L. J. Chan. 255), that trustees are entitled to the fair expense of defending the trust-estate by opposing a bill which would have led to injury to the trust-estate, is a reasonable qualification, but not an exception to the rule. That qualification is not, however, applicable here. The opposing a measure tending to injure the trust is a very different proceeding from that with which we are now dealing. I shall add no more. I quite appreciate and feel the force of the suggestion that it is hard to throw the burden of these costs on the trustees. It is so. I regret that no arrangement has been made, and that we are under the necessity of deciding the point. But, on the other hand, surely it would be hard if those who have voluntarily paid the cost of their successful opposition to this bill were now assessed for payment of the cost of its unsuccessful prosecution. I feel that I have no other alternative, in accordance with my view of the statutes, and of the legal principles applicable to public trusts, than to express my concurrence in the opinion of Lord Kinloch and the Lord Ordinary.

LORD DEAS.—For the purposes of this case it is not necessary to go far back into the history of the water supply of Edinburgh. There have been a variety of Acts of Parliament passed, from time to time, incorporating a water company, with certain powers for the purpose of supplying water to the city, the share-[598]-holders of the company being entitled to the profit, if any, arising from what I may call the business of the company; and, on the other hand, an assessment was laid on the inhabitants on account of the water supplied to them. In 1868 or 1869 a bill was promoted to create a public trust, and to transfer to that trust the undertaking of the water company, and at the same time to bring in an additional supply of water from St. Mary's Loch. This last portion of the bill was struck out, it was said, in consequence of failure to comply with the standing orders. That bill had narrated, in its preamble, that the present supply of water was totally inadequate for the rapidly increasing population. That part of the preamble had been necessarily struck out along with the clauses which provided for the introduction of St. Mary's Loch water. The bill resulted in the statute of 1869, 32 & 33 Vict. c. 144, which transferred the undertaking of the water company to the trustees, but which, of course, did not confer the compulsory powers of taking land, &c., which would have been appropriate only if a particular scheme for obtaining water had been sanctioned. It is proper, however, to observe that the bill, as it originally stood, narrating the inadequacy of the present supply, and proposing to add to it from St. Mary's Loch, was promoted by the three corporations of Edinburgh, Leith, and Portobello,—the whole members of which corporations were elected by the ratepayers, and may, in that sense, be regarded as their representatives. The same three corporations were authorised, by the statute of 1869, to appoint, and did appoint, the trustees, who then introduced a separate bill to bring in the water of St. Mary's Loch, upon the preamble, that whereas the present supply of water to the city, and to Leith, Portobello, and places adjacent, was inadequate and insufficient for the wants of the present and rapidly increasing population, and that it was necessary that a sufficient supply of pure and wholesome water should be

furnished to the inhabitants, it would be of advantage if the trustees were authorised to introduce such additional supply of water from St. Mary's Loch, and powers given them to execute the necessary works, &c. The House of Commons held the preamble to be proved, and passed the bill. The House of Lords held that the preamble was not proved; and the question now to be decided by this Court is, can the expenses of promoting that bill be taken out of the rates?

I do not apprehend that there is any difference of opinion among us as to the law applicable to such a question; unless, indeed, Lord Kinloch meant to say that no implication, however strong, in terms of the Act would warrant going to Parliament for compulsory powers to carry out the objects of the Act; which would be a doctrine inconsistent with the rule of construing all such trusts so as to give fair effect to the intention of the Legislature, just as, in private trusts, fair effect is given to the intention of the granter, by holding powers, such as a power of sale, to be implied, although not expressed, if necessary for the extrication of the purposes of the trust, of which we have instances in the cases of Erskine's Trustees *v.* Wemyss, May 13, 1829, F. C. and 4 S. and D. 772; M'Kinnon, December 4, 1838, F. C. and 1 D. 153; Henderson *v.* Somerville, June 22, 1841, 3 D. 1049, &c.

The law applicable to such a question as the present I understand to be, that if the trustees were applying for powers either inconsistent with the purposes of the statute, or not fairly contemplated by the statute, they went to Parliament at their own risk as regarded expenses; but, on the other hand, that if, according to a fair and reasonable construction of their Act of Parliament—taking into consideration the circumstances in which it was passed—it appeared to have been contemplated, although not expressly said, that additional water was to be brought in, then the trustees were entitled to go to Parliament for those compulsory powers without which they could not carry into effect that contemplated purpose of bringing in more water, and if they did so in good faith they were entitled to lay the expenses on the rates, whether the application was successful or not.

That is a mode of stating the law to which I do not suppose your Lordships would object, and which is in accordance with all the authorities cited in the able note of the Lord Ordinary. As regards the matter of good faith, Mr. Macdonald, for the complainers, had conceded that point, in the present case, in favour of the trustees, not very heartily, certainly, but still it was conceded; and [599] whether it had been conceded or not, I see no reason for any doubt about it. Whatever the quality of the water of St. Mary's Loch had been—however undoubted its quality and abundant its quantity—the ratepayers would not all have been agreed as to the propriety of bringing it in. There would always have been two classes of the community,—one looking mainly to their own pockets in the present generation, and thinking that the next generation should provide for itself; the other class taking a more liberal and patriotic view,—that we should do something for our descendants as well as for ourselves, as our forefathers did, or ought to have done, for us. According to the difference of minds in this respect, although there had been no uneasy feeling (as undoubtedly there was) about the quality of the water—although St. Mary's Loch had been full to the brim of water equal to the best water of the Pentland Hills, there would, I have no doubt, still have been a formidable division among the ratepayers for and against the scheme. There is nothing, however, I think in the mere extent or cost of the scheme which could be held to infer *mala fides*, or such palpable extravagance as ought to affect the present question of Parliamentary expenses. Nor is it difficult to believe that the trustees were themselves satisfied with the quality of the water. The fact that the House of Commons, upon evidence led, and in the face of opposition, had passed the bill, is of itself pretty conclusive upon both these points.

The question the Court has to consider, therefore, is, whether the Act, fairly read, and looking to the real evidence afforded by the circumstances in which it was applied for and obtained, did or did not contemplate that an additional supply of water was to be brought into the city. If it did, I can have no doubt that the trustees were entitled to go to Parliament to get these compulsory powers, without which they could not expect to get that additional supply; and, although they might fail in the particular scheme, that ought not to prevent the expenses from coming out of the rates.

I agree in the law laid down by the Lord Ordinary. I also agree with him that there is no dispute here about the general law or general principle applicable to such cases, and that the only question is (as the Lord Ordinary fairly puts it), "what is the

real purpose of the trust, and what are the powers incidental thereto, which are either expressly or by implication vested in the trustees?"

If what the trustees here did was done in accordance with the real purpose, or one of the real purposes, of their trust, and with the powers conferred on them by implication, although not expressly set forth or specified, then the rule of law is with them. If not, then it is against them. Or to apply the Lord Ordinary's test in still more direct words to the case in hand: If it was the real purpose of this trust, or one of its real purposes, that an additional supply of water should be obtained from new sources, then the law is with them. If not, it is against them.

I am humbly of opinion that, upon a fair and reasonable construction of this Act of Parliament, the real purpose I have just stated is sufficiently apparent. In this, and this only, I differ from the Lord Ordinary; for, if this be conceded, it will not, I think, be disputed, and obviously would not have been so by the Lord Ordinary, that the power to do what was necessary to carry out that purpose was necessarily implied.

I shall now proceed to deal with this question of construction in the first instance, at all events, on the strictest principle that can possibly be applied, namely, by confining attention to what appears on the face of the Act itself. In reading the Act, however, it must, of course, be read (in terms of sec. 4) with the whole clauses of the general Water-Works Act of 1847 incorporated into it, so far as the special Act does not expressly except or exclude them, which it does only as regards clauses which were not appropriate where, a specific scheme not being sanctioned, compulsory powers to take land, &c., would have been out of place. The fact of these particular clauses not being incorporated in the Act raises therefore no presumption that Parliament did not contemplate the bringing in of a separate bill under which the St. Mary's Loch scheme, or any other scheme, might be deliberately considered.

With this explanation, the title and preamble of the special Act require atten-[600]-tion. The title of the Act is, "An Act to create and incorporate a public trust for supplying water to the city of Edinburgh," &c., and "to transfer to the trust the undertaking and powers of the Edinburgh Water Company, and for other purposes." This title, it will be observed, consists of two parts. If the existing supply of water had been deemed sufficient for the greatly extended distribution contemplated by the Act, then although the words "for supplying water," &c., had been omitted, the title in its continuous form would nevertheless have been complete, and would have stood thus,—"An Act to create and incorporate a public trust, and to transfer to that trust the undertaking and powers of the Edinburgh Water Company, and for other purposes." Then the preamble, after narrating the previous Acts "for more effectually supplying the city of Edinburgh and places adjacent with water," &c., bears, "Whereas it is expedient that the supply of water to the said city of Edinburgh, town and port of Leith, and town of Portobello and places adjacent, should be provided by and placed under the control, regulation, and management of trustees," and that the undertaking, &c., of the water company should be vested in them. Here again words are used, and still more emphatic words than in the title, unnecessary to express the meaning, if that meaning was what it is now said to be. For besides affirming the expediency of transferring to the trustees the undertaking, &c., of the Water Company, and placing that undertaking, &c., under the control, regulation, and management of the trustees, it is expressly affirmed to be expedient that the supply of water to Edinburgh, Leith, Portobello, and places adjacent, "should be provided by" the trustees. It could in no proper sense be said that the water was to be provided by the trustees, if they were merely to distribute the water which had been provided by the Water Company. Nor would it be easy to reconcile an affirmation of the expediency of such distribution of the existing supply with the obligation imposed by the Act (sec. 61) to give every owner and occupier "a sufficient supply of water for domestic purposes," unless it was assumed that the population had neither increased nor was likely to increase, or that the existing supply was largely superabundant.

Before examining, however, the enactments in the special Act, it is necessary to attend to the enactments in the general Water-Works Act of 1847, in connection with sec. 4 of the special Act, which incorporates these enactments into the special Act, subject to a proviso that the penalties in the general Act shall not attach to the trustees for five years after the undertaking vests in them under the special Act.

Section 35 of the general Water-Works Act bears—"The undertakers shall provide and keep in the pipes to be laid down by them a supply of pure and wholesome water,

sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act, who, as hereinafter provided, shall be entitled to demand a supply, and shall be willing to pay water-rate for the same." That, surely, is a very different thing from distributing among the citizens such a supply as they might happen to have been previously provided with. As respects what Lord Kinloch says, that the effect of these clauses is much weakened or done away with by their general application to all such undertakings, I think it most natural and expedient, where powers are given which virtually exclude competition, that there should be some obligation to provide such a supply of pure and wholesome water as should be reasonably sufficient for the domestic use of the whole inhabitants, who are, on their part, bound to accept of and pay for that supply. There is no hardship in this, because if a certain fixed supply is considered sufficient for the particular town or district, it is easy to introduce into the special Act a declaration that the supply thereby definitely provided for shall be deemed sufficient to satisfy the provisions of the general Water-Works Act.

As to the question of penalties, it might very well be that reasons for non-liability might readily be found, and easily accepted, but what I am dealing with at present is, whether there is not a duty imposed of providing an adequate supply of water, whatever might be said against liability for penalties, if parties could show that they were not in a position in which they could fulfil that duty. The Lord Ordinary says that they might go to Parliament again and again and not [601] get the powers. If they had done that it might be a very good reason for excusing them from the penalties, but if they did not make the attempt their position might be very different, and it is not easy to see how that went to show that according to a fair construction of the Act it did not contemplate the bringing in of an additional supply of water. The same clause goes on to say—"And such supply shall be constantly laid on at such a pressure as will make the water reach the top storey of the highest houses within the said limits, unless it be provided by the special Act that the water to be supplied by the undertakers need not be constantly laid on under pressure; and the undertakers shall cause pipes to be laid down and water to be brought to every part of the town and district within the limits of the special Act, whereto they shall be required by as many owners or occupiers" as that the aggregate water-rate shall be not less than a specified proportion of the expense of laying the pipes. Following up this, it is provided by section 36 that if for twenty-eight days after a demand in writing "the undertakers shall refuse or neglect to lay down pipes in the manner hereinbefore described, and to provide such supply as aforesaid, or as provided by the special Act, they shall forfeit to each such owner or occupier the amount of the rate," and the sum of 40s. for each day of failure or neglect, provided always "that the undertakers shall not be liable to any penalty for not supplying water if the want of such supply shall ensue from frost, unusual drought, or other unavoidable cause or accident." Then there is sec. 42, which obliges the undertakers to provide for extinguishing fires, and sec. 43, which bears that if they neglect to keep their pipes charged under pressure, "or neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of £10," and to the additional forfeiture therein mentioned. Then there is this provision in sec. 53,—"Every owner and occupier of any dwelling-house or part of a dwelling-house within the limits of the special Act shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water-rate in respect thereof according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes."

We must now look to the clauses in the special Act, and before recurring to sec. 4, which is one of great importance, I wish to call attention to the following sections:—The 25th section subjects the trustees "to all obligations and restrictions whatsoever" to which the Water Company would have been subject. Section 25th bears—"The trustees may from time to time extend the existing works, mains, and pipes of the company, or any additional mains and pipes that may hereafter be constructed and laid by the trustees, whenever it shall be necessary for the purpose of supplying water to the inhabitants within the limits of this Act." The 60th section bears—"The limits of this Act for the compulsory supply of water by the trustees shall comprise and include the city of Edinburgh, town of Leith including the port thereof, and town of Portobello, and the limits last described shall be termed the limits of compulsory

supply." The 61st section enacts that "the trustees shall cause pipes to be laid in so far as this may not have been already done, and water to be brought through all the streets within the limits of compulsory supply, and shall furnish to every owner or occupier," &c., by pipes to be provided and maintained by him, "a sufficient supply of water for domestic purposes." Under these clauses, and the clauses for exacting corresponding rates, the obligations are correlative on the trustees to provide, and the owners or occupiers to accept or pay for the water within certain limits, which are therefore described as the limits of compulsory supply.

[His Lordship then quoted sections 65 and 79 as to expenditure and borrowing money, and proceeded]—These clauses do not appear to me to create the difficulty suggested by the Lord Ordinary and your Lordship in the chair, that there is no fund out of which the expenses now in dispute (if in themselves otherwise chargeable) could be paid. For, while section 65 provides for fixing an annual rate to cover the costs and expenses therein mentioned, "and all other charges and expenses, in so far as the trustees may consider the same to be fairly [602] and equitably chargeable against revenue," this must be read along with section 71, which provides that "the trustees may assess and levy the same domestic water-rate prospectively, in order to raise money to pay charges and expenses to be incurred thereafter, or retrospectively, in order to raise money to pay charges and expenses already incurred." Assuming then that the expenses now in dispute were lawfully incurred, and that the trustees were to think the same fairly and equitably chargeable against revenue, there seems nothing to prevent them from so assessing and levying the rate under section 71 as to provide for these expenses. The Lord Ordinary observes that such expenses "can hardly be said to be a proper or equitable charge against revenue"; and he adds, "if the Act had passed these would have been a charge against capital." But neither of these observations can be held to have much or indeed any force. The burden would not necessarily be laid on any one year, but might be spread over a period of years. And in place of the Legislature deeming it inequitable to charge such expenses against revenue, the Act of 1869, sec. 100, confers upon the trustees the option of paying the expenses of obtaining that Act either "out of the rates to be levied by them under the authority of this Act and other revenues of the trust, or moneys to be borrowed on the security of the same." There is no room for concluding therefore that, if the abortive Act had passed, the expenses of obtaining it would have been made a charge against capital. Nor can it be deemed inequitable to charge such expenses against revenue in place of against capital, while the very Act now being construed imports that, if chargeable at all, they may equitably be charged against either. There seems in no view, therefore, any difficulty in finding a fund out of which to pay the disputed expenses if duly incurred for behoof of the trust; for the trustees may, in that view, assess and levy the water-rate so as to cover them under section 71, which section the Lord Ordinary seems to have overlooked.

To recur now to section 4 of the special Act, which, after incorporating the Water-Works Acts, as already mentioned, bears—"Provided always that the trustees shall not be bound to have the water constantly laid on under pressure, and that no penalty under the said incorporated Acts, in respect of the supply, shall attach to the trustees for a period of five years from the vesting of the undertaking in the trustees under this Act"—the question naturally occurs, what was the meaning or object of this proviso?

It is clear enough, on the face of this proviso (1), that, had it not been inserted in the Act, the trustees might have been subjected in penalties under the Water-Works Clauses Act within the five years; (2) that these penalties were penalties connected with the supply of water; (3) that the trustees will become liable to these penalties on the expiry of the five years, if something shall not have been done which was contemplated to be done within that period. The important question occurs, what that something is.

If it be an additional supply of water, the inference is irresistible that the Act contemplated that the trustees were to bring in an additional supply. And the inference upon that again is equally irresistible, that it would be their duty to go to Parliament for the necessary compulsory powers.

It has been suggested that the five years may have been allowed for taking measures to prevent waste and provide additional storage. There is no probability in that view. The Water Company had all the powers to check waste which the trustees have, and a deep personal interest to use these powers, and to economise the water, if that

could be accomplished, by additional storage; for the profits or loss affected the individual pockets of the shareholders, whereas the trustees have only the motive of public duty to induce them to economise.

The obligation laid on the trustees (sec. 61 of the special Act) is to cause "water to be brought throughout all the streets within the limits of compulsory supply," and to "furnish to every owner or occupier of every house, or part of a house, a sufficient supply of water for domestic purposes"; and the consequences of failure to do this are, by sections 36 and 43 of the Water-Works Clauses Act, liability to a penalty of £10 and forfeiture of the rate, together with 40s. for every day of failure to every person who has paid or tendered the rate.

These are obviously the penalties from which the trustees are to be exempted [603] for five years, and which they are to be liable to thereafter; and it seems extravagant to suppose that they are to be so liable unless they shall find means, by additional storage, and preventing waste of the existing supply, to send throughout all the streets, building, and to be built, within the compulsory limits, sufficient water for the domestic purposes of every owner or occupier of every house or part of a house, erecting or to be erected, and at same time to leave those who have the water already in possession of an equally adequate supply.

On the other hand, if the object was to allow five years for obtaining the sanction of Parliament, after deliberate inquiry and consideration, to a scheme for an adequate additional supply of water, there was nothing unreasonable in the position in which the trustees were to be placed after the lapse of five years, for that position would then just be the same with the position in which the Legislature, for sanitary and other salutary purposes, had placed all undertakers for supplying towns with water by the provisions of the Water Clauses Act.

The 35th section of the Water Clauses Act bears, it has been seen, that "the undertakers shall provide, and keep in the pipes to be laid down by them, a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act," who become bound, as therein mentioned, to pay the rate; such supply to be constantly laid on at a pressure to reach the tops of the highest houses, unless there be a dispensation with such pressure in the special Act. The penalties provided by sections 61, 36, and 43, already noticed, are applicable to all such undertakers, and not unreasonably so, for the policy of the Water Clauses Act is obviously to compel the undertakers to satisfy the Legislature, before obtaining their special Act, that the supply proposed in that special Act will be a full supply, and in that case a clause in that Act may fairly be asked and conceded to the effect that the stipulated supply, when brought in, shall be held to satisfy the requirements of the Water Clauses Act.

Accordingly, in the Edinburgh Water Company's special Acts, passed subsequent to the general Water Clauses Act of April 1847, clauses were inserted, obviously with the purpose of limiting the operation of the general Act by specifying the things which, when done, were to be held to satisfy its requirements (*vide* section 46 of the Act of July 1847—the preamble of the Act of 1853—and sections 78, 79, and 112 of the Act of 1856). There was no suspensive clause in any of these special Acts similar to that which is found in section 4 of the special Act of 1869. On the other hand, there is in that Act of 1869 no explanatory or limiting clause with reference to the requirements of the Water Clauses Act of 1847. The appropriate place for this last would be in an Act, if it shall be obtained, conferring compulsory powers to procure the desiderated additional supply of water.

I have, however, to repeat the remark I have already indicated, that, whether the risk of penalties being rigidly exacted from the trustees, after the lapse of five years, be greater or less, that does not affect the question whether the five years were not allowed to enable them to go to Parliament and bring in more water. I think that, construing the suspensive clause along with the whole other enactments, no other conclusion could fairly and legitimately be drawn than that such was the object of the clause. And if this be so, the trustees could surely not be personally liable, without relief against the trust-funds, for expenses incurred in *bona fide* doing what it would have been a breach of their duty not to have done.

It will thus be seen that I do not call in question the rule of law that if trustees go to Parliament for powers to change the purposes of the trust, or powers to do something not fairly within the contemplation of the trust, they go at their own risk

as regards expenses. Neither do I impugn the authority of any of the numerous cases cited. I rest my opinion on a sound and reasonable construction of this particular Act of Parliament, namely, the Trust Act of 1869, including the statutory enactments incorporated with and referred to in it. None of the cases cited conflict with the judgment I am disposed to pronounce in this case. The only one which at first sight might seem to do so is the one singled out by your Lordship in the chair, viz., the Attorney-General v. Andrews, [604] Jan. 24, 1849, 19 Law Journal, Chancery, 197. But that case was quite different from this. The Act constituting the trust there proceeded, as the Vice-Chancellor pointed out, on "a recital that it had been ascertained that an abundant supply of water may be readily procured by boring in the common near Southampton." All the operations for obtaining the anticipated supply of water were, by the express terms of the Act, confined to the common; and what was more vital to the question, the only assessment authorised was an assessment on the occupiers of messuage tenements, &c., rated to and paying poor-rates "within the said town of Southampton." What the commissioners proposed was to promote, at the expense of the existing ratepayers, a bill in Parliament for the construction of extensive additional works, and "to take water from certain lands and springs in the parishes of North and South Stonehaven, and from the river Itchen navigation in the county of Southampton, and from other places"; and to ordain "the owners of all rateable property within the limits of the said bill to be rated to, and to pay all rates authorised to be levied under, the said recited Act or the proposed bill, instead of the occupiers thereof." That was truly a proposal to obtain one Act to overturn another. Not only was the expressly defined area of Southampton Common to be extended over certain parishes, but the constituency was to be entirely changed. The money of the existing ratepayers was to be used for promoting a bill under which they were no longer to exist and to have a voice as ratepayers. The commissioners would have had a better set of debtors, but the substituted ratepayers (the landlords) would no doubt have contrived to make their tenants bear the burden as before, in the shape of increased rents. At all events it was not contended that the things proposed to be done by the one Act were within the contemplation of the other. On the contrary, they were palpably quite opposed to it, and inferred the rescinding of some of its most vital enactments. I cannot therefore regard that case as any precedent for the present case.

I have said that I rest my opinion on the construction of the Act of Parliament, because that is a clearly judicial ground, which seems to me sufficient. But if I were to go into the real evidence afforded by the surrounding facts and circumstances—and I will not undertake to say that these are altogether irrelevant—I should find nothing but confirmation of the views I have stated.

We see from the Water Company's Acts, recited in the preamble of the Act we are now dealing with of 1869, that, for more than a century past, an additional supply of water had, from time to time, been required for the city of Edinburgh and places adjacent, on account of the constantly increasing population—the necessity for such additional supply recurring latterly every few years. It is not alleged that the city has ceased to extend and the population to increase since the date of the Water Company's last Act in July 1863. The fact is notoriously otherwise, for we cannot drive round this city, with our eyes open, without seeing whole streets springing up, like mushrooms, in every direction, with a rapidity quite unprecedented. Neither can we help knowing that almost every season there have been periods during which the supply of water was short and intermittent—even in the class of houses which we ourselves inhabit, provided as these are with numerous cisterns—which makes it not difficult to believe the statement in the record, of which we have had no denial, that the poorer classes of the inhabitants had been suffering greatly for some years from want of water, and that it was the failure of the Water Company, as proved before Parliament, to bring in more water, which led to the company being superseded by the Act of 1869. That the water, never at any time superabundant, could be, and can continue to be, introduced into all the new streets and houses erected, and being erected, without encroaching on the supply of those who previously enjoyed it, is plainly a physical impossibility. The Water Company undoubtedly did much for the city. I can myself remember, when I first attended college, some half a century ago, frequently seeing, in crossing the High Street, a crowd of people who had stood there all night round a solitary well near the Cross, waiting their turn to get a pitcherful

of water. But increasing luxury renders it a very different thing to supply water to the city now from what it was then. Bath-rooms and water-closets were little known in those [605] days, and altogether unknown at a somewhat earlier period. For instance, although Heriot Row was, from the first, one of the choicest streets in the New Town, there was not a water-closet in it when it was built in the early part of this century, whereas there is now not a house in it without them, and in the house I occupy in that street there are eight or nine. I need not add that no new buildings are now erected without them, and still less need I add that without an abundant supply of water they had better not be there. Doubtless this, among other considerations, applicable to towns and cities generally, goes to account for the policy of the Water Clauses Act of 1847, requiring that the water shall be constantly kept under pressure so as to reach the top storey of the highest houses, and that every house within the limits shall have a sufficient supply for domestic purposes.

Lord Kinloch has referred in his opinion to the terms of the deliverance of the committee of the House of Lords, which is quoted and relied on by the complainers in the record. But that deliverance has, of course, no judicial authority. Two branches of the Legislature came to opposite results, and we cannot weigh the one against the other without having before us the evidence on which they proceeded. That would be going into too wide a field. It is stated in the record that the complainers did not dispute in Parliament the necessity for bringing in more water, but alleged that it could be got from other sources preferable to St. Mary's Loch. I doubt the relevancy of that allegation in the record, although there has been no denial of it; but if it be true, it would seem to follow that as the leading opponents of that bill have now got themselves, as we all know, elected trustees, and in command of a majority, they must either go to Parliament, at their own risk as to expenses, to get their own scheme sanctioned, or occupy a somewhat uneasy position, which will not become improved when the suspensive period of five years expires.

It has been suggested by Lord Kinloch that additional sources of supply may be got by voluntary contract of purchase and sale. I do not see how that can be done consistently with your Lordships' proposed judgment. If the trustees could not go to Parliament at the expense of the trust for compulsory powers to purchase, they certainly cannot use the funds of the trust for the voluntary purchase of property which, in that view, their statute does not authorise them to acquire.

But, while I notice these considerations on both sides, I rest my opinion, as I have said, upon the fair and reasonable construction of the statute, and that construction leads me to the result that the trustees were entitled to go to Parliament as they did, and that, although their scheme was not sanctioned, they are legally entitled to lay the expenses so incurred upon the rates.

LORD PRESIDENT.—This is a question which depends upon a rule in law which is almost a self-evident proposition—namely, that trust-funds cannot be lawfully used or expended except for trust-purposes. As the Lord Ordinary has very well said, the difficulty does not lie in ascertaining the true nature of the rule, but in its application to the circumstances of particular cases. There is another rule in the law of trusts which I think also very important to be observed, and which I think is just as clear and well-founded as the other, and that is, that the purposes of the trust and the powers of the trustees are to be found, in the case of private trusts, only in the deed or deeds constituting the trust, and, in the case of public trusts, only in the Act or Acts of Parliament constituting or affecting the trust. Here we have only one Act of Parliament to deal with, for this is a new trust, created for the first time in the year 1869, and, with the exception of the statute passed in that year, we have no other in which we can seek for either the purposes or powers of the trustees. The question is, whether the promotion of the bill of 1871 is one of the purposes of the trust created by the Act of 1869? It is said, and, as I think, justly said, that the powers of trustees, whether private trustees or statutory, may be either expressly stated or implied; but it depends a good deal upon the nature of the power claimed whether it can be held to be implied, and it depends still more upon the nature of the power claimed what is necessary to create sufficient implication. There [606] are several powers which are very easily implied in the case of all trusts—powers which, though not expressed, are absolutely necessary for the administration, the ordinary personal administration, of every trust. There are other powers, again, which it would be very difficult to imply, and which can hardly be held to belong to trustees unless

expressly conferred. These may be said to be among the essentials of particular trusts. Now, the question here comes to be, what is the nature of the power claimed in the present case in view of these general rules. It is said that the Act of 1869 has conferred upon the trustees, among other powers, the power of bringing in water from a new source of supply, or at least of applying to Parliament for the necessary powers to enable them to do so. I confess I would expect so important a power as that to be expressly given, and yet I think it is conceded on all hands that it is not expressly given. But it is contended that it is given by clear implication; and, without admitting that that would be sufficient, I proceed to consider whether there is any foundation for such an implication in the Act of 1869.

My brother Lord Deas has called attention to the title and the preamble of the statute, which I also think very important. The title of the statute is—"An Act to create and incorporate a public trust for supplying water to the city of Edinburgh, town and port of Leith, town of Portobello, and districts, and places adjacent; to transfer to the trust the undertaking and powers of the Edinburgh Water Company; and for other purposes." The preamble, again, says that "it is expedient that the supply of water to the city of Edinburgh, town and port of Leith, town of Portobello, and places adjacent, and other places named, should be provided by and placed under the control, regulation, and management of trustees, as representing and for and on behalf of the community of the said city, port and towns, and places adjacent, and that the undertaking of the company of proprietors of the Edinburgh Water Company, and their whole rights, privileges, lands, buildings, streams, reservoirs, water, and other property should be vested in the said trustees." The portion of the preamble that my brother Lord Deas remarked upon particularly was that which relates to the constitution of the trust, and he seemed to think that the trust could hardly be constituted for the purpose of supplying a large district and a large city with water without the powers being given to add and increase the supply according to circumstances. It would be a very extraordinary thing certainly to constitute a trust to supply water without giving it the powers to supply water or putting into its hands the existing supply; but in the portion of the preamble to which he referred there is nothing indicated except the expediency of constituting a public trust for this public purpose, and we have to look to the second part of the title and the preamble for the purpose of seeing how Parliament intended to give the power to the trust to make such a supply, and that is by transferring and vesting in them the existing undertaking of the Edinburgh Water Company. The title and the preamble of the statute, to my mind, speak in very intelligible language, and seem to indicate very strongly that the purpose of this statute is to substitute for the private company a public trust, to carry on the undertaking which had previously been carried on by a company of proprietors for their own purposes.

In perfect accordance with this view of the scope and object of the Act of Parliament I think we shall find all the different sections run. The property vested in the trustees is exclusively the undertaking of the old company. That is made very distinct, indeed, by the 20th clause of the statute, which explains and describes very fully the whole estate which is to be vested in the company, and the whole power generally which they are to exercise, and these are the estate of the old company and the powers which belonged to it. In subsequent sections, such as the 56th and 57th, power is expressly given to extend the existing works, mains, and pipes of the company, or any additional mains and pipes that may be constructed and laid by the trustees, whenever it shall be necessary for the purpose of supplying water to the inhabitants within the limits of this Act; and, in addition to maintaining the public wells now maintained, they are authorised also to maintain a sufficient number of wells, fountains, and standpipes, from which the poorest class of the inhabitants should be [607] permitted to draw water for domestic purposes, and for such purposes only, and shall keep them at all times charged with water—a most important and necessary requirement. The Act implies, of course, that with a rapid extension of the population, where new streets are coming into existence year after year, requiring an extension of mains and pipes, there should be additional wells for the poorer classes. I need not go through the other clauses of the statute, because I do not think it is alleged that there is in any of them anything to imply a power in the trustees, without any additional Parliamentary authority, to acquire property or extend their operations in the way of bringing in additional sources of supply. That is not contemplated

certainly in any of the clauses. It is suggested, indeed, that there was a known inadequacy in the supply. It must have been in the mind of the Legislature in constituting this trust that additional water must be brought in some time or other. That is very possible, and I shall deal with it hereafter. But the question is only this, whether this trust contains within itself the power to bring in an additional supply from a new source, and whether the trustees, acting under this limited trust, with funds at their disposal for meeting specific purposes, can themselves go, at the expense of the trust, to obtain sufficient powers. Upon this question, which is really the only one before us, there are two sections of the statute which appear to me to be of paramount importance, and these are the sections which relate to the application of the funds of the trust—the capital and the revenue.

The 79th clause empowers the trustees to borrow money, and it distinctly specifies for what purposes the borrowed money is to be applied :—" It shall be lawful for the trustees, for payment from time to time of the mortgage debt of the company, and the several sums payable by the trustees to the company, as hereinbefore provided, with the expense of renewing main pipes and conduits, and of laying additional service pipes, if it shall be found necessary to incur such expense, to borrow on mortgage any sum not exceeding £220,000." There is a specific application provided for the money that the trustees are empowered to borrow. It can be applied for the payment of the mortgage debt of the company, which, we are informed, extended to £133,000 ; " of the several sums payable by the trustees to the company as hereinbefore provided " —that is, by section 22—and these sums, we are informed, amounted to upwards of £20,000—" or to the expense of renewing main pipes and conduits, and laying additional service pipes." There is no other purpose specified, and there are no general words in this clause that can enable the trustees to apply any part of their borrowed money to any purpose not there specified. It humbly appears to me that if the trustees had power to charge against the trust-funds the expense of unsuccessfully promoting the bill of 1871, it would form a proper charge against capital, and therefore the fund out of which it can be paid is this very capital fund which is provided by the 79th section. But let us see whether, even upon the assumption that it might naturally form a charge against revenue, there is any room for applying any of the sums arising from rates to such a purpose as this. The application of the money received from rates is provided for by the 65th clause ; " the trustees are authorised and required, once in every year, to estimate and fix the amount of money necessary to be levied for the purpose of defraying the cost, charges, and expenses of supplying the said city, towns, port, and district with water for and during the year then current, under which shall be comprehended the payment of the annuities, interest of any money to be borrowed under the provisions of this Act, expenses of management, maintenance of works, repairs, materials, wages, taxes, and other outgoings and charges, and the payment of the sum required to be annually set apart for a sinking fund as hereinafter provided, together with the expense of distributing supplies of water, and all other charges and expenses, in so far as the trustees may consider the same to be fairly and equitably chargeable against revenue." Nothing, therefore, it is plain, under this clause, can be charged against the money raised from rates, except what is properly chargeable against revenue. All these things are specified. The enumeration, no doubt, is not an exhaustive one, because, although there are a great many particulars specified there are those general words superadded, " other outgoings and charges " ; but I need [608] hardly say that it is a fixed principle of construction that where such general words follow a particular specification they can only embrace outgoings and charges in accordance with the particulars specified. No extraordinary expenditure, therefore, and no expenditure made once for all and for the general purposes connected with the trust—such as the purposes for which the borrowed money is applicable—could ever be lawfully chargeable under the 65th section against revenue.

The 71st section has been referred to by Lord Deas in connection with this, and it seems to me in entire harmony with what I have said. The trustees are there authorised to anticipate revenue or to anticipate expenditure, and that is quite necessary in the administration of any trust, because it may happen that the estimate that is made under the 65th section, or the budget of the year, may turn out to be to a certain extent inaccurate and fallacious, and it becomes necessary to supplement it by some additional estimate in a subsequent year; or if the trustees may think that the estimate

of the present year may be taken as a moderate one, and that next year they may be put to much extra cost that may be chargeable against revenue, for the purpose of meeting it they are authorised to make the estimates for the current year larger than what is necessary for the expense of the current year. But it does not alter the nature of the purposes for which the money is to go. They are still proper charges, which can only be made against revenue.

The result seems to be, that the trustees have not in their hands any funds, either capital or revenue, that are not specifically appropriated, and certainly no part of them is specifically appropriated to the promotion of bills in Parliament. There is nothing in either of these clauses which can convey the slightest countenance to such an idea. The scope, therefore, of this Act of Parliament, in precise accordance with its title and preamble, leads me to the conclusion that there is no ground whatever for the implication that the trustees are expected to increase the supply of water to the city and district by bringing in water from new sources. It may be that it is contemplated and expected that that will be done. There are ways and means of doing it. But these trustees, as trustees, cannot do a single act or apply a single penny of money except in precise accordance with their Act and constitution.

There is an argument, however, founded upon the incorporation with this statute of certain clauses of the Water-Works Act, and this is an argument which deserves careful consideration. The fourth section of this statute is the incorporating clause, and I think it is in its language very instructive :—" The Water-Works Clauses Acts 1847 and 1863, except the provisions with respect to the construction of water-works, and with respect to the amount of profit to be received by the undertakers, when the water-works are carried on for their benefit, and except as regards any matter or thing otherwise provided for in this Act, shall be incorporated with this Act and applied to the water-works, lands, hereditaments, rights, easements, credits, and effects hereby vested in the trustees, or in, over, or upon which the trustees have, by this Act, any power or right; and the words 'lands' and 'streams' used therein shall mean the lands and streams by this Act vested in the trustees, or over or in which the trustees have, by this Act, any power or right; and the expression 'the undertaking' used therein shall mean the undertaking and works of the company by this Act vested in the trustees, provided always the trustees shall not be bound to have water constantly laid on under pressure, and that no penalty under the said incorporated Acts in respect of the supply shall attach to the trustees for a period of five years from the vesting of the undertaking in the trustees under this Act." Now, it is not merely the exclusion here of the clauses of the Water-Works Acts, in respect to their construction, that appears to be worthy of observation, but still more the provision that the clauses of the Water-Works Act shall apply to no estate, or works, or stream, or water, except those which are hereby vested in the trustees—that is, the undertaking of the old company, and nothing else. So that nothing else is brought by the operation of this Act within the administration of the trustees but what is pointed out by these clauses. Now, with that light, let us see what is the meaning of the clauses so incorporated that they [609] can be applied to this particular trust. The most important, and the only ones that are really worthy of special reference, are 35, 36, and 43 of the Act 1847. The 35th section requires that a constant supply of water shall be kept for domestic purposes at high pressure. The 36th provides a penalty for neglect to lay pipes for the supply of water for domestic uses, and the 43d provides a penalty for refusal to fix and maintain fire-plugs, or for occasional failure of supply of water.

Now, to consider the meaning of these clauses, in the first place, apart from the special Act in which they are incorporated: Does this mean that all water companies and all statutory trustees for the supply of water are bound, where the supply is not perfectly adequate, to go to Parliament for fresh powers? Because, according to the argument on this clause, that must be the meaning. My brother, Lord Deas, says you may separate the penalties from the obligation. The penalties may not be enforceable in particular circumstances, and there may be plenty of excuses for preventing a party from being liable in penalties though there may have been a violation of duty. Is every statutory body of public trustees charged with the supply of water, and every private company charged with a similar duty, guilty of a breach of duty for every day it delays going to Parliament to get an additional supply of water where the supply of the town is not fully adequate? I cannot conceive the possibility of such a construction being put upon these clauses, even apart from what

is contained in the special Act. For the result would be that a body of statutory trustees with certain limited powers, are to be driven by penalties—for the penalties undoubtedly come in here as a sanction—whether they may excuse themselves from their liability to penalties or not—to proceed to Parliament for the purpose of extending their own powers. A much more reasonable construction, as it appears to me, of these clauses is, that the trustees, or a company as the case may be, shall be bound to use the supply they have to the fullest extent it can be made available for the purpose of fulfilling what is desired by this clause—a constant supply of water for domestic and other purposes; and this is strongly confirmed by examination of the special language of these clauses. The penalties are not imposed for failure. There is no such language. The penalty does not attach to failure; the penalty only attaches to refusal or neglect. But there can be no statutory neglect to perform a duty which the trustees cannot perform, and which, under the constitution of their trust, they have no means of performing. It is refusal or neglect alone that is to be visited with penalties. As I said before, there is neither refusal nor neglect if the trustees do all that their powers enable them to do. The matter becomes even more clear when we deal with these clauses as applicable to the Act of 1869, and with the language of the 4th section of that Act, incorporating these clauses, because it then becomes clear that these clauses are intended to have operation and effect only as applicable to the undertaking vested in the trustees by the statute of 1869, namely, the undertaking of the company as transferred by that Act. Although I think it very desirable to examine that argument minutely, when it comes to be examined it is really of no weight at all.

The result, therefore, I think, is clear enough, that the trustees have no power vested in them to increase their supply by bringing in water from new sources, or of going to Parliament for the purpose of obtaining powers to enable them to do so. And while they have no power conferred upon them to do that, they have no funds in their hands which can be lawfully applied to such a purpose, because every shilling of the funds they have is specifically appropriated. But the question is asked, if that be so, and if the rule of law applicable to such a trust is so strict in its application, how is an adequate supply to be got—how are the powers to be obtained from Parliament for the purpose of bringing in an additional supply of water? The people of Edinburgh or any other city similarly circumstanced, are placed in this unhappy predicament, that they can never have such a supply, because no body can go to Parliament except at its own risk or cost. I do not suppose the people of Edinburgh will be placed in any more unfortunate position than the people of Southampton were by a similar decision, to the effect that the water trustees could not apply any of the funds in their hands for the purpose of promoting a bill in Parliament for obtaining an additional [610] supply. The case was decided in the year 1850, and it was by no means the first of a long series of cases to the same effect, and I am not aware that any practical inconvenience has ever been found to result from the existence of this rule, for this very plain reason, that no party can approach Parliament except at his own risk in the way of expense, and those who obtained the Act of 1869 incurred that risk, and every party who goes to Parliament to get an Act constituting such a trust for the first time incurs that risk, and every statute obtained for the first time to supply a town with water is obtained at this risk. Was there any difficulty in getting such Acts, or getting them charged against the community? None whatever. But these parties must be careful to go to Parliament with such a scheme as is likely to obtain the sanction of Parliament, and as much as possible to disarm opposition in the community they represent. And if they take these precautionary measures, they will not only obtain their Act, but obtain it with a clause authorising them to charge the expense of obtaining it against the funds raised under its authority. It is in that way that all such Acts are obtained—that all persons who go to Parliament for powers, whether for the first time or for the purpose of increasing or enlarging the powers already conferred, invariaby go with this risk—that if they fail in obtaining the Act they must themselves pay their own costs. I confess I do not view the operation of the rule of law leading to results of this kind with apprehension. On the contrary, I think it is most salutary indeed, and absolutely indispensable to prevent abuse.

In common with all your Lordships, I have given to the promoters of this bill, the trustees under the Act of 1869, credit for perfect good faith, and I say that by no means as an unmeaning phrase. I say it in the same sense as it was said at the

bar; and I cannot agree with Lord Deas that the counsel for the suspenders made that admission unwillingly. It seems to me he made it cheerfully and sincerely; but while giving them credit for good faith in all that they have done, I still am bound to come to the conclusion that they have done what they were not, as trustees, entitled to do. In saying that they were actuated by good faith, I take it for granted not only that they believed it was a scheme for the public benefit, but I mean also this, that I think they undoubtedly believed that, even if unsuccessful in their application to Parliament, they would be entitled to charge the expenses against the community. But, most unfortunately, they were either not advised at all, or they were very ill advised. If they were not advised, and if they did not take legal advice before acting upon this assumption, it is much to be regretted, because, undoubtedly, the result has been to place them in that position. But I am afraid none of these considerations can influence us in the slightest degree in our decision—that the promotion of the bill of 1871 was not one of the purposes of the trust created by the Act of 1869.

THE COURT adhered, with additional expenses.

GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—J. D. MARWICK, S.S.C.—Agents.

[*Principle applied*, Wakefield *v.* Comm. of Supply of Renfrew, 1878, 6 R. 259. *Commented upon*, Perth Water Comm. *v.* Macdonald, 1879, 6 R. 1050.]

No. 105. X. MACPHERSON, 610. 9 Mar. 1872. 2d Div.—Lord Gifford, R.

JOHN BOOKLESS MORGAN, Pursuer.—*M'Laren—Nevay.*
ROBERT SMART, Defender.—*Rhind.*

Cautioner—Liberation—Mercantile Law Amendment Act, 1856.—19 *&* 20 *Vict.* c. 60. —Section 9 of this Act enacts that "where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of such cautioners, without the consent of the other cautioners, shall be deemed and taken to be a discharge granted to all the cautioners, but nothing herein contained shall be deemed to extend to the case of a cautioner consenting to the discharge of a co-cautioner who may have become bankrupt." *Held* (*rev.* judgment of Lord Gifford) (1) that the enactment applied only to joint and several obligations, and that it did not apply to a case where payment of a debt of £105 was guaranteed by one cautioner separately to the extent of £70, and by another to the extent of £35; and (2) that the dis-[611]-charge by the creditor of one of the cautioners did not affect the liability of the other for his proportion of the debt.

Observed, that the section applies to obligations which are substantially joint and several, although contained in separate writings.

This action was raised by John B. Morgan, grocer in Edinburgh, against Robert Smart, to recover £35, under a letter of guarantee granted by the defender in the following circumstances:—

On 15th July 1869 the pursuer agree to sell his stock in trade to one Roderick M'Donald, the latter agreeing to find security to the amount of £105; and the cautioners who were offered were William Banks to the extent of £70, and the defender Smart to the extent of £35. Separate letters of guarantee were handed to the pursuer for these amounts. The defender's letter was in these terms:—"Mr. J. B. Morgan. —Sir, I hereby become bound, as security for Mr. Roderick M'Donald, 20 Rose Street, to the amount of thirty-five pounds sterling, for the stock in the premises in New Lane, Newhaven, belonging to you, and sold by you to him, said sum to be paid by Whitsunday eighteen hundred and seventy-one (1871); and I am, yours respectfully," (Signed) "Ro. SMART." M'Donald thereupon obtained possession of the stock and premises.

The pursuer averred,—"The balance due, with interest as at 15th May 1871

(when the amount of the defender's guarantee of £35 became payable), amounted to £65, 14s. 3d. The pursuer subsequently, on 22d June 1871, recovered payment from the trustee on Banks' insolvent estate of a sum of £11, 8s. 2d., being the amount of the pursuer's dividend on his claim upon the estate, thus leaving due to the pursuer a balance of principal and interest, as at 15th May 1871, of £54, 6s. 1d. When the claim was made upon the trustee (who, it is believed, acted under a voluntary trust-deed executed by Banks for behoof of his creditors), he, although the claim was not then payable, admitted or ranked it as a contingent one, a dividend being set aside to meet it when payable; and the pursuer avers, that if he had not then made the claim he would never have received anything under Banks' guarantee, he having, after the execution of the trust-deed, left this country, and never having since been heard of."

The defender, in answer to this, stated,—"Denied that at 15th May 1871 there remained any balance due on said stock. Admitted that the pursuer on or about 22d June 1871 took payment of a composition, or restricted sum, the precise amount of which is unknown to the defender, from the trustee on the (alleged) insolvent estate of William Banks." The defender averred that "it was either a restricted sum or a composition, and that the pursuer in respect of said payment discharged said estate and the said William Banks of any liability attaching to it or to him in respect of the foresaid letter of guarantee for £70. Explained that Banks was not sequestrated, and that the pursuer's said discharge of him and his estate, without obtaining full payment of the £70, was without the consent or knowledge of the defender. Explained that the defender does not know and does not admit that Banks was or is insolvent; and averred that, had the pursuer chosen, he could have obtained full payment from Banks of any claim for which he was liable under his said letter of guarantee."

The defender averred that after the letter of guarantee had been granted the agreement between the pursuer and M'Donald had been materially altered without the cautioner's consent.

The defender pleaded;—(2) The pursuer having, without the defender's consent, bound himself, by the said agreement of 21st July 1869, to give M'Donald time for payment of the stock which, by the original agreement between the parties, M'Donald was not entitled to demand, the defender [612] was thereby liberated from his cautionary obligation. (3) The obligation undertaken in the defender's letter was discharged by the pursuer and M'Donald entering, without the consent or knowledge of the defender, into an agreement which materially altered the original agreement, and greatly increased the risk of a cautionary obligation for payment of the stock. (4) At common law, the pursuer having, without the defender's consent, discharged William Banks as above set forth, must be held to have discharged the defender. Also, in any view, he must be held to have discharged him *quoad* two-thirds of the debt (if any) due by M'Donald for the stock, that being the proportion which Banks' cautionary obligation bears to the defender's. (5) In respect of the provisions of the 9th section of the Mercantile Law Amendment Act, Scotland, 1856, the pursuer having, without the defender's consent, discharged William Banks, as above set forth, the said discharge operates as a discharge of the defender also.*

A proof was led. It appeared that Banks' affairs having become involved his assets were distributed rateably among his creditors. The pursuer lodged a claim for £70 under the letter of guarantee. He subsequently raised a small debt summons against Banks, restricting the sum to £12. He used arrestments on this summons, and obtained payment under a decree of forthcoming.

The proof as to the alleged alteration of the agreement was not conclusive. (The Lord Ordinary held the alteration to be established, but the Court held that it had not been proved.)

---

* 19 & 20 Vict. c. 60, sec. 9—"From and after the passing of this Act, where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of such cautioners, without the consent of the other cautioners, shall be deemed and taken to be a discharge granted to all the cautioners; but nothing herein contained shall be deemed to extend to the case of a cautioner consenting to the discharge of a co-cautioner who may have become bankrupt."

The Lord Ordinary (Gifford) pronounced this interlocutor:—"Assoilzies the defender from the conclusions of the action: Finds the pursuer liable in expenses," &c.*

The pursuer reclaimed.

---

* "NOTE.—Although the sum in dispute in the present case is only £35, the case has been very keenly litigated, and the questions raised are not without difficulty.

"The pursuer's claim is founded upon the defender's letter of guarantee, No. 7 of process, dated 15th July 1869, whereby the defender became bound as security for Mr. Roderick M'Donald to the amount of £35 sterling, for grocer's stock in Newhaven, belonging to the pursuer, and sold by him to M'Donald.

"The pursuer's statement is that, on the faith of this letter of guarantee, he delivered certain stock to M'Donald, and that M'Donald has failed to pay the balance of the price, amounting, as at Whitsunday 1871, to £54, 6s. 1d.

"The defences chiefly insisted in by the defender in the debate upon the concluded proof resolve themselves into three, viz.—(1) That the original agreement of sale between the pursuer and M'Donald, and in reference to which alone the defender became cautioner, was superseded by a subsequent agreement between the pursuer and M'Donald, to which the defender was no party;

"(2) That the pursuer, without the consent of the defender, gave time to M'Donald, the principal debtor; and

"(3) That the defender is liberated by the pursuer having, without the defender's consent, discharged a co-cautioner, a Mr. Banks, who had also become security for the price of the stock to the extent of £70, though in a separate letter from the defender.

"It was hardly disputed by the pursuer that these defences are relevant, and [613] if sufficiently established upon the evidence that they would lead to absolvitor; and the real questions between the parties came to turn upon the import and effect of the proof adduced before the Lord Ordinary.

"After fully considering the proof, both documentary and oral, the Lord Ordinary has come to be of opinion, that the whole of the three defences above-mentioned have been sufficiently established. He has come to this result, not without hesitation, for, in some particulars, the evidence is conflicting, and the proof far from satisfactory. Various points of considerable nicety arise in the proof, and both in law and in the facts an ingenious argument was submitted for the pursuer; but, on the whole, the Lord Ordinary thinks enough has been established to liberate the cautioner.

"Without entering into any details, the Lord Ordinary will very shortly indicate the view which he takes on each of the three defences above noted, into which, for convenience, the defender's case may be separated.

"I. The Lord Ordinary thinks it is sufficiently established that after taking the defender's letter of guarantee the pursuer made, in some respects, a new arrangement with M'Donald.

"If the only effect of that arrangement had been to reduce the amount of stock sold so as to bring the price within the amount covered by the two letters of guarantee this would not have been enough to liberate the cautioners or either of them, for the Lord Ordinary thinks it proved that it was intimated, at least to the present defender, that as he had only become cautioner for £35 instead of for £70, the pursuer would withdraw some of the stock which he originally proposed to sell.

"But a dispute arose between M'Donald and the pursuer, which led to the pursuer excluding M'Donald for a time from the whole stock, to a claim of damages on the part of M'Donald, to the employment of agents on both sides, and to a great variety of communings and correspondence. What was the precise result is certainly far from clear upon the evidence, but the Lord Ordinary holds it made out that to some extent the original agreement suffered modification. The pursuer granted to M'Donald a receipt, No. 62 of process, for a first payment of £20, and the receipt bears that the sum was paid, not under M'Donald's original offer, but under an arrangement embodied in a letter from Mr. Galloway to Mr. Barclay, dated 22d July 1869. This letter contains the heads of an agreement, said to have been come to at a meeting of agents and parties, and although the full details are not given, it seems plain that that arrangement is somewhat different from the original agreement with M'Donald. It is true, the pursuer says he never saw this letter of Galloway's; but he took money and signed a receipt bearing express reference to it, and he can hardly be allowed now to disclaim it. If the heads mentioned in Galloway's

[613] He argued;—There was no new agreement finally concluded. The Mercantile Law Amendment Act only applied to joint and several obli-[614]-gations.

letter, to which the pursuer is tied by his own receipt, are held to be the whole heads of the agreement—and this is not unreasonable—then it is plain that the original agreement with M'Donald was most materially altered—indeed wholly superseded.

"It may be true that the pursuer was annoyed by M'Donald's conduct, and by his threatened action of damages, and was glad to settle with him on reasonable terms, but then he had no right to make a new bargain with him, and keep the cautioner bound. The cautioner should have been consulted, and made a party to the new arrangement.

"There is, unquestionably, a nicety, for it was plausibly maintained that the so-called new arrangement, even accepting the heads in Mr. Galloway's letter, was not materially different from the original one. But this is very delicate ground for the pursuer to take. Once the pursuer falls from his original agreement, though but in minor respects, he liberates the cautioner, for the law cannot judge or decide whether the cautioner would have consented to be a cautioner under the new or modified agreement.

"The whole letters and documents and the whole evidence must be carefully [614] looked to. The Lord Ordinary merely indicates the principle upon which he has proceeded.

"II. It seems established, though certainly not to a very large extent, that time was given by the pursuer to M'Donald without the consent of the cautioner.

"Here, again, the Lord Ordinary may simply take Mr. Galloway's letter, vouched by the pursuer's receipt relative thereto. Weekly payments seem to be converted into monthly payments, the provision limiting M'Donald's drawings from the business to £1 per week, and all the stipulations about book-keeping and profits seem to be dispensed with, and, accordingly, none of these were enforced, or attempted to be enforced.

"Now, it may be that all this did not very materially weaken the precautions for the cautioner's safety, or make his position worse or more dangerous than it was before. But the law cannot judge this, and the creditor has himself to blame if, without the cautioner's consent, he alters in any respect the debtor's position and liabilities. The case may be very narrow, but a cautionary obligation is *strictissimi juris*, and a rigid rule must be applied.

"III. It appears to the Lord Ordinary that the pursuer did virtually discharge the co-cautioner Banks, or restrict Banks' liability by summoning him in the Small-debt Court for £12 only, by taking decree against him for that sum, and by enforcing this decree by arrestment and furthcoming. The provision of the Small-debt Act is explicit, that a creditor suing under the Act for a limited sum falling within its range shall be held to have abandoned any larger or farther debt; it is the same as if Banks had got a deed of restriction and discharge making his debt only £12.

"It was very ingeniously urged that this was done merely with a view to recovering a rateable dividend from the estate of Banks, calculated on the whole £70, and this appears to be true, but not the less was there in form a discharge of Banks for £58. It is not without reluctance that the Lord Ordinary feels himself compelled to hold that the discharge must liberate a co-cautioner, though it was granted for a very excusable, indeed for a quite innocent motive. The present defender was entitled to rateable relief against Banks, and he never consented that Banks should be liberated for less than full payment.

"The provision of the Mercantile Law Amendment Act is quite explicit, and the Lord Ordinary thinks it applicable to the present case. It does not appear to him to make any difference that the two cautioners were bound by separate instruments, and that the amounts for which they were respectively liable were different. They were each bound for the whole price, though to different extents, and it is proved that the defender granted his obligation for £35, in the knowledge and in the full view of Banks having become cautioner for £70. The whole debt due by M'Donald is now reduced to £54, 6s. 1d., and the Lord Ordinary thinks that the pursuer was not entitled to discharge the co-cautioner Banks of a sum greater than that whole amount, without at the same time liberating the present defender.—See Bell's Coms. I. 369–377 (M'Laren's ed.).

"The Lord Ordinary has therefore, and on all the three grounds, though some

The guarantees here were not joint and several. They were conjunct neither *in re* nor *in verbis*. Each cautioner was separately and absolutely bound to the extent of the sum in his letter of guarantee.

The defender argued;—The new arrangement was acted on. By it time was given to M'Donald, and the defender was on that account liberated. The guarantees were practically joint and several, and the Mercantile Law Amendment Act applied.

At advising,—

LORD JUSTICE-CLERK.—I am of opinion that the interlocutor of the Lord Ordinary should be altered.

[615] On the first ground which was argued to us I am clear that there is no satisfactory evidence that any change in the original contract was ever finally made. That there was a negotiation for a change seems probable, but it appears never to have been agreed to. On the contrary, I think it proved that up to the last the parties were at variance in regard to it.

On the last point—namely, the effect of the alleged discharge in liberating the defender—it seems clear that according to the law of Scotland, before the Mercantile Law Amendment Act, the defender could only have pleaded this discharge to the effect of relieving him of that part of his obligation for which he had a claim of relief against the discharged cautioner. The question, therefore, comes to depend on the construction of the clause in the Mercantile Law Amendment Act which has been founded on. I have come to be of opinion that this clause cannot apply unless the cautioners are bound *in solidum*; so that the discharge to the cautioner shall be, to him at least, a discharge of the whole debt. It applies to the case of joint and several obligants only, in which a discharge to the one covers the whole ground for which both are bound. But here it is certain that the cautioners were not, at the commencement, bound for the same debt at all, and one of them might have paid up his share, and obtained his discharge, without in any way affecting the obligation of the other. They were bound for two separate sums, which together made up a capital of £105; and although, by payments by the principal debtor, it may be that one of the cautioners remained bound for the whole balance, while the other was bound for a portion of it, the separate nature of the obligation in its inception is not thereby altered. It was still open to the creditor, on receiving his proportion from one of the cautioners, to discharge him entirely without affecting the liability of the other, and therefore the obligation is not one to which the principle of total liberation introduced by the Act can apply. I am therefore of opinion that the pursuer is entitled to prevail in this action to the extent of the proportion of the remaining balance, for which the defender had no claim for contribution against the other cautioner, who has been discharged.

LORD COWAN.—After careful consideration, I arrive at the conclusion that no one of the three grounds relied on by the Lord Ordinary is sufficient to support the interlocutor under review.

The first is that there was an essential change made in the contract of parties. I concur in the views stated by your Lordship on that point. No new contract was actually carried out, to the effect of superseding in any essential matter the original arrangement to which the cautioner was a party.

Then, as to the giving time. That and the question of new contract ran into each other; for although it seems to have been wished to make the payments monthly, and not weekly, this was not finally carried through, and was not acted on. The payment made, and for which the receipt was granted, does not correspond either with the one or with the other. It was a mere payment generally to account of the sums due, and I cannot see any ground on which it can be held that there was here "giving time" in the proper sense of that term.

The third point, as to the liberation of a co-cautioner, is very important. The law of Scotland is undoubtedly as your Lordship has stated. Irrespective of the Mercantile Law Amendment Act the result which must have been arrived at is, that the cautioner would be liberated to the extent he was injured by the liberation of his co-cautioner, but to no greater extent.

Then what is the meaning of the Act? I have not been able to get quit of the

---

of them are stronger than others, come to the conclusion that the defender must be assoilzied."

conviction that the clause applies solely to joint and several obligations. It applies to obligants conjunct *in re* or *in re et verbis*. I think it may apply though there is more than one writing, if the obligations are substantially conjunct. I think that is the true meaning of the clause. The proviso at the end of the clause provides that where one cautioner consents to the liberation of another he shall not take advantage of that liberation, but shall be liable in terms of his original obligation—*i.e.* to the full extent to which he must have been liable had the statute never passed. And this seems to me to corroborate the general view I take of the true meaning and effect of the main provision. I do [616] not think that such a case as we have to deal with falls within the enactment. The two obligations are neither conjunct *in re* nor *in verbis*. They are for distinct specified sums, and in different documents, having no reference to each other, although they no doubt relate to the same debt.

LORD BENHOLME and LORD NEAVES concurred.

This interlocutor was pronounced :—" Alter said interlocutor, and decern in terms of the summons to the extent of £21, 18s. 1d. : Find the pursuer entitled to the full expenses of the proof, and to the remaining expenses, subject to a deduction of one-third of the taxed amount," &c.

JOHN KNOX CRAWFORD, S.S.C.—FERGUSON & JUNNER, W.S.—Agents.

No. 106. X. MACPHERSON, 616. 13 Mar. 1872. 1st Div.—B.

THE LATE WILLIAM FORSYTH'S TRUSTEES, of the First Part.—*Brand.*
MRS. A. J. FORSYTH OR CURRIE AND HUSBAND, AND MRS. W. FORSYTH OR LINDSAY AND HUSBAND, of the Second Part.—*Brand.*
MISS ANNIE ANDERSON FORSYTH, of the Third Part.—*Shand—M'Lean.*

Succession—Testament—Holograph Writing.—After the death of a person whose settlement, with two codicils thereto, had been prepared by law-agents and formally executed, there was found in an open drawer, apart from these documents, a writing of later date, holograph of, and signed by the deceased, headed " draft of codicil," containing a new disposition of his property in favour of his children, but with a blank in the ultimate destination of the estate failing children and their issue. He survived the date of this document for several months, and there was nothing to show that it had been signed subsequent to the date it bore. *Held* that the writing was a mere draft, and inoperative as a testamentary writing.

William Forsyth, spirit-merchant in Glasgow, died on 25th December 1870, survived by his wife and three daughters. The eldest daughter, Annie Anderson Forsyth, was unmarried, and resided with her parents. The other daughters, Mrs. Currie and Mrs. Lindsay, were married in 1867 and 1869 respectively, and each received from Mr. Forsyth at the time of her marriage certain furniture, table linen, &c., but no money provision.

Mr. Forsyth left property to the value of £10,480, besides household furniture valued at £174. After his death there was found in his house in Glasgow, along with other valuable papers in a private drawer, secured by a lock and springs, a trust-disposition and settlement dated 25th October 1847, with two codicils dated respectively 9th August 1848 and 21st March 1867. Each of these documents had been prepared by different law-agents, and each was formal and duly tested.

By the trust-disposition and settlement the deceased provided a life-rent of his estate to his widow, the capital to be equally divided among his children. The codicils did not effect any alteration on the general scheme of the trust-deed.

A short time after Mr. Forsyth's death his widow found in an unlocked drawer, which contained articles of clothing in daily use by the deceased, a document in his handwriting, folded, and lying flat in the front of the drawer.

The document was in the following terms :—" Draft of Codicil.—Should Annie Anderson Forsyth, my daughter, remain unmarried at the death of myself and her mother, and considering the attention and interest she has taken in us since Agnes

and Mina was married; and farther, considering they were both set off with a competent assortment of bed and body clothes, table linen, and other things necessary for their house-furnishing, I give and [617] bequeith to my daughter Annie the whole of my household furniture, bed and table linen, silver plate, books, pictures, indeed all in use in the house; and considering at my death there will be in cash £10,000 (ten thousand pounds) less or more, including the life insurances in the Scottish Widows' Fund and Caledonian Life Ins. offices, I bequeith to each of my married daughters £3000, free of legacy-duty, which sum is to be put out to intst. in good heritable security, or in the Glasgow Water or River Trusts, and the intst. paid half-yearly to them so long as they live; and in the event of them leaving a family, the money to be equally divided among their children when the youngest is twenty-two years old; but should there be no family left by either of them, the money is to revert to the longest liver, and after her death to be distributed as follows:—

The reversion or balance of the money, which I expect will amount to considerably more than £3000, is to go to Annie, my oldest daughter, and to be put out at intst. as before mentioned; and in the event of her dying unmarried and without leaving lawful issue, is to revert as before mentioned, along with the proceeds of the sale of the household furniture and other effects belonging to her at her death.

"21 Sept. 1870. WILLIAM FORSYTH."

Prior to 5th September 1870 Mr. Forsyth had read to his wife a writing in which he made special extra provision for his unmarried daughter, Annie. Mrs. Forsyth signified her approval, but at the same time expressed a wish that Mr. Forsyth should in his lifetime make some provision *de præsenti* in favour of his two married daughters. Seeing that she was not satisfied, the deceased burned the paper in her presence. After his death Mrs. Forsyth, being under the impression that he might have executed another writing giving effect to his views in favour of his unmarried daughter, made a search for such a document, and the result was the finding of the holograph writing above mentioned, which, according to Mrs. Forsyth's recollection, was in precisely the same terms as that which the deceased read over to her and destroyed in her presence.

Mr. Forsyth, on 20th October 1870, was suddenly seized with the illness of which he died. During the third week of this illness he rallied for a few days, and then gradually grew weaker until his death on 25th December 1870.

Questions having arisen as to the validity of the holograph document as a testamentary writing, a special case setting forth the facts above narrated was presented to the Court craving their Lordships' opinion and judgment upon that point.*

LORD PRESIDENT.—The question is, whether the holograph writing by Mr. Forsyth is a valid tested writing. He died on 25th December 1870, leaving a widow and three daughters. The eldest daughter is unmarried, and always lived with her father; the other two were married respectively on 6th August 1867 and 10th August 1869. Mr. Forsyth executed a formal and tested deed of settlement on 25th October 1847. Its terms are given in the special case. He executed a codicil in 1848, in which he made some unimportant alterations in his settlement. He did nothing more till 1867, when he made a further alteration, by providing more particularly for the distribution of his estates among his daughters and their issue. The principle of division remained the same throughout all these deeds, viz., that of equal distribution.

[618] But on 1st December 1870, it is said that Mr. Forsyth altered his settlement by the holograph writing now in question. The great difficulty in holding it to be part of his testament is the title which he has given it. He calls it "draft of codicil," and these words are written in his own handwriting. The object of it is to benefit his eldest daughter, and the motive is declared to be that his two married daughters had received an outfit at the time of their marriage, showing that the document must have been written at least after August 1869. The effect of this codicil, if it were to receive effect, would be to pay off the married daughters with £3000 each, and give the balance of the estate, between £4000 and £5000, to the eldest.

---

* *Authorities cited.*—Munro *v.* Coutts, 1813, 1 Dow, 437; Horsburgh *v.* Horsburgh, 1847, 9 D. 329; Scott *v.* Sceales, Feb. 5, 1864, *ante*, vol. ii. 613; Lowson *v.* Ford, March 20, 1866, *ante*, vol. iv. 631; Sibbald's Trustees *v.* Greig, Jan. 13, 1871, *ante*, vol. ix. 399; Magistrates of Dundee *v.* Morris, 1858, 3 M'Q. 134; Williams on Executors, vol. i. 68, 69.

Now, this is called by himself "draft of codicil," and when these words were written it is difficult to suppose that he meant it to be anything but a draft. The question comes to be, whether, and at what time, it came to be changed from a draft to a perfect testamentary document? It is signed, and if it could be proved that the original was unsigned, and that it was signed *post intervallum*, that would intelligibly fix the point of time when the change took place. But nothing is known about that. There is no reason to suppose that the signature was not written at the same time with the rest of the paper.

Then there are the circumstances connected with its discovery, which, though not conclusive, are always more or less material. The original settlement, and the two formal tested codicils of 1847 and 1848, were found in what I understand to have been Mr. Forsyth's repository for papers of value, a locked drawer, in his book-case. This holograph paper was not found there; it was found by his widow in an unlocked drawer, where no important papers lay, in a chest of drawers under the book-case, in which he kept his ordinary clothing. It was folded and lying flat, but without backing or endorsement.

We now have to determine whether that document is to be taken as part of the will of Mr. Forsyth, or only as an intended alteration of his settlement. We have to consider on the one side, that it is signed, and one the other, that it is called by himself only a draft. These circumstances are not very consistent with each other. It is not, however, an unknown thing that a party preparing a draft of his own will should sign it, for the purpose of authenticating it to the conveyancer who is to put it in form, and that is quite an intelligible reason. Another circumstance, in itself not very important, assumes some importance in connection with the title of the document. There is an important blank in the paper, more likely to be left in a draft than in a completed testamentary paper. The £3000 left to each of his married daughters and their children is to be divided when the youngest of the children reaches the age of twenty-one, but should there be no family left by either of them the ulitmate destination is left blank.

The circumstance also that Mr. Forsyth was in use, when he made testamentary papers, to employ a law-agent, is not to be thrown out of view. His three former testamentary deeds were executed by three different firms, and are all tested instruments. He had not left Glasgow, so far as we are informed. It is not said that he was not at home when he wrote the holograph paper. He had thus immediate and easy access to a man of business if he intended to put it into shape, and it is not alleged that he was in a state of incapacity, either from the state of his health, or otherwise, to employ a law-agent. Although he was taken somewhat suddenly ill, that was at a later period. The imperfect state of the paper, and its important blank, are not therefore to be accounted for by sudden illness followed by death.

Taking the whole circumstances into account, I am of opinion that there is no sufficient reason for taking what the deceased himself has described as a "draft of codicil" to be a completed testamentary paper.

LORD DEAS concurred.

LORD ARDMILLAN.—I have felt considerable difficulty in this case, and it is not without some hesitation that I have come to the same conclusion as your Lordships, but I have been impelled to that result by the combined force of [619] several considerations. In the first place, the testator never on any previous occasion appears to have attempted to make a holograph will, but, on the contrary, he invariably consulted a law-agent as to the testamentary disposal of his property. He did so in 1847, when he executed the original settlement, and again in 1848, and in 1867 when he executed formal codicils to that deed. Nor were these writings all prepared by the same person. A different agent was employed in the preparation of each of them, and this I think strengthens the inference that the informal holograph writing of 1870 does not embody the deliberate and confirmed purpose of the deceased.

In the second place, we have the fact that this document bears to be only a draft, and is dated 21st September 1870. But, as the testator lived for three months after that, he had ample time to have converted it into a formal writing; and he did not do so. He left it as a draft, and we must hold that he intentionally did so.

In the next place, I think it a circumstance of some importance that the holograph writing contains a blank *in gremio*, obviously intended to be filled up by the deceased either after deliberation or after consultation with some legal adviser. He may have

intended to consider either as to the ultimate destination of his property, or he may have been in doubt as to the proper mode in which his wishes should be expressed, but, in any case, it is extremely difficult to suppose that a writing left with such an important hiatus, in an imperfect state, could have been intended to operate as a deliberate and final expression of the writer's will.

Lastly, the document was not found along with the other testamentary writings and papers of value belonging to the deceased, but was discovered lying loose in a drawer containing articles of clothing, where it is much more likely to have been left by accident or carelessness, than to have been deposited for safe custody.

Taking all these circumstances together, I can come to no other conclusion than that we must answer the question put to us in the negative.

LORD KINLOCH.—I am of opinion that the alleged codicil cannot be held part of the last will and settlement of the deceased William Forsyth.

The paper in question is entitled by the deceased "draft of codicil." This implies that when he wrote it he considered it a mere draft, and not a completed instrument. The same is to be inferred from the circumstance that, in regard to the ultimate destination of his fortune, failing his daughters and their issue, a blank is left in the document for the names to be afterwards filled up. It may be that in a final deed of settlement the want of an ultimate destination would not affect the validity of the writing. But, coupled with the title "draft of codicil," this blank in the document confirms the inference that Mr. Forsyth intended this as nothing but a scroll, and did not leave it as a completed instrument.

I do not think it of any conclusiveness that the document is signed by Mr. Forsyth. Some people sign even drafts; and we have cases on the books in which the document was signed, and yet held to be a mere draft or instructions. If, indeed, it could have been shown that the document was originally unsigned, and that some time afterwards Mr. Forsyth deliberately put his name to it, that would have been strong evidence to prove that he intended to leave it as a completed instrument. But there is no proof of this. From aught that appears the name was adhibited at the same time that the document was written. And the mere addition of the signature does not, I think, in that case alter its character from what Mr. Forsyth himself calls it, a "draft of codicil."

The other evidence in the case all runs in the same direction. Mr. Forsyth's will, and two prior codicils, are all regularly tested; and the probability is that he intended to follow the same course with the additional codicil. It was not put up with the will and the other codicils, but found loose in an open drawer. It bears the date of 21st September 1870, and Mr. Forsyth did not die till 25th December subsequent, so that he had abundance of time to turn this draft into a formal settlement, if he was so disposed. As he did not do so, I think [620] the only legal and safe conclusion is to hold that he left it as it bears to be, a "draft codicil," and nothing else.

The interlocutor of Court accordingly answered the question appended to the special case in the negative.

CAMPBELL & SMITH, S.S.C.—ADAM SHIELL, S.S.C.—Agents.

[*Distinguished*, Whyte *v.* Hamilton, 1881, 8 R. 940; 1882, 9 R. (H. L.) 53.]

No. 107. X. MACPHERSON, 620. 13 Mar. 1872. 1st Div.—B.

JAMES HUTTON (Trustee in the Sequestration of Thomas Robertson), Petitioner.—*Harper.*

Bankrupt—Sequestration—Trustee—Discharge—Appointment of new Trustee—Bankruptcy Act, 1856 (19 & 20 *Vict. cap.* 79), *sec.* 74—*Casus improvisus—Nobile officium.*—It is only on the death, resignation, or removal of a trustee that the Sheriff is empowered by the Bankruptcy Act to convene a meeting of creditors for the election of a new trustee, and in cases to meet which there are no provisions in the statute the proper course is to apply to the Court with a view to a remit to the Lord Ordinary

on the Bills to appoint a meeting of creditors. On the emergence of funds belonging to a sequestrated estate after the trustee had been discharged but before the bankrupt's discharge, a meeting of creditors was convened by order of the Sheriff at which a new trustee was elected, who thereafter applied to the Court for warrant on the keeper of records to deliver up to him the sederunt book in the sequestration. *Held* that the petitioner had not been duly elected, and petition therefore dismissed.

The estates of Thomas Robertson were sequestrated by the Sheriff of Lanarkshire in 1864, and George Macfarlane, accountant in Glasgow, was duly elected and confirmed as trustee in the sequestration. Macfarlane was discharged of his office after recovering and realising certain funds, no other property being known to exist available for distribution among the creditors. Prior to his discharge Macfarlane, in terms of the statute of 1856 (19 & 20 Vict. cap. 79), sec. 153, transmitted to the Accountant in Bankruptcy the sederunt book in the sequestration, which, in accordance with the usual practice, was afterwards delivered to the Deputy-keeper of Records.

The bankrupt was not discharged.

Thereafter additional funds having emerged, a meeting of creditors was convened by order of the Sheriff on application made to him for that purpose by one of the number, and James Hutton, C.A., Glasgow, was elected new trustee, and was confirmed as such by the Sheriff.

Hutton then presented this petition to the Court setting forth the facts, and craving warrant on the Keeper of Records to deliver up to him the sederunt book in the sequestration.

After hearing counsel in support of the application the Court held that the petitioner had not been duly elected, in respect that it is only on the death, resignation, or removal of a trustee that the Sheriff has power under the Bankruptcy Act (sec. 74) to convene a meeting of creditors for the election of a new trustee, and that in other cases the only competent course is to apply not to the Sheriff, but to the Court, to appoint a meeting of creditors for the election of such trustee.*

Petition dismissed.

DUNCAN & BLACK, W.S.—Agents.

No. 108. X. MACPHERSON, 621. 15 Mar. 1872. 1st Div.—B.

ARCHIBALD CAMPBELL SWINTON AND OTHERS (Sir John Pringle's Trustees).—*Adam—Paul.*

THE HONOURABLE MRS. MARY GAVIN PRINGLE OR BAILLIE HAMILTON AND OTHERS.—*Sol.-Gen. Clark—Watson.*

SIR NORMAN W. D. PRINGLE, BART. OF NEWHALL.—*Millar—Marshall.*

Heritable and Moveable—Trust—Legitim.—By various deeds a trust was constituted for the management of the truster's estates during his life, including the payment of debts and the sale of land, and for its distribution after his death. A policy of insurance effected by the truster on the life of his son and heir became payable by the son's death, and the proceeds were invested by the trustees, with the truster's knowledge, on heritable security. *Held* that this sum was heritable, and did not form part of the executry estate in a question as to legitim.

Policy of Insurance—Executry—Legitim.—A husband predeceased his wife, on whose life he had effected two policies of insurance. *Held*, in a question with children claiming legitim, that these policies formed part of his moveable estate at the date of his death, and in calculating the amount of legitim were to be valued at their actuarial value, that is, at their real value in the market.

The late Sir John Pringle died on 15th June 1869. He was married in 1809 to Miss Emilia Anne Macleod, who died in 1829, and in 1831 to Lady Elizabeth Maitland

* Thomson, 1863, *ante*, vol. ii. p. 325; Gentles, 1870, *ante*, vol. ix. p. 176.

Campbell, who survived him. None of his sons survived him. He was survived by daughters and granddaughters of the first marriage, and by the two daughters of the second marriage, Mrs. Baillie Hamilton and Mrs. Anderson.

An antenuptial contract between Sir John Pringle and his first wife in 1809 contained provisions in favour of the children of that marriage in full satisfaction of legitim. There was also an antenuptial contract on the occasion of Sir John Pringle's second marriage, dated 13th October 1831, by which Lady Elizabeth Pringle's *jus relictæ* was excluded, and her father, the Marquess of Breadalbane, settled £20,000 on the children of the marriage. In that contract Sir John Pringle made no provision for the children of that marriage, and their right to legitim was not excluded. On 21st December 1837 Sir John Pringle conveyed his estates of Newhall and Stitchell to trustees for certain purposes. In 1841 the trustees, with a view to a loan transaction, effected a policy of insurance with the North British Insurance Company on the life of Lady Elizabeth Pringle for £5000. In 1850 it became necessary to borrow further sums of money, in order to pay off debts due by Sir John and his trust-estate; and for further security of a loan of £28,000 by the Edinburgh Life Assurance Company, it was arranged that the trust of 1837 should be ended, and a new trust, containing more ample powers, created by Sir John Pringle. Sir John also effected another policy of £5000, dated 8th January 1850, on the life of Lady Elizabeth Pringle, and one of £5000, of the same date, on the life of his son Captain James Pringle. These were assigned by Sir John and Captain Pringle to the assurance company in security of the said advance, by bond and disposition and assignation in security dated 30th January 1850. The trustees under the original trust-deed of 1837 also assigned to the assurance company, in security as foresaid, with consent of Sir John and Lady Elizabeth Pringle, the first-mentioned policy for £5000. The trust-deed of 1850 conferred on the trustees very ample powers of managing and selling the truster's estates, and it and the subsequent deeds of Sir John dealt with his whole estate and its disposal, both during his life and at his death.

The trustees sold the estate of Stitchill in November 1853, and out of [622] the price paid off the debts, including the £28,000 due to the Edinburgh Life Assurance Company; and, with the approval of Sir John Pringle, they invested the balance of the price in heritable security in their own names, and said balance remained so invested at the death of Sir John in June 1869.

By assignation and translation, dated 24th November and 12th and 21st December 1853, the Edinburgh Life Assurance Company, with consent of Sir John and Lady Elizabeth Pringle, conveyed the two policies of assurance on Lady Pringle's life, and the policy of assurance on the life of Mr. James Pringle, younger of Stitchill, above mentioned, to the trustees under the deed of January 1850, for the uses and purposes contained in that deed.

The trustees kept up the three policies of insurance. On 12th November 1855 Sir John Pringle executed a supplementary trust-deed, by which, *inter alia*, he empowered his trustees, in the event of his surviving Lady Elizabeth Pringle, to purchase with the proceeds of the policies of insurance on her life an alimentary annuity on his life.

Mr. James Pringle died in 1865, and the trustees invested the proceeds of the policy on his life on heritable security.

Sir John Pringle executed various other deeds of direction to his trustees, &c., which it is unnecessary to particularise. The estates of Sir John Pringle remained vested at his death in the trustees under the deed of 1850 and subsequent relative deeds. After his death they conveyed the estate of Newhall to Sir N. W. D. Pringle, his nephew, the third party to this special case, by deed of entail in terms of the directions in the trust-deeds dated 20th and 23d September 1870.

The provisions to the daughters of the first marriage, and under Sir John's testamentary deeds, were not within this case as finally amended. The right to the residue belonged to Sir N. W. D. Pringle.

It was admitted that the funds for legitim, claimed by Mrs. Baillie Hamilton and Mrs. Anderson, amounted, in consequence of Lady E. Pringle's renunciation of *jus relictæ*, to a half of the free moveable estate after deducting debts. As it was disputed, however, whether the policies of assurance ought to be included as parts of the moveable estate before estimating the legitim, this special case was submitted to the Court. The trustees under Sir John Pringle's trust-deeds were the first

parties, Mrs. Baillie Hamilton and Mrs. Anderson the second parties, and Sir Norman W. D. Pringle the third party.

The case was submitted for the opinion and judgment of the Court on the following questions :—" 1. Whether the £5888, 16s. received under the policy on Captain Pringle's life, and invested on heritable security by Sir John Pringle's trustees, ought to be included as part of the moveable estate of Sir John Pringle in estimating the fund for legitim ? 2. Whether the two policies on the life of Lady Elizabeth Pringle with the North British Insurance Company and the Edinburgh Life Assurance Company respectively ought to be included as part of the moveable estate of Sir John Pringle before estimating the amount of said estate forming the fund for legitim ? And if so, 3. Whether, in estimating the moveable estate of Sir John Pringle for legitim, the said policies should be taken (1) at the amount which would have been obtained for them if surrendered to the respective insurance companies as at the date of Sir John Pringle's death ; or (2) at the amount which would have been obtained for them if publicly sold as at the date of Sir John Pringle's death ; or (3) at their real actuarial value at said date, as the same may be ascertained by a remit to the respective offices, or otherwise ? "

It was maintained by Mrs. Baillie Hamilton and Mrs. Anderson, the [623] parties of the second part,—1st, The sum realised from the policy of assurance on the life of James Pringle, the eldest son of Sir John, which was invested by the trustees on heritable security, and also the policies of assurance on the life of Lady Elizabeth Pringle, formed part of the moveable estate of Sir John Pringle at his death, and the value thereof must be taken into account in estimating the amount of the legitim fund.* Nothing which the trustees did in the management of the estate could alter the character of any part of it in a question of succession. And 2d, The value of the policies on the life of Lady Elizabeth, for the purpose of computing said legitim, must be taken to be the amount which they would have realised if brought to public sale immediately after the death of Sir John ; or otherwise, the amount is to be taken at the real actuarial value of the policies at that date, as the same may be ascertained by a remit to the respective offices, or otherwise.

It was maintained by Sir N. W. D. Pringle, the party of the third part,—1st, The policy of assurance on the life of James Pringle, and the policies on the life of Lady Elizabeth, were by Sir John Pringle during his lifetime irrevocably vested in his trustees by *inter vivos* deeds, and he was divested thereof, and at the date of his death they formed no part of his executry estate out of which his daughters by his second marriage could claim legitim ; 2d, In any view the proceeds of the policy on the life of Sir James Pringle having been invested by the trustees on heritable security, with the knowledge of Sir John Pringle, and acting as his mandataries, did not form part of his executry estate ; and 3d, Even assuming that the policies on the life of Lady Elizabeth shall be dealt with as forming part of Sir John's estate at his death, the value thereof for the purpose of estimating the legitim fund should be taken to be the amount which would have been obtained for them from the respective insurance companies, if surrendered as at the date of Sir John Pringle's death. The proposition that a policy of insurance on the wife's life forms part of the husband's estate is not established by the cases cited, which are to the contrary effect ; and it is inconsistent with the principle, that the " condition of an uncertain event suspends not only the execution of an obligation, but the obligation itself." †

At advising,—

LORD PRESIDENT.—The first question in the special case is, whether the sum of £5888, 16s., received under the policy on Captain Pringle's life, and invested on heritable security by Sir John Pringle's trustees, ought to be included as part of the moveable estate of Sir John Pringle in estimating the fund for legitim. In the 15th head of the special case it is stated that Mr. James Pringle, on whose life the policy in question was effected by Sir John Pringle, died in 1865, and the proceeds of the policy (£5000), together with the bonuses which had accrued thereon (£888, 16s.), were paid by the assurance company to Sir John Pringle's trustees. They invested the

* Wight *v.* Brown, Jan. 27, 1849, 11 D. 459 ; Muirhead *v.* Muirhead's Factor, Dec. 6, 1867, *ante*, vol. vi. 95 ; Smith *v.* Kerr, June 5, 1869, *ante*, vol. vii. 863.

† Ersk. iii. 1, 6 ; and case of Fotheringham, *ibi cit.*, Nov. 18, 1694, M. 5765 ; Meuse *v.* Craig, 1748, 5 Br. Sup. 503.

money on heritable security, the whole sum being so invested at or before the term of Martinmas 1866, and at Sir John Pringle's death these investments remained undisturbed. We are also informed in the same article, that in a deed of assumption and conveyance, dated in October and November 1867, the heritable securities on which the proceeds of this policy was invested are referred to. To that deed Sir John Pringle was a consenting party, from which it may be inferred that he was aware of the way in which the money had been invested. The ground on which one of the parties to this case contends that the proceeds of this policy are moveable is, that the trustees of Sir [624] John Pringle had no power to alter the succession to him as to any part of the estate under their charge; or rather, that nothing which they did in the administration of his estate can be allowed to have the effect of altering his succession. This is a well-known principle, but I doubt if it is applicable to the circumstances of this case. The position of Sir John Pringle was peculiar. The trustees were, in a more proper sense than usual, the mandataries of the truster, administering his estate under his superintendence, not as an insolvent estate, but in such a way as to bring it into the best condition for his benefit while he lived, and to carry out his intentions with regard to his family after his death. It is not the case of trustees doing an act which would have the effect of altering the succession to part of the estate of an intestate, for Sir John Pringle did not die intestate. Indeed the purpose of the trust was to provide for the distribution of the estate after his death. There is no doubt that in the case of the children claiming legitim, as has actually happened, some administrative acts of the trustees may prove disadvantageous to the children. But the investment under consideration may be considered as an act of the truster himself acting by trustees whom he had appointed for certain purposes. This is the true view of the case; but it is further to be observed that it was clearly brought under Sir John Pringle's notice how the money was invested. The investment was thus as much the act of Sir John Pringle as if it had been done by himself. I am, therefore, of opinion that the answer to the first question ought to be in the negative.

2. The second question, which relates to two policies of insurance on the life of Lady Elizabeth Pringle, is, whether the value of the policies is to be included as part of Sir John Pringle's moveable estate before estimating the amount of legitim. The first policy is dated 16th March 1841, and is in name of certain parties as trustees for Sir John Pringle, and it bears that "in case Lady Elizabeth Pringle shall happen to die at any time within the term of one year, the stocks, funds, securities, and property of the corporation shall be subject and liable . . . to satisfy and make good to the said assured, or to their executors, administrators, or assigns, within three months next after proof shall have been given to the satisfaction of the said corporation of the death of the said Lady Elizabeth Pringle, the full sum of £5000," and so forth. The other policy is dated in 1850, and is in similar or equivalent terms. The peculiarity of the question is, that Sir John Pringle, for whose benefit the policies were effected, predeceased his wife, who is still alive. The question is, whether these two current policies form part of his moveable estate at the date of his death. I am of opinion that they do, and on very much the same grounds on which we decided the case of Muirhead. I take leave to say that that was a very well-considered case, and it is one from the principles of which I see no reason to depart. It is true that in that case the policy of insurance was not current. But even there it was contended that the sums in the policies of insurance did not fall within the communion of goods, in respect that they were only conditional or contingent debts not payable till the husband's death. Undoubtedly the difference here is, that Lady Elizabeth Pringle, on whose life the insurances are effected, is still alive, and there would be an important difference even if she were now dead, because she was alive at the death of her husband. But beyond all question the policy effected in 1841 and that effected in 1850 were, during Sir John Pringle's life, valuable portions of his estate, because he survived the commencement of these policies for a great number of years,—in the one case for nearly thirty, and in the other for nineteen years. At his death they were valuable property. They belonged to him through the trustees, and not only were they valuable, but they were subjects of marketable value. I cannot say that subjects of this kind were not possessed of present value, or that they were not assets of the person to whom they belonged, and parts of his moveable estate. If a man dies with no other property in the world but a policy of this kind I cannot hold that he died

without any moveable property in a question either with creditors or executors. It appears to me, therefore, that these policies must be taken to be part of Sir John Pringle's moveable estate.

But there occurs here another question, which is somewhat new, but is not, I think, attended with much difficulty. That question is how these policies are [625] to be valued. Three ways of valuing them are suggested,—either (1) to take the surrender value; or (2) the value of the policies if they had been sold at Sir John Pringle's death; or (3) to take what is called the actuarial value at that date. The first I do not think is a fair value; for it is matter of notoriety that the surrender value of policies of insurance is always less than they will sell for in the market. I doubt whether the second and third modes of valuation are really alternative or different at all. What the policies would have sold for can only be ascertained by valuing them now; and I can, therefore, see no other way of ascertaining the value of the policies in 1869 but by having them now valued by an actuary.

LORD DEAS and LORD ARDMILLAN concurred.

LORD KINLOCH.—With regard to the questions put to us in the amended case, my opinion is as follows:—

1. With reference to the sums recovered under the policy on Captain Pringle's life, and invested on heritable security by Sir John Pringle's trustees, I think they formed heritable succession of Sir John Pringle, and cannot be included as part of his moveable estate. The trustees were acting as Sir John's mandataries, and I see nothing to induce me to think that they acted against their mandate when investing on heritable security, as they did, with his full assent, with regard to the larger portion of the estate. Sir John lived for about three years after the investment, and may be fairly presumed to have been aware of it. No disapprobation being found expressed by him, but approbation rather given, I think that this investment must be taken just as if it was an investment made by Sir John Pringle himself, and so left at the date of his death, when there can be no doubt it would enter into his heritable succession.

2. With regard to the two policies on the life of Lady Elizabeth Pringle, I am of opinion that these formed part of Sir John Pringle's moveable estate at his death, on which the legitim is to be estimated. They were Sir John's property, and by their nature payable to his representatives *in mobilibus*. They were capable of being alienated, sold, or mortgaged by him during his lifetime. The date of payment of the sum in the policy was, indeed, not come at his death, and is not yet come, Lady Elizabeth being still alive. But this only made the debt future; it did not make it contingent, in the proper legal sense. It was a fully vested right. The premium must, of course, be paid in order to keep up the policies; but this is not a legal contingency. It is a condition or burden, often attachable to fully vested claims, such as the condition of paying the price in the case of an article purchased, and the like, which never makes the right contingent in a legal sense. There is no arbitrary discretion in Sir John's executors about paying the premium. This, if not done by them, must be matter of arrangement, or judicial order. The policies have a present value in the market, and that value could be raised by a sale. It appears to me that they are as fully part of Sir John's moveable estate as any part of that estate whatever. If they had been policies on the life of any third party can there be a doubt that they would form assets of Sir John's executry? But if so, it makes no difference that they are on the life of Lady Pringle. If these policies are not part of Sir John's executry estate I do not see what they are, or to whose estate they belong, or under what legal category they fall.

That these policies are part of Sir John Pringle's executry estate, on which legitim is to be calculated, flows, I think, directly from the decision of this Division in the case of Muirhead *v.* Lindsay, Dec. 6, 1867, *ante*, vol. vi. 95. I think that this is an unquestionably sound judgment, and not overruled by any other since pronounced.

3. With regard to the mode of valuing the policies, I do not understand that either party insists for a present sale. The only question is one of value. I am of opinion that the value to be taken is not the surrender value in the office, for this is not the true value, but a consideration for the office taking them back. I do not see how their value on a public sale could be ascertained, except by an actual sale. I think their true value is what is called their actuarial value,— [626] that is, their real value

as documents of obligation, with the condition of paying the premium, as estimated by men of skill.

The following interlocutor was pronounced:—"In answer to the first question, find and declare that the sum of £5888, 16s., received by Sir John Pringle's trustees under the policy on the late Captain Pringle's life, and invested on heritable security by Sir John Pringle's trustees, ought not to be included as part of the moveable estate of Sir John Pringle in estimating the fund for legitim: In answer to the second question, find and declare that the two policies effected by Sir John Pringle's trustees on the life of Lady Elizabeth, his wife, with the North British Insurance Company and the Edinburgh Life Assurance Company respectively, ought to be included as part of the moveable estate of Sir John Pringle before ascertaining the amount of the fund for legitim: And in answer to the third question, find and declare that in estimating the amount of the moveable estate of Sir John Pringle with a view to fixing the fund for legitim, the said policies should be taken at their real actuarial value at the date of Sir John Pringle's death, and decern."

JOHN N. FORMAN, W.S.—DAVIDSON & SYME, W.S.—ROBERT SMITH, S.S.C.—Agents.

No. 109. X. MACPHERSON, 626. 16 Mar. 1872. 1st Div.—Sheriff of Edinburgh, M.

THOMAS SCOTT AND ROBERT CAMPBELL (Creditors on Thomas Couper's Sequestrated Estates), Appellants.—*M'Kechnie.*

THOMAS COUPER, Respondent.—*Rhind.*

Bankruptcy (Scotland) Act, 1856 (19 & 20 *Vict. cap.* 79), *sec.* 146—*Discharge of Bankrupt.—Held* that the 146th section of the Bankruptcy Act, in providing (1) that it shall not be competent to present a petition for a bankrupt's discharge, or obtain the consent of any creditor thereto, until the trustee shall have prepared a report with regard to the bankrupt's conduct, and (2) that "such report shall be produced in the proceedings for the bankrupt's discharge, and shall be referred to by its date, or by other direct reference, in any consent to his discharge," is imperative, and not merely directory, and consequently that an undated minute expressing the concurrence of a majority of creditors in number and value to the bankrupt's discharge, without any reference to the trustee's report, was not valid.

In May 1870 the estates of Thomas Couper, smith, engineer, and contractor at West Calder, were sequestrated by order of the Sheriff of Edinburgh, in terms of the Bankruptcy Act, and Alexander Munro, coachbuilder, Broughton Market, Edinburgh, was unanimously elected trustee in the sequestration, at the statutory meeting held for that purpose.

In January 1872 the trustee reported, in terms of the 146th section of the Bankruptcy Act, that the bankrupt had complied with all the provisions of the statute, and that he believed he had made a fair discovery and surrender of his estate, that he had attended the diets of examination, and had not, so far as known to the trustee, been guilty of any collusion, but that his bankruptcy had arisen from innocent misfortunes and losses in business, and not from culpable or undue conduct. Thereupon, and on 26th January 1872, the bankrupt petitioned the Sheriff for his discharge, stating that he had obtained the concurrence of a majority in number and value of the creditors who had produced oaths in the sequestration. This application was opposed by Thomas Scott and Robert Campbell, both iron-merchants in Edinburgh, two of Couper's creditors, who stated a number of objections, all of which were repelled by the [627] Sheriff, who found the petitioner entitled to his discharge, and appointed him to appear and emit the statutory declaration. Against this deliverance the opposing creditors appealed to the Court, and maintained that the application for discharge had not been presented in conformity with the provisions of the 146th section of the Bankruptcy Act, in respect (1) that the consents of the concurring creditors had been obtained before the date of the trustee's report; and

consequently (2) that the consents did not contain a direct reference to the report, as expressly required by the statute.*

The minute expressing the concurrence of the consenting creditors was not dated, and the bankrupt did not admit that it had been obtained prior to the trustee's report. In answer to the second objection, he contended that the concluding words of the 146th section of the Act, to the effect that the consents should refer to the report, were not imperative, but directory merely.

LORD PRESIDENT.—I think the objection fatal, and cannot at all accede to the contention of the bankrupt's counsel, that the clause regulating the consents of creditors is merely a direction, or directory provision. It is distinctly imperative, both from the words used in the clause itself, and from the objects which, it is apparent throughout, were in the view of the Legislature. It is the policy of this statutory enactment—and it is a sound policy—that the bankrupt shall not be allowed to deal or transact with his creditors, with a view to his discharge, until the report of the trustee has been read to a meeting of them. This is set forth distinctly and imperatively in the clause referred to. The reason for requiring that the creditors' consents shall bear distinct reference to the trustee's report is to make sure that the report shall have been previously made in accordance with the policy and intention of the Legislature in framing this statute.

I think we must therefore alter, and remit to the Sheriff to refuse the petition for discharge.

The other Judges concurred.

This interlocutor was pronounced:—"Recall the deliverance of the Sheriff-substitute complained of: Find that the consent by the creditors does not in any way refer to the trustee's report, as required by the 146th section of the Bankrupt Act: Therefore remit to the Sheriff to refuse the petition: Find the appellants entitled to expenses in this Court: Allow an account," &c.

WILLIAM BLACK, S.S.C.—MENZIES & CAMERON, S.S.C.—Agents.

No. 110. X. MACPHERSON, 627. 16 Mar. 1872. 2d Div.—R.

EDWARD ADAM AND OTHERS (Connel's Trustees).—*Sol.-Gen. Clark*—*W. A. Brown.*

ISABELLA MACONNAL OR CONNEL.—*Fraser*—*R. V. Campbell.*

Foreign—Testament—Disposition of heritage—Statute 31 *&* 32 *Vict. c.* 101, *sec.* 20—*Writ—Authentication.—Held* that an English will containing a conveyance of Scotch heritage was a valid conveyance thereof under the Act 31 & 32 Vict. c. 101, sec. 20, the deed having been duly executed as a testamentary [628] writing, although prior to the Act it would not have been received as a probative deed by the law of Scotland.

This special case was presented by Col. Edward Adams, &c., trustees and executors of the deceased Dr. Abraham James Nisbet Connel, of the first part, and Isabella Maconnal or Connel and John Robertson, eldest surviving son of the deceased Helen Maconnal by her marriage with John Robertson, the heirs in heritage of the said deceased Dr. Abraham James Nisbet Connel, of the second part.

The late Dr. Abraham James Nisbet Connel died at London on the 9th of March 1871. At the time of his death he was possessed of considerable personal estate, and some freehold and leasehold property in England, and he also died possessed

* The Act provides that "it shall not be competent for the bankrupt to present a petition for his discharge, or to obtain any consent of any creditor to such discharge, until the trustee shall have prepared a report with regard to the conduct of the bankrupt, &c.; . . . and such report shall be produced in the proceedings for the bankrupt's discharge, and shall be referred to by its date, or by other direct reference, in any consent to his discharge."

of a large number of shares in the British Linen Company's Bank, and some heritable property in Edinburgh. Dr. Connel, by his will dated 6th February 1871, after appointing trustees and executors, provided as follows:—"As to all my real estate and my personal estate (except such plate as is hereinafter specifically bequeathed), whatsoever and wheresoever, over which I now have, or at the time of my decease may have, any power of gift, devise, bequest, disponement, conveyance, disposition, and appointment (but as to estates vested in me upon trust, or by way of mortgage, subject to the trusts and equities affecting the same respectively), all which said real and personal estate is hereinafter referred to as my said trust-estate, I give, devise, bequeath, dispose, dispone, appoint, and convey the same into my said trustees, their heirs, executors, and administrators respectively, upon trust that they or the survivors or survivor of them, or the heirs, executors, or administrators of such survivor, shall, in such manner and under such stipulations, and upon such terms and conditions in all respects as they or he shall in their or his discretion think fit, sell, collect, or otherwise convert into money, according to the nature of the premises, all such parts of the same premises as shall not consist of money, and shall buy in or rescind or vary any contract for sale, and resell, without being answerable for loss; and may, for the purposes aforesaid, or any of them, execute and do all such assurances and things as they or he shall think fit: And I declare that my said trustees shall, out of the monies to be produced by such sale, collection, and conversion, after payment of my just debts, funeral and testamentary expenses, pay the legacies or sums of sterling money," &c. The deed concluded with the following testing-clause and docquet in the English form:—"In witness whereof, I, the said Abraham James Nisbet Connel, the testator, have hereunto set my hand this 6th day of February 1871. A. J. N. CONNEL, M.D. Signed by the said Abraham James Nisbet Connel, the testator, as and for his last will and testament, in the presence of us, both present at the same time, who at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses. CHAS. THOMAS ORFORD, ALFRED BARKER, Clerks to Messrs. Wordsworth, Blake, and Harris, South Sea House, London, Solrs."

Dr. Connel was of Scotch origin, and for many years was a medical officer in the Rifle Brigade, and afterwards served in the 2d regiment of Horse Guards.

The will was executed according to the law of England, and was valid to include and pass all the real and personal estate of the deceased situated in England.

The parties, however, were agreed that Dr. Connel's will, assuming it to operate a conveyance of his heritable estate in Scotland, was not liable to challenge on the head of deathbed.

The second parties to the case were the persons who would be entitled [629] to succeed to Dr. Connel's heritable estate in Scotland in the event of its being held that that was not validly conveyed to his trustees by the will in question.

The question on which the opinion and judgment of the Court was requested was—"Whether the will of the testator operates, under the Act 31 & 32 Vict. cap. 101, sec. 20, a conveyance to the trustees therein named of his heritable estate in Scotland?" *

At advising,—

LORD JUSTICE-CLERK.—This special case raises a point of general application, and of some importance. The question rests on this state of facts. Dr. Connel died, having executed in England, according to the forms of the law of England, a will, which contains the following clause:—"As to all my real estate and my personal estate (except such plate as is hereinafter specifically bequeathed) whatsoever and wheresoever, over which I now have, or at the time of my decease may have, any power of gift, devise, bequest, disponement, conveyance, disposition, and appointment (but as to estates vested in me upon trust or by way of mortgage, subject to the trusts and equities affecting the same respectively), all which said real

---

* *Authorities for the first parties.*—Erskine, 3, 2, sec. 40 and sec. 25; Dundas *v.* Dundas, Dec. 22, 1830, 4 W. and S. 460; Earl of Dalkeith *v.* Book, Feb. 13, 1728, 1 Ross L. C. (Land Rights), 105.

Authority for second party.—Purvis' Trustees *v.* Purvis' Executors, March 23, 1861, 23 D. 812.

and personal estate is hereinafter referred to as my said trust-estate, I give, devise, bequeath, dispose, dispone, appoint, and convey the same unto my said trustees, their heirs, executors," &c. It is certain, as regards the heritable estate thereby attempted to be conveyed, that the will would not have been effectual prior to 1868. By the law of Scotland, however, a will executed according to the law of the place of execution would be effectual as regards moveables. This principle was given effect to in the case of Purvis, in which it was unanimously held that it had always been the law of Scotland that a will executed according to the law of the place of execution was effectual as to moveables. Thereafter the Act 24 & 25 Vict. was passed, extending this principle of law to the three parts of the kingdom. By that enactment a will executed according to the law of England will enable an executor to obtain confirmation in Scotland, and a will executed according to the law of Scotland will enable the testator to obtain letters of administration in England. But that statute made no change in the law as to the conveyance of heritage. The Act 31 & 32 Vict. sec. 20, deals with this matter. The first object of that section is to alter the law of Scotland, which required words of *de præsenti* conveyance in a disposition of heritage. The second object of the section was to do away with the necessity for dispositive words. The clause then goes on to provide how the conveyance shall be completed subject to these alterations.

We must attend to the precise words of the clause—(1st) "From and after the commencement of this Act it shall be competent to any owner of lands to settle the succession to the same, in the event of his death, not only by conveyances *de præsenti* according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings"; and (2dly) "No testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands, which shall have been granted by any person alive at the commencement of this Act, or shall have been granted by any person after the commencement of this Act, shall be held to be invalid as a settlement of lands to which such deed or writing applies, on the ground that the granter has not used, with reference to such lands, the word 'dispone,' or other word or words importing a conveyance *de præsenti*." The 3d part commences in this way—"And where any such deed or writing" (that is, any deed or writing purporting to convey heritage) "shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain, with reference to such lands, any word or words which would, if used in a will or testament with reference to moveables, [630] be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands."

Now, the question which arises is whether this clause applies to the case. It was ingeniously argued that it could not apply, as the deed in question expressly conveys the lands. I do not think we should be giving effect to the plain meaning of the statute if we were to hold that, because the word "dispone" is used, a greater amount of authentication is required than if that word had not been used. The real object of the statute was to deal with the phraseology of the conveyance, and not with the authentication. We have to inquire whether the deed in question is a testamentary writing, authenticated according to the law of Scotland. By the Act 24 & 25 Vict. a testament is valid if executed either according to the law of Scotland or according to the law of the place of execution. The law of Scotland does permit a testamentary writing to be executed according to the forms of the place of execution. My opinion, therefore, is that this will, executed according to the law of England, is sufficient to convey heritable as well as moveable property in Scotland.

LORD COWAN.—I concur in the observations which have been made. My notion of the clause is, that its purpose is to confer on the owner of heritable property the same power of intimating his will and intention as to the succession to his heritable estate as he had before with regard to his moveable estate. Whatsoever expression and whatsoever deeds were sufficient to carry personal or moveable estate from the dead to the living are hereafter to be sufficient to carry heritage. The declared will of the deceased as to his succession is to receive effect. This view gives unity to the whole clause. The subsequent part of the clause throws light upon the first

part. We have there an obligation on the legal successor of the grantor in heritage to carry out his ancestor's intention, and of this obligation the disponee is vested with power to enforce implement. The mode in which the intention is to be carried out in the completion of the feudal title to the real estate is left to be regulated by the *lex rei sitæ*.

LORD BENHOLME and LORD NEAVES concurred.

THE COURT pronounced this interlocutor:—"The Lords," &c. "are of opinion and find that the will of the testator operates, under the Act 31 & 32 Vict. c. 101, sec. 20, a conveyance to the trustees therein named of the heritable estate in Scotland belonging to the testator, and decern."

RICHARDSON & JOHNSTON, W.S.—JAMES YOUNG, S.S.C.—Agents.

[*Commented upon*, M'Leod's Trs. *v.* M'Leod, 1875, 2 R. 481.]

No. 111. X. MACPHERSON, 630. 19 Mar. 1872. 1st Div.—B.

MAGISTRATES AND TOWN COUNCIL OF ARBROATH, Pursuers.—*Sol.-Gen. Clark —Marshall.*

JAMES ANDERSON DICKSON, Defender.—*Watson—Balfour.*

Burgage—Real Burden.—In a disposition of lands by the magistrates of a royal burgh, to be holden in free burgage, the disponers stipulated for an annual payment to them called feu-duty, and for a payment of the same amount at the entry of each heir and singular successor. These payments were not declared to be real burdens on the subjects. *Held* that the owner of the subjects was personally liable for the annual payments and duplications thereof stipulated in his titles, but that the clauses relating to these payments had no feudal effect, being incompatible with a burgage holding, and did not constitute real burdens.

Burgage—Feu.—Observed (*per* Lord Deas), that a feu-disposition may be granted of a burgage subject for payment of a feu-duty.

[631] *Expenses.*—When a respondent in a reclaiming note objects to the Lord Ordinary's interlocutor as to expenses he must do so at the hearing.

By disposition dated 14th February 1811 the Magistrates and Town Council of Arbroath, as representing the community, sold, alienated, and in feu-farm disponed to Hercules Ross, Esq., four lots of the common muir of Aberbrothock, to be called Paradise. The disposition proceeded on the narrative of a sale by public roup at the sum of £10 per acre of entry-money, and £1 yearly of feu-duty. It contained an obligation to infeft—"To be holden of His Majesty and his royal successors in free burgage, for service of burgh used and wont, and rendering and paying yearly to us and our successors in office or assignees the sum of £39, 5s. 8½d. sterling, in name of feu-duty, and that at the term," &c.; "as also to pay to us and our successors in office or assignees the like sum of £39, 5s. 8½d. at the entry of each heir and singular successor to the foresaid four lots of muir, as often as the same shall happen: Providing and declaring always, as it is hereby expressly provided and declared, that if two years' feu-duty shall lie and remain unpaid, and be allowed to run into the third, then these presents shall become void and null, and of no force or effect whatever." Infeftments followed, in which these clauses were engrossed. The subjects, after various transmissions, came to be vested in the defender by disposition and assignation dated 22d June 1860, and instrument of resignation and sasine following thereon, recorded in the Register of Sasines at Arbroath 12th July 1860. This infeftment contained the clauses above quoted, except the proviso that failure to pay the feu-duty for two years should infer a nullity.

The defender paid the annual sum called in the titles a feu-duty, but did not pay the £39, 5s. 8½d. due by him in respect of his entry.

The Magistrates and Town Council of Arbroath brought this action, concluding for declarator that under and in virtue of the disposition of 1811, and the infeftment

following thereon, "the payment of the said annual feu-duty and of the said sum of £39, 5s. 8½d., in addition to the said annual feu-duty at the entry of each heir and singular successor to said subjects as often as the same should happen, were constituted, and still form real burdens upon the said subjects above described, in favour of the Provost, Magistrates, and Council of the said burgh, and their successors in office." There was also an alternative conclusion for declarator that under the said disposition and infeftment, and the subsequent writs and title-deeds, including his own infeftment, "the said subjects above described were, from and after the said 22d day of June 1860, and are now, holden by the defender, the said James Anderson Dickson, for the rendering and payment yearly to the Magistrates and Town Council of Aberbrothock, and their successors in office, of the said yearly feu-duty and periodical casualty above-mentioned."

The pursuers pleaded;—(1) Under the articles of roup above set forth, and the original disposition in favour of Hercules Ross, and the infeftment following thereon, the said money feu-duty and additional payment at the entry of each heir and singular successor were imposed as real burdens upon the said lands, and were payable by the said Hercules Ross and all his successors, including the defender, and the pursuers are entitled to decree of declarator as concluded for. (2) The defender, as now holding the said property under the pursuers, is liable to the said real burden, and is bound to pay to the pursuers the said sum of £39, 5s. 8½d. in respect of his entry, with interest, as concluded for. (3) Separately, the foresaid payment on the entry of heirs and singular successors having entered the records in the infeftment on the original disposition, and [632] being also engrossed at length in the infeftment of the defender, he is bound to pay the same, with interest, as concluded for. (4) In any view, the payment of the said casualty being a condition of the title under which the defender holds the said lands, the defender is bound to implement that condition, and to make payment.

The defender pleaded;—(1) The sums specified in the conclusions of the summons not having been effectually constituted real burdens upon the subjects belonging to the defender, the pursuers are not entitled to decree of declarator as concluded for.

The Lord Ordinary (25th November 1871) pronounced this interlocutor:—"Finds that the obligation for annual payments, and duplications thereof at the entry of each heir and singular successor, contained in the defender's titles, is binding upon the defender: Finds that although the defender has regularly made the annual payments of £39, 5s. 8½d. due by him since his entry on 12th July 1860, he has not paid the sum of £39, 5s. 8½d. or duplication, due by him on his entry: Therefore decerns against the defender for the said sum of £39, 5s. 8½d. due by him on his entry to the subjects libelled on, with interest thereon at the rate of 5 per cent. per annum from the date of citation on the summons till paid: Assoilzies the defender from the declaratory conclusions of the summons; Finds expenses due to neither party, and decerns." *

---

* "NOTE.—The defender's lands are, as is admitted by the pursuers, held burgage. In addition to the burgh services used and wont the pursuers stipulated in the original grant for an annual payment to them (improperly called a feu-duty) of £39, 5s. 8½d., and for payment of a like sum, or duplication, on the entry of each heir and singular successor. But these payments, which are to be made to the pursuers, not as representing Her Majesty, but for behoof of the common good of the town of Arbroath, are not declared in the titles to be real burdens upon the subjects, and they are not constituent parts of a burgage holding. They are, in the Lord Ordinary's opinion, only due in virtue of the mere personal condition or obligation which was imposed upon the original acquirer of the subjects, and which has by the titles been transmitted to and adopted by the defender, so that he now holds the subjects under that condition or obligation. The defender is therefore entitled to be assoilzied from the first declaratory conclusion, by which the pursuers seek to have it found and declared that these payments were constituted and form real burdens on the subjects in favour of the pursuers and their successors in office—Magistrates of Perth, 18 December 1830, 9 S. 225, and 11th July 1835, 13 S. 1100.

"The Lord Ordinary is also of opinion that the defender is entitled to be assoilzied from the second declaratory conclusion, by which the pursuers seek to have it found and declared that in virtue of the defender's titles the subjects were and are 'now

[633] The pursuers reclaimed, and argued ;—Effect must be given to the conditions upon which the grant was made. The terms were similar to those imposed in feu-rights.* But conceding that this is not a feu-duty, and that the magistrates are not in a position similar to that of a superior, the payment in question has been constituted a real burden on the subjects. No set form of words is required for that purpose, nor even an express declaration of intention; but it is enough if the intention to create a real burden be clear on the face of the deed.†

Argued for the defender ;—This is a burgage holding, in which the vassal holds directly of the Crown, and in which there can be no " private sasine." ‡ Hence there can be no proper feu-duty. Neither is this payment a real burden. It is not to be paid furth of the lands ; and there is a clause of redemption within ten years. As for the irritancy, that cannot make that a feu-duty which is not one in its own nature. Moreover, if the defender's right be irritated there is no one to whom it could pass, for the disponers stand in no feudal relation towards the defender. In order to become a real burden the right must appear in the defender's title. No *voces signatæ* are required for this purpose ; but there must be no ambiguity in the constitution of the burden upon the lands, and it must enter the investiture.§ Here, as in the cases cited, there was only a personal obligation. The contention of the pursuers in this case was directly negatived by the opinions in the case cited below,‖ in which Lord Corehouse, who wrote the leading opinion in Tailors of Aberdeen *v.* Coutts, was Lord Ordinary.

At advising,—

LORD PRESIDENT.—This action is raised by the Magistrates of Arbroath against the defender, Mr. Anderson Dickson, as proprietor of a subject in the common muir of Arbroath known by the name of Paradise, and the first conclusion of the action is that certain money payments, one of them an annual money payment and the other an occasional payment, which are provided for in the titles of the defender, were constituted and still form real burdens upon the said subjects above described in favour of the pursuers. They conclude also that even if these payments are not to be declared real burdens, there should be declarator that the subjects were, from and after the 22d June 1860, when Mr. Dickson, the defender, acquired them, and are now, holden by the defender for the rendering and paying yearly to the Magistrates and Town-Council of Arbroath, and their successors in office, of the said yearly feu-duty and periodical casualty above mentioned. Then there is a declaratory conclusion directed against the defender for payment of what is called a casualty of £39, 5s. 8½d. as due by him on the 12th of July 1860. It would appear that Mr. Dickson, the

---

holden ' by him ' for the rendering and payment ' to the pursuers and their successors in office of ' the yearly feu-duty and periodical casualty ' libelled on. The defender holds the subjects of Her Majesty in free burgage for service of burgh used and wont, and not for rendering and paying of any yearly feu-duty and casualty. No doubt the condition in the titles to make payment of the annual sum and duplication therein mentioned to the pursuers and their successors is obligatory on the defender, and the Lord Ordinary has so found. But that does not, in the Lord Ordinary's opinion, warrant decree of declarator in the terms concluded for.

" The defender did not in his defences dispute his personal liability for payment of these sums, and before the summons was raised he had paid the whole yearly sums due by him. But he had not paid the sum due for his entry on 12th July 1860. Had the defender tendered payment of this duplication before the summons was raised the Lord Ordinary would have found him entitled to expenses ; but having only done so after his defences should have been lodged, the Lord Ordinary considers that expenses should be found due to neither party."

* Dickson *v.* Louther, Feb. 1, 1823, 2 S. 176 ; Dawson *v.* Magistrates of Glasgow, Nov. 14, 1827, 6 S. 19,—Aff. March 21, 1830, 4 W. and S. 81.

† Tailors of Aberdeen *v.* Coutts, H. of L., August 3, 1840, 1 Rob. 296.

‡ 1567, c. 27.

§ Bankton, ii. 5, 25 (vol. i. p. 653) ; Martin *v.* Paterson, June 22, 1808, M. App. Personal and Real, 5 ; M'Intyre *v.* Masterton, Feb. 3, 1824, 2 S. 664 (N. E. 559) ; Stair, ii. 3, 54, 55, 57.

‖ Magistrates of Perth *v.* Stewart, Dec. 18, 1830, 9 S. 225—July 11, 1835, 13 S. 1100.

defender, has been in use to make payment of the annual payment stipulated in the titles, but refuses to make payment of this which is called a casualty, and therefore they conclude for payment of it. The Lord Ordinary has given judgment in favour of the pursuers, in so far as regards the payment of this sum of £39, 5s. 8¼d., but as regards the declaratory conclusion he has assoilzied the defender. The defender does not complain of the decree for the payment of this sum of money, but the [634] Magistrates have reclaimed against the Lord Ordinary's interlocutor, and insist upon their conclusion of declarator,—that is to say, they maintain, in the first place, that the payments stipulated in the titles are real burdens upon the subjects conveyed, and, in the second place, that if they are not real burdens, then that these payments form the reddendo of the tenure, for that is what I understand to be the meaning of the second declaratory conclusion. The decision of this question must of course depend upon an examination of the titles. The money payments which are alleged to be real burdens, appear for the first time in a disposition by the Magistrates and Town Council of Arbroath in favour of Hercules Ross upon the 14th of February 1811. The subjects are conveyed to him by the Magistrates, "to be holden of his Majesty and his royal successors in free burgage for service of burgh used and wont." The holding therefore is plainly and strictly a burgage holding. But the expression of the holding is followed immediately by these words, "and rendering and paying yearly to us and our successors in office, or assignees, the sum of £39, 5s. 8¼d. in name of feu-duty, and that at the term of Martinmas yearly, &c., as also to pay to us and our successors in office, or assignees, the like sum of £39, 5s. 8¼d. at the entry of each heir and singular successor to the foresaid four lots of muir, as often as the same shall happen, and that besides and over and above the said yearly feu-duty"; and then follows a proviso "that if two years' feu-duty shall lie and remain unpaid, and be allowed to run into the third, then these presents shall become void and null, and of no force or effect whatever." Now, the subjects conveyed by the Magistrates in this deed have come through several transmissions to be vested in the person of the defender, and the only difference between the title of the present defender and that of Hercules Ross, who derived immediately from the Magistrates, is that in the title of the present defender the proviso about these presents being declared null and void in the event of two years' feu-duty running into arrear is omitted. In other respects the title of Hercules Ross and that of the defender are identical in expression. Now, it is almost unnecessary to say that what the Magistrates attempted to do in this disposition to Hercules Ross was to create at once a burgage holding and a feu holding, and it is just as unnecessary to say that that was utterly impossible, and that the holding of these subjects is a burgage holding and nothing else. But assuming it to be a burgage holding they still attempted to create a feu-duty, to put the owner of the subject holding immediately of his Majesty in free burgage for service of burgh used and wont, in the position of being liable in payment of a proper feu-duty to the seller, who happened to be the Magistrates of the burgh, but who might have been anybody else just as well. There is nothing in the position of the Magistrates of the burgh to make this a bit more competent than it would have been to any other seller. Now, the creation of a feu-duty in such a title is an utter impossibility, and therefore this cannot be dealt with as being a feu-duty.

But it is said that although it cannot be a feu-duty, and cannot be dealt with as if it was a payment to be made to a superior like a feu-duty, still it may by the operation of this deed have been created a real burden; and the argument generally used by the reclaimers in support of this proposition seems to amount to this, that although to create a real burden it is necessary that it should be declared to be a real burden in the title, still that declaration does not require to be made in any precise form of words. There are no *voces signatæ* necessary to be used in order to accomplish the result of creating a real burden, and if it be the plain purpose and intention of the parties, from the words they have used, to make the payment a real burden upon the lands, it will be given effect to, and it will be held to be a real burden. If that doctrine be sound and applicable to the present case, it seems to me that the result will be this, that when parties make an utterly abortive and unsuccessful attempt to create a feu-duty, because they thereby indicate an intention of making a real burden, which a feu-duty undoubtedly is, or rather something more, they shall be held to have effectually created a real burden, although they have utterly failed in creating a feu-duty. An abortive attempt to create a feu-duty is to be an effectual creation of a real burden. Now, that is one of those anomalous and absurd results

which it would [635] be very difficult to arrive at by any form of reasoning. But it seems to me that the argument labours under a very important fallacy. The thing which the parties here have intended to do was to make a feu-duty, which is *debitum fundi*,—it is something more than a real burden,—and they have failed to do so. That which they have attempted to do cannot be done in such a deed of conveyance as this, or with reference to a subject held in burgage; and therefore any attempt to attach it to the lands as a feu-duty having entirely failed it seems to me to follow that it is not attached to the lands in any way whatever as a real burden. I think the doctrine on which the argument is founded is also a little misunderstood and carried too far. The argument is put always as if it was a mere question of intention,—whether the parties had it in their mind to create a real burden, although they may have expressed themselves very ill in their attempt to do so. Now, I cannot recognise any doctrine of that kind. I quite admit that the words "real burden" need not be used if equivalent words are used, but that there must be equivalent words appears to me to be indispensable. A burden to pay either a principal sum or to make an annual payment,—in short, an obligation to pay money, whether in one sum, or annually, or occasionally, can only be made to affect lands by being made a real burden upon these lands, independent altogether of the personal obligation of the proprietor for the time being. And that is not a thing to be spelt out of a deed; it must be distinctly found there. We are not to construe a deed of conveyance of this kind as we construe a will, for the purpose of arriving by all means, and even by something like conjectural means, at what the intention of the testator is. We must have something a great deal more than that. We must have something that plainly shows that this is to be in all time coming a burden affecting the lands, as something separate and distinct from a personal obligation. That is the doctrine of a whole series of cases in our law, beginning with the case of Mackenzie *v.* Lord Lovat, in 1721,* and distinctly wrought out and made very clear in the important cases of Martin *v.* Paterson in 1808, and M'Intyre *v.* Masterton in 1824. It seems to be sometimes imagined that the case of the Tailors of Aberdeen *v.* Coutts impinged upon this settled doctrine of the law of Scotland, but I think that is an entire mistake. It is too readily taken for granted that that case of the Tailors of Aberdeen is a case upon real burden, which it does not appear to me to be at all. The particular matters dealt with in that case were rather conditions of the right than real burdens, and they were conditions particularly applicable to an urban tenement, which was the subject there in question. The true question between the parties was, whether in a disposition of a burgage subject consisting of building ground it had been effectually provided so as to attach as a condition to the grant and to the subjects themselves that houses of a certain character should be built on the ground, that there should be an avoidance of the carrying on of particular trades which constituted a nuisance, and that some other obligations of a similar kind should be performed by the proprietor for the time being, in the way of enclosing the ground with railings and making a foot-pavement along the property, and various other things of the kind; and all these were held to be perfectly effectual without the necessity of their being declared real burdens. But these are of a totally different character from the burdens that we are dealing with here, which are obligations to pay money; and in the case of obligations to pay money, whether it be a principal sum, or an annual payment, or an occasional payment, I know of no authority in the law of Scotland for saying that these can be made to affect the lands as distinguished from the personal obligation of the owner of the lands, by anything but a declaration that they shall be real burdens, or by the use of words plainly importing the same thing. Now, there appears to me in this case to be a total absence of this, and therefore I am of opinion that the Lord Ordinary has done right in assoilzieing from the first declaratory conclusion of the summons. The second declaratory conclusion is, I think, still more clearly quite untenable, because it really amounts to this,—a declarator that this burgage subject, held in free burgage of the Crown, is to be holden in all time coming for payment of [636] this so-called feu-duty,—which is just as much as to say that the subject is at one and the same time a burgage holding and a feu holding, the one being perfectly inconsistent with the other. I am therefore for adhering to the Lord Ordinary's interlocutor. But there is one part of the interlocutor,—I mean the preliminary finding, which lays

* Robertson's App. p. 607.

the foundation for his decree for payment,—that I think might be somewhat better expressed. His Lordship "finds that the obligation for annual payments, and duplications thereof at the entry of each heir and singular successor, contained in the defender's titles, is binding upon the defender." Now, that is a little vague and uncertain in its meaning. I agree that it is binding upon the defender, but I think it is binding upon the defender as owner for the time being of the subject; and that being the ground of liability, I think it is better that it should be expressed in the finding itself.

LORD DEAS.—I agree entirely in the observations made by your Lordship in the chair; and if it were necessary to say anything more about the law applicable to cases of this kind I should consider it sufficient to refer to what I see I said in the case of Stewart *v.* The Duke of Montrose, 15th February 1860, as reported at the foot of p. 803 of 22 Dunlop, and which it is unnecessary to repeat. I may also refer to the opinion of Lord Gillies in the case of Dawson *v.* The Magistrates of Glasgow, 14th November 1827, in which he says—"They (the Magistrates) make a grant of these lands to Mr. Young in free burgage, and they add a precept of sasine which is totally inapplicable to and perfectly absurd in a burgage holding, but quite consistent with a feu-right. It is, I admit, quite impossible to reconcile the terms of the different clauses, and even different parts of the same clauses, of this conveyance with itself. It declares and expressly stipulates that the vassal shall pay a feu-duty to the Magistrates, and it also provides that the lands shall be held *in libero burgagio*. I cannot reconcile these, and it is impossible to reconcile them. By one part of the deed it is a feu holding; by the other it is a burgage holding. In short, it is like many other specimens of Glasgow conveyancing which we have had before us." These remarks are literally applicable to the sort of conveyancing attempted here. This deed in the dispositive clause dispones the subjects in feu-farm, in consideration of the yearly feu-duty and casualty after mentioned, &c., and the holding is "to be holden of His Majesty and his royal successors in free burgage for service of burgh used and wont, and rendering and paying yearly to us and our successors in office or assignees the sum of £39, 5s. 8¼d. sterling, in name of feu-duty," and so on. Then there is a procuratory of resignation—"To resign and surrender, as we hereby resign, surrender, upgive, and deliver, All and Whole the foresaid four lots of the common muir of Aberbrothock, measuring, lying, and described as aforesaid, and here held as repeated *brevitatis causa*, in the hands of the said provost, or any one of the said bailies, as in the hands of His Majesty, immediate lawful superior thereof, in favours and for new infeftment of the same, to be made and granted back again by them to the said Hercules Ross and his foresaids, heritably and irredeemably, in due and competent form," and so on. It is thus a contradiction and an absurdity in point of conveyancing on the face of it. There is no doubt at all, as Lord Gillies said, that the Magistrates might have created a feu holding and a feu-duty. There was nothing to prevent that. The question has arisen from time to time in what register sasines upon feu-dispositions of burgage subjects ought to be recorded, but that a feu-disposition may be granted of a burgage subject for payment of a feu-duty there can be no doubt at all. But this deed creates a feu holding in one clause, and a burgage holding in another. In short, it is a complete miscarriage in point of conveyancing. I agree particularly with your Lordship that it will not do to say that because they intended to create a feu-duty, that is sufficient for the creation of a real burden. It is not essential, for creating a real burden, to use the words "real burden," but if you do not use these words you must use words which are equivalent. It is not enough that you can gather such an intention from the general scope of the deed, as you would gather a testator's intention from his will. You must use appropriate words, and you must use them in the dispositive clause, and in the precept of sasine if it be a feu holding, or in the procuratory of resignation if it be a burgage [637] holding, so that they may enter the record in due form. I have no difficulty whatever in adhering to the Lord Ordinary's interlocutor.

LORD ARDMILLAN.—I am of opinion that in the disposition by the Magistrates in 1811 there is a valid and effectual personal condition and obligation, in respect of which the defender was bound to pay the annual sum therein called a feu-duty, and is bound to pay to the pursuers the sum concluded for as a casualty on entry to the subjects. But I am of opinion that the pursuers have not instructed sufficient grounds to support the conclusion for declarator, that the annual duties, termed

feu-duties, or the sum called a casualty in the disposition and in the summons, are "real burdens on the subjects."

The tenure set forth in the disposition of 1811 is "to be holden of His Majesty and his royal successors in free burgage for service of burgh used and wont." Of course that burgage tenure under the Crown for burgh service cannot be converted into a feu holding by the insertion of a clause of separate reddendo in the form of feu-duty to the Magistrates, who are the disponers. The Magistrates are not the superiors, nor was Mr. Ross, who was the original disponee, nor is Mr. Dickson, now coming in place of Mr. Ross, the feudal vassal of the Magistrates. Of this, I think, there can be no doubt. The Magistrates are disponers, but not superiors. Mr. Ross (succeeded by Mr. Dickson) was disponee, but not feudally vassal. The investiture is on the burgage holding,—the Crown is superior, and the reddendo is burgh service.

The opinion of Lord Corehouse, and the decision of the Court in the case of the Magistrates of Perth, in December 1830, and again in July 1835, is to my mind conclusive of the question up to that point. It is not as a proper feu-duty—not as an incident of the feudal holding—that the sum sued for can be recovered. To that extent and effect the authority of the case of the Magistrates of Perth remains unimpaired by the decision in the case of the Tailors of Aberdeen *v.* Coutts in the House of Lords on 3d August 1840.

But although not a feu-duty, nor a proper condition of the feudal investiture, it is said that the annual sum claimed, and also the casualty, are real burdens on the subject; and this view is said to be supported by the decision in the case of Coutts.

I do not think that the pursuers can support this declaratory conclusion by the case of Coutts. The opinion drawn by Lord Corehouse is the foundation of the decision in the case of Coutts; but the opinion of the same distinguished Judge is also the foundation of the decision in the first case of the Magistrates of Perth. The truth is, that in so far as regards the creation of the investiture, and the constitution of the relation between superior and vassal, and the incompetency of attaching a feu holding from the Magistrates to a burgage tenure under the Crown, there is no antagonism or inconsistency between the two decisions. As I read both judgments, the attempt to engraft a feu holding on a burgage tenure is contrary to the settled principles of law, and cannot succeed.

But, even assuming this, the pursuers still maintain that these annual payments, and also the duplicand on entry, are created real burdens, of the nature of annual-rents. I do not doubt that this creation of a real burden is possible, if done by distinct declaration. But I do not think it has been effectually done in this case. They are not declared to be real burdens; they are not payable "furth of the lands"; the clause of irritancy on failure to pay is not directed to be engrossed in the sasines, and is actually not within the immediate title of the defender. Neither in express words, nor in any language unequivocally declaring intention, have these pecuniary obligations been declared real burdens; and when the fact of burgage tenure and the incompatibility of "feu-duties" is borne in mind, I cannot admit that mere implication is sufficient.

We cannot conjecture or imply a matter so important as the creation of a real burden. It must in some words or other be expressed. It is not so expressed. Accordingly, without again referring to the authorities on which we had much argument, and which your Lordship has explained so clearly, I have only to add that I agree with your Lordship and with Lord Deas in the opinions just delivered.

[638] LORD KINLOCH.—There are some things in this case not susceptible of any doubt.

It is unquestionable that the defender holds his property simply by a burgage holding. Any apparent attempt to combine a feu holding with a burgage is plainly ineffectual. The property was burgh property, being part of the town moor; and it was disponed "to be holden of His Majesty and his royal successors in free burgage for service of burgh used and wont." Although, therefore, the property was also said to be "in feu-farm disponed," and "rendering and paying yearly to us and our successors in office or assignees the sum of £39, 5s. 8½d. in name of feu-duty," with a duplicand at the entry of each heir and singular successor, it is plain that this attempted twofold holding was wholly incompetent and ineffectual; and the holding remains burgage, and this only.

The defender, who has made up a title to the property, does not dispute his liability

to make payment of the annual sum called feu-duty, and of the other sum called double feu-duty for an entry. And it does not seem susceptible of dispute that every successor so making up a title will be equally liable, as on a personal obligation to pay specific sums of money, inherent in the right so taken up.

But what the pursuers demand is, that the Court should declare these to be real burdens on the subjects,—that is, payable out of the subjects, and enforceable by real diligence. The payments, it will be observed, are by the title to be made "to us and our successors in office or assignees." And the result of success by the pursuers, whether expressly sought or not, would be to establish a ground-annual or rent-charge, not necessarily connected with the tenure, but assignable to any one, with the quality of being in any assignee's person a real burden, leviable by real diligence.

I think it settled by the opinions in the well-known case of the Tailors of Aberdeen v. Coutts that to establish a real burden it is not necessary that it should be declared such in express terms, but that it may be constituted by words distinctly importing its imposition. But I do not think that the present case comes within the rule of the authority. Although it may not be necessary to declare a real burden in express terms to be such, there must be habile words used for the purpose of operating the intention. This is not done in the present case, which attempts to reach the result, not by the imposition of a real burden standing independent of tenure, but by the creation of a feu-right, of which a feu-duty and duplicand are set forth as elements. It may be guessed that the parties intended to make these payments real burdens, but only because they have used the word "feu-duty," thereby referring to a payment which is commonly considered such. I do not think that this satisfies the requirement of the reported case. It is not the creation of a real burden by clear and distinct words, though not imposing it in express terms. It is an attempt to create an illegitimate tenure, of which feu-duty is an element; and when this attempt is foiled to set up the feu-duty as a real burden apart from all tenure. This I think inadmissible. When the attempt to make a feu holding fails, all the incidents of the holding must fall to the ground. The pursuers cannot make one thing, and when that is found ineffectual, then, by a sort of pantomimic procedure, convert it into another. They cannot change a feu-duty, which is only effectual as an incident of a feu holding, into a wholly different real burden, which is effectual apart from all tenure. The pursuers, in short, have not made the thing which they aimed at, but have made something else which does not suit their purpose, and which they cannot now transform into the other.

What the pursuers now seek to establish is a totally different thing from the feu-duty; it is a ground-annual, not payable to a superior, but payable out of the lands to any appointed creditor. I shall not inquire whether the pursuers would have succeeded had they used the word "ground-annual" in place of "feu-duty." I am not prepared to say, after the opinion in the Tailors of Aberdeen, that a ground-annual distinctly imposed would require, for legal effect, to be expressly declared a real burden, though it commonly is, and will always be, most safely declared so. The answer to the pursuers is that they have not created a ground-[639]-annual, but attempted to create a feu-duty; and when the thing cannot be sustained as a feu-duty, it cannot subsist as anything. They did not make a ground-annual, and cannot, therefore, have such sustained.

I am of opinion that the Lord Ordinary's interlocutor should be in substance adhered to.

On a suggestion being made as to the disposal of expenses, the Lord President intimated that the Court wished it to be understood that, where a respondent in a reclaiming note wishes to say anything against the Lord Ordinary's interlocutor, even on the matter of expenses, he must say so at the hearing, for he cannot be listened to afterwards.

This interlocutor was pronounced on 15th March 1872:—"The Lords having heard counsel on the reclaiming note for the Magistrates of Arbroath against Lord Mackenzie's interlocutor of 25th November 1871, Recall the said interlocutor, in so far as it finds 'that the obligation for annual payments and duplications thereof at the entry of each heir and singular successor, contained in the defender's titles, is binding upon the defender'; and, in place thereof, find that the defender, as proprietor for the time being of the heritable property mentioned in the summons, is personally liable for the annual payments and duplications thereof stipulated in his

titles to the said property: *Quoad ultra* adhere to the said interlocutor: Find the defender entitled to expenses since the date of the Lord Ordinary's interlocutor reclaimed against; and remit to the Auditor to tax the account of said expenses, and report."

G. & J. BINNY, W.S.—WEBSTER & WILL, S.S.C.—Agents.

[*Approved*, Davidson *v.* Dalziel, 1881, 8 R. 990.]

No. 112. X. MACPHERSON, 639. 19 Mar. 1872. 1st Div.—B.

THE COMMISSIONERS OF SUPPLY FOR THE COUNTY OF ARGYLL, of the First Part.—*Watson—Maclachlan.*

THE COMMISSIONERS OF THE CALEDONIAN CANAL, of the Second Part.—*Sol.-Gen. Clark—Marshall.*

Canal—Assessment—Public Property—Valuation of Lands (Scotland) Act, 1854 (17 & 18 *Vict. cap.* 91).—A canal was constructed by a number of private individuals, incorporated by Act of Parliament, authorising them to levy dues and tolls for their own behoof; and by another statute passed in 1799 regulations were enacted for the assessment of the company's property for all public and parochial rates leviable in respect thereof. Large sums were afterwards advanced by Government for the extension and repair of the canal upon security of the dues and tolls which the company was empowered to levy; but these sums, principal and interest, being unpaid, an Act was passed in 1848 vesting certain commissioners for public purposes with the property and administration of the canal, with a power of redemption in favour of the company within twenty years, but this power was not exercised during that period. *Held* (1) that the commissioners were liable to be assessed for county rates in respect of their ownership and occupancy of the canal and its appurtenances; and (2) that the valuation fell to be made in accordance with the Valuation of Lands Act of 1854, and not under the special Act of 1799.

The Crinan Canal, which is situate in the county of Argyll, extending across the peninsula of Kintyre from Ardrishaig to Crinan, was originated towards the close of last century by a company of private individuals, who expended upwards of £100,000 upon the undertaking.

The company was incorporated by the Act 33 Geo. III. cap. 104, whereby it was authorised to raise money by shares and loans for making and completing the canal, and to levy certain dues and tolls. By a subsequent Act, 39 Geo. III. cap. 27, passed in 1799, the company was em-[640]-powered to raise additional capital on security of the canal and rates; and it was enacted (sec. 13) "That all parochial rates and assessments which shall or may at any time be laid, assessed, or imposed upon the rates and personal estate of the said company of proprietors shall be laid, assessed, and imposed in each parish or place respectively where rates are assessed in respect of the stock or personal estate of the inhabitants in general, in proportion to the length of the said canal, and the amount of rates taken in respect of such length in such respective parish or place, and not otherwise; and that, in respect of any parliamentary and parochial rates that shall or may be from time to time rated or assessed upon the said company of proprietors, for and in respect of the lands and grounds already purchased or taken, or to be purchased or taken, and in respect of all warehouses or other buildings erected or to be erected by the said company of proprietors, in pursuance of the said recited Act, the same shall be so rated and assessed in the same proportion as other lands, grounds, and buildings nearest adjoining the same, according to their respective value, were or shall be rated, and in no larger or more extensive proportion and as the same lands, grounds, and buildings so purchased or taken, or to be purchased or taken and erected, would be rateable, in case the same were the property of individuals in their natural capacity, and made use of for common purposes only."

Subsequent to 1799 and prior to 1848 several Acts were passed, whereby the Government was authorised to advance various sums of money, amounting in all to £74,400, for the completion and repair of the canal, upon security of the dues and tolls which the company was empowered to levy.

Of the sums so advanced, however, neither principal nor interest was repaid; and in 1848 an Act was passed (11 & 12 Vict. cap. 54), entitled "An Act for incorporating the Commissioners of the Caledonian Canal, and for vesting the Crinan Canal in the said Commissioners."

The preamble of this statute set forth the several Acts of Parliament before referred to; that the public debt on the Crinan Canal amounted without interest to £74,400; that the revenue derived therefrom had been, and still was, scarcely sufficient to defray the costs of maintaining the canal in efficient working order, "and there is no prospect of any augmentation of such revenue except by an adjustment of the duties leviable, and by the expenditure of large sums of money, as considerable repairs are still necessary to render the navigation safe and permanently useful"; and in the circumstances "that it is just and reasonable that the said canal and works connected therewith should be held at the disposal of the Commissioners of Her Majesty's Treasury, freed and discharged from all the right, title, interest, claim, and equity of the said company of proprietors, or of any person or persons claiming from or through them"; and that it would be of advantage that the Commissioners of the Caledonian Canal were incorporated, and that it appeared essential that the Crinan Canal and works should be vested in the Commissioners of the Caledonian Canal, it was therefore enacted by section 2 that the Commissioners of the Caledonian Canal should be incorporated under the name of "The Commissioners of the Caledonian Canal," and by that name should and might sue and be sued, and acquire, hold, and enjoy, and also acquire and dispose of lands and property, heritable and moveable, real and personal; and by section 5, "That from and after the passing of this Act the tolls and rates arising from the Crinan Canal, and also the canal itself, and all the estate, right, title, and interest in and to the same, and all quays, houses, lands, privileges, easements, and appurtenances belonging or appertaining thereunto, shall be and become the property of, and [641] the same are hereby transferred to and vested in the Commissioners, freed and discharged from all rights, equity, or claim of the said company of proprietors of the Crinan Canal, or of any person or persons claiming through them, except as hereinafter provided; and the Commissioners shall thenceforth have and enjoy all the rights, powers, and authorities for levying, taking, altering, and managing the tolls, rates, and duties leviable on the Crinan Canal, and all other rights, powers, and authorities now or at any time heretofore possessed or enjoyed by the said company of proprietors, and shall and may henceforth undertake and exercise the management and administration of the Crinan Canal, and of everything connected therewith, in as full and ample a manner as now appertains to them with regard to the Caledonian Canal, under or by virtue of the said last-mentioned Acts and of this Act; and from and after the passing of this Act all right of management or interference, and all interest of any other parties whatsoever, of or in the Crinan Canal, and the works and appurtenances thereof or belonging thereto, and the tolls and rates arising therefrom, shall to all intents and purposes, except as hereinafter provided, cease and determine."

By section 6 it was enacted "that if the said company of proprietors shall at any time within twenty years from the passing of this Act pay or cause to be paid into Her Majesty's Treasury the said sum of £74,400, with legal interest thereon, and also all such sums of money as the Commissioners shall have expended in improving and keeping in repair the Crinan Canal and works connected therewith, over and above the amount of the tolls and rates which shall in the meantime have been received from the said canal, then and in such case the tolls and rates arising from the said canal, and also the said canal itself, and all the estate, right, title, and interest in and to the same, and all quays, houses, lands, and privileges, easements and appurtenances belonging or appertaining thereunto, shall revert to and again become the property of and be vested in the said company of proprietors, freed and discharged from all claims on the part of Her Majesty's Treasury, in as full and ample a manner to all intents and purposes as if this Act had not been passed." The power of redemption contained in the section last quoted was never exercised.

On or about 2d February 1859 the embankment of the highest reservoir of the

Crinan Canal gave way, and great injury was thereby caused both to the canal itself and the adjacent country. Unless the reservoir embankments and the banks of the canal had been restored the canal would have been entirely a ruin. Application was accordingly made by the Commissioners of the Caledonian Canal to the Treasury for an advance of money for that purpose, which was granted out of the Consolidated Fund of the United Kingdom by the Act 22 & 23 Vict. cap. 55.

By a subsequent statute, 23 & 24 Vict. cap. 46, the powers of the Commissioners were enlarged, and new rates and duties were authorised to be levied in respect of the traffic passing through the Crinan Canal, some of these being additional, and others a revision of the former rates and duties. In this Act the Caledonian and Crinan Canals are dealt with together, and in the same manner.

In some years a small surplus revenue was derived from the Crinan Canal after deducting the expenditure required for keeping it in repair, &c. This surplus was expended by the Commissioners in new works for the improvement of the canal, and the public debt upon it remained unpaid.

For the years 1868–69, 1869–70, and 1870–71, the Commissioners of the Caledonian Canal, as owners and occupants of the Crinan Canal, with the houses, lands, quays, and other appurtenances thereof, were assessed for [642] the various county assessments leviable by the Commissioners of Supply from the owners or occupants of all lands and heritages within the county of Argyll, according to the yearly value thereof as appearing in the valuation-roll of the county, made up in terms of the Valuation of Lands Act, 1854, 17 & 18 Vict. cap. 91.

The Commissioners of the Caledonian Canal having disputed their liability for these assessments a special case was presented to the Court setting forth the facts above narrated, and craving an opinion and judgment upon the following questions:—"1. Whether the second parties are, as owners or occupiers of the said Crinan Canal and its appurtenances, liable to assessment in respect thereof under the said statute mentioned on the second page hereof? 2. Whether the said Crinan Canal and appurtenancest hereof, now vested in the second parties, and the revenue thereof, are exempt from the assessments imposed by the first parties under the statutes mentioned on the second page hereof? In the event of the first question being answered in the affirmative and of the second being answered in the negative, 3. Whether the valuation at which the said Crinan Canal and appurtenances are to be rated for the assessments made or to be made by the said first parties is to be regulated by the Act 39 Geo. III. cap. 27 (1799)?"

In the course of the discussion, which turned upon the effect of the various statutory enactments above referred to, the undernoted authorities were cited.*

At advising,—

LORD PRESIDENT.—The Commissioners of Supply of the county of Argyll have imposed upon the Commissioners of the Caledonian Canal, in respect of their ownership and occupation of the Crinan Canal, and the quays, houses, lands, and appurtenances thereof, certain assessments for the years 1868–69, 1869–70, and 1870–71. These assessments are imposed under the five following statutes—(1) 20 & 21 Vict. c. 71, entituled, "An Act for the regulation of the care and treatment of lunatics, and for the provision, maintenance, and regulation of lunatic asylums in Scotland," 25th August 1857. (2) 20 & 21 Vict. c. 72, entituled, "An Act to render more effectual the Police in counties and burghs in Scotland," 25th August 1857. (3) 23 & 24 Vict. c. 79, entituled, "An Act to provide additional accommodation for the Sheriff-courts in Scotland," 6th August 1860. (4) 23 & 24 Vict. c. 105, entituled, "An Act to provide for the management of the General Prison at Perth, and for the administration of Local Prisons in Scotland," 20th August 1860; and (5) 31 & 32 Vict. c. 82, entituled, "An Act to abolish the power of levying the assessment known as 'Rogue Money,' and in lieu thereof to confer on the Commissioners of Supply of counties in Scotland the power of levying a 'County General Assessment,'" 31st July 1868.

The Commissioners of the Caledonian Canal contend that they are not liable to such assessments in respect of their ownership and occupation of the Crinan Canal, &c. Such is the dispute upon which our opinion is asked under the first and second ques-

* Clyde Navigation Trustees *v.* Adamson, *ante*, vol. iii. H. of L. p. 100; and Mersey Dock Board *v.* Jones, *ante*, vol. iii. H. of L. p. 102; Leith Dock Commissioners *v.* Miller, *ante*, vol. iv. H. of L. p. 14; Greig *v.* University of Edinburgh, *ante*, vol. vi. H. of L. p. 97.

tions of this special case. The Crinan Canal was originally constructed by a private company as a commercial speculation, and it is needless to say that, so long as it remained the property of such a company, it was subject to assessment to the fullest extent. Prior to 1848 this was the condition of matters; although before that time the proprietors of the Crinan Canal had become very largely indebted to the Treasury for money advanced to enable them to carry on and complete their enterprise. But in 1848 a very great change was [643] effected by the statute 11 & 12 Vict. c. 54, which was passed for the purpose of "incorporating the Commissioners of the Caledonian Canal, and for vesting the Crinan Canal in said Commissioners." That Act provided for the administration of the Crinan Canal by the Commissioners of the Caledonian Canal in such a way as to pay off, if possible, the public debt with which it was burdened. But as the prospect of being able to do so was very distant, the preamble of the statute bears "that it is just and reasonable that the said canal and works connected therewith should be held at the disposal of the Commissioners of Her Majesty's Treasury, freed and discharged from all right, title, interest, claim and equity of the said company of proprietors, or of any person or persons claiming from or through them." The statute, accordingly, after incorporating the Commissioners of the Caledonian Canal, proceeds to enact that "the tolls and rates arising from the Crinan Canal, and also the canal itself, and all the estate, right, title, and interest in and to the same, and all quays, houses, lands, privileges, easements, and appurtenances belonging or appertaining thereunto, shall be and become the property of, and the same are hereby transferred to and vested in the Commissioners, freed and discharged from all rights, equity, or claim of the said company of proprietors of the Crinan Canal, or of any person or persons claiming through them, except as hereinafter provided; and the Commissioners shall thenceforth have and enjoy all the rights, powers, and authorities for levying, taking, altering, and managing the tolls, rates, and duties leviable on the Crinan Canal, and all other rights, powers, and authorities now or at any time heretofore possessed or enjoyed by the said company of proprietors, and shall and may henceforth undertake and exercise the management and administration of the Crinan Canal, and of everything connected therewith, in as full and ample a manner as now appertains to them with regard to the Caledonian Canal. Section 6 then provides that the company of proprietors are to be entitled to be reinstated in their property if they shall within twenty years from the passing of the act pay to the Treasury the whole debt with which the canal had been burdened.

Now, this statute certainly effected a great alteration on the Crinan Canal as a subject of property. The canal no longer belonged to a commercial company, but became vested in statutory commissioners apparently for public purposes. The Commissioners have accordingly contended that they possess the Crinan Canal just as they do the Caledonian Canal; and, indeed, if is quite plain from the section of the statute which I have just quoted that the Crinan Canal is vested in the Commissioners in the same way in all respects as the Caledonian Canal.

It thus occurred to the Court in considering this case that if the Caledonian Canal is not a proper subject of assessment in the hands of the Commissioners, neither is the Crinan Canal; and accordingly it is necessary to consider the position of the Caledonian Canal in regard to assessments. That is a question of very considerable importance, since it not only affects the present case, but also involves the liability of the Caledonian Canal for assessments. It seems to me, however, that it is quite indispensable for us to consider that question in order to decide the present case. The existence of a power of redemption to the original proprietors of the Crinan Canal, as provided by the 6th section of 11 & 12 Vict. cap. 54, might have been a specialty of some importance as distinguishing the Crinan from the Caledonian Canal. But it is now quite immaterial, since the twenty years within which the power might have been exercised expired in 1868; so that the Crinan Canal is now absolutely vested in the Commissioners of the Caledonian Canal, and all the rights of the original proprietors are for ever extinguished.

The question whether the Caledonian Canal, as possessed and administered by the Commissioners, is a proper subject of assessment, is dependent on a series of statutes different from those regulating the Crinan Canal, until a recent period when the two canals became vested in the same body of Commissioners. But it is quite unnecessary to go back into the history of the Caledonian Canal; it is sufficient to say that it did not originate in private enterprise, but was constructed with public

funds, and vested in commissioners for the convenience of the public. Of that there can be no doubt whatever; and it may be further conceded that at some stages of its existence the canal was to all effect vested in [644] and administered by a department of the government of the country. But the only important matter is its present position, that is to say, its statutory constitution, as now fixed by an Act passed in 1860, viz. 23 & 24 Vict. cap. 46. By that statute the two canals are entirely amalgamated in the hands of the Commissioners, so far as that was not already done by 11 & 12 Vict. cap. 54; so that as regards the present question the two canals may be described as one after the passing of the Act of 1860. Now, that Act proceeds upon a recital of all the previous statutes affecting both canals; it incorporates the Lands Clauses Act, the Commissioners Clauses Act, and the Harbours Clauses Act; and then it proceeds to grant authority to the Commissioners to support, maintain, improve, and use the canals, together with all harbours, basins, reservoirs, &c., "and to do and perform all such acts as the Commissioners shall think expedient for maintaining, repairing, improving, and supporting the canals and the appurtenances belonging thereto, and for the full use and enjoyment thereof," &c. They have power to widen the canals, to raise the banks, or sink the bed, and to give off water for the use of manufactories and works. For the purpose of enabling them to carry on this extensive administration, the 10th section of the statute confers on them power to levy certain rates and duties. Out of these rates or of any other funds at their disposal they are empowered to make docks, and to levy rates on vessels using such docks. They are also authorised to levy rates for the use of warehouses, cranes, and weighing machines, and the mode of imposing them is specified. The Commissioners are also empowered by section 19 to employ vessels and carry passengers and goods, that is to say, they are enabled to embark in the business of carriers. They are next empowered to make bye-laws and impose fines—another source of revenue—and to license pilots. By section 23 they are allowed to borrow, with consent of the Treasury, any sum not exceeding £20,000, in addition to any money which they were previously authorised to borrow. Section 25 then provides for the application of the rates and moneys borrowed. Lastly, by section 28, the Commissioners are empowered to sell and dispose of superfluous lands either for a price or a feu-duty.

Now, it is impossible to read this Act of 1860 without seeing that the position of the Commissioners is very clearly defined. They are canal trustees, just as other people are dock and harbour trustees, for the purpose of maintaining and improving a very important public work. The locality of this public work is rather extensive, for it reaches from sea to sea, and in that respect it probably differs from most of the public works which we are accustomed to deal with. But in no other respect can I see any distinction between the position of these Commissioners and that of the Clyde Trustees or the Commissioners of Leith Docks. They are all alike invested with a very important subject, which is intended to be used by the public, to be maintained by the levying of rates, and to be administered to the best advantage with a view to public utility. But the public purposes for which the works are in all these cases intended are of a totally different character from those which belong to estates vested in the Crown, or in some department of the Government, the beneficial right in which forms part of the national property. The Caledonian Canal or the property of the Clyde Trustees may be public property in one sense, but it is not national, since there is no beneficial interest in any but those who may happen to use it. Now, this distinction has formed the ground of judgment in so many recent cases, and has been so frequently expounded both in this Court and in the House of Lords, that it is needless for me to dwell upon it. After reading the Act of 1860 I cannot avoid holding the canal to be subject to all ordinary taxation, just as much as the harbour of Glasgow or the docks of Leith. It is not national in the proper sense of the term, and it is therefore not entitled to that exemption from assessments which is applicable to national property alone.

That disposes of the first and second questions. The third question is, whether the valuation at which the Crinan Canal and its appurtenances are to be rated for those assessments is to be regulated by the Act 39 Geo. III. cap. 27 (1799). Now, that was a statute which was passed very soon after the canal was made, and it was intended to regulate the manner in which parochial and other rates [645] were to be levied from the proprietors of the canal. There was then no general law fixing the mode of valuation for such purposes, and as the canal passed through a number of

different parishes, in the absence of a fixed rule as to how rates were to be levied, such an enactment was necessary. But now such assessments are common, and have been made the subject of general legislation, which, I apprehend, entirely supersedes any old and private Act of this description. I am of opinion that these assessments fall to be laid on in accordance with the valuation-roll of the county.

LORD DEAS.—The two first queries submitted to us raise the question whether the Crinan Canal is liable to assessment. I think that the result of the provisions contained in the 25th section of the Act of 1860 is that the canal is held by the Commissioners for the benefit of that portion of the public only which makes use of it, and, that being so, the case comes directly under the authority of the decision in the case of Adamson *v.* The Clyde Navigation Trustees, and I therefore agree with your Lordship that we must hold the Canal Commissioners liable. If they had not been liable to be assessed in respect of the Caledonian Canal it might still have been a question whether they should be assessed in respect of the Crinan Canal; but if, as I think, there can be no doubt that the Caledonian Canal is liable, there are no grounds upon which the Crinan Canal can be held to be exempt. It is unnecessary to say more. As regards the third question, I agree with your Lordship upon that also.

LORD ARDMILLAN.—In regard to the two first questions, I am of opinion that since the passing of the Act of 1860 both the Caledonian and the Crinan Canal are in the same position as regards liability for assessment. The rights and powers of the Commissioners under that Act have been made the same in respect to both these canals, and I think that their liability is also the same. They do not hold and administer the property for purposes affecting either the partimonial rights of the Crown, or the interests of the community at large, like the officials of a public department such as the Post-office, but their position is analogous to that of harbour or dock trustees, who are vested with property for specified and limited purposes affecting only a portion of the community, and whose liability in assessment must be held to be now settled by decision, particularly in the case of Adamson *v.* The Clyde Navigation Trustees, and the other cases referred to. I will not therefore occupy time by going over the same ground as your Lordship. As to the remaining question I do not think it admits of almost any doubt that the valuation must be made according to the existing statutory rule, and not under the Act of 1799, and I am of opinion, therefore, that that question must be answered in the negative.

LORD KINLOCH.—The leading question put to us is, whether the Commissioners of the Caledonian Canal are liable in county rates, in respect of their ownership or occupancy of the Crinan Canal.

This canal was formed towards the close of last century by a company incorporated by Act of Parliament for that purpose. It was found necessary to give this company large assistance by loans from the public purse. A series of Acts were passed authorising these loans, and statutorily impledging the canal in security of their repayment. Under this authority £25,000 were advanced by the Scottish Exchequer in 1799, £25,000 by the Treasury in 1805, £5000 out of the Consolidated Fund in 1811, and £19,400 by the Scottish Exchequer in 1816, making £74,400 in all. In security of these advances the canal was assigned over to the Scottish Barons of Exchequer; and in 1833, in connection with the arrangements for the abolition of the Court of Exchequer in Scotland, a transference of the security was made to the King's Remembrancer, and Auditor of Exchequer for the time being.

The advances seem to have outgone the value of the Crinan Canal; and, in the year 1848, an Act was passed, the 11 & 12 Vict. c. 54, which, on the narrative of the insufficiency of the canal to meet its burdens, and whereas (as the Act bears) "it appears to the Commissioners of Her Majesty's Treasury to be [646] essential that the Crinan Canal, and works connected therewith, should be vested in the Commissioners of the Caledonian Canal, in order that both navigations may be united under the same management," declared the canal accordingly to be so vested, in property and administration, "freed and discharged from all rights, equity, or claim of the company of proprietors of the Crinan Canal, or of any person or persons claiming through them, except as hereinafter provided." The after provision was that, if, within twenty years from the passing of the Act, the Crinan Canal Company should pay into the Treasury the above-mentioned sum of £74,400 and interest, and any other sum due by them in consequence of the charges on the canal exceeding its produce in tolls and rates, the right to the undertaking should "revert to, and again become the

property of, and be vested in the said company of proprietors, freed and discharged from all claims on the part of Her Majesty's Treasury." This payment was never made; and no reversion of the right to the original company ever took place.

The substance of this proceeding was simply that the Crinan Canal was bodily taken over in payment of the advances made on its behalf. How, after being so taken over, it was ultimately disposed of, was fixed, first, by the Act 11 & 12 Vict., already quoted, which vested the Crinan Canal in the Commissioners of the Caledonian Canal, and still more fully by an after Act of 23 & 24 Vict. c. 46. This Act applied equally to the Caledonian and Crinan Canals, which were subjected to the same administration in the persons of the same Commissioners. These Commissioners were authorised to maintain the Canals, and to charge specified rates and duties for the use of the navigation. They were empowered to construct docks and basins and other incident works. They were authorised to borrow money on the security of the rates, and to apply it for the purposes of the Act. And the following express enactment as to both canals was contained in section 25—"All rates levied and all rents received, and all moneys borrowed under the authority of this Act, shall be applied and expended on or in connection with the canals, or either of them, and in providing additional accommodation for the traffic thereon, or in making docks, basins, or slips as aforesaid, as shall from time to time appear to the Commissioners expedient." The whole produce of both canals is thus devoted in express terms to expenditure on the canals.

In this state of things I consider the liability of the Crinan Canal to assessment for the general taxation of the country to be not a matter of difficulty. I perceive no difference in this respect between the Crinan Canal and the Caledonian. But it is only as to the Crinan Canal that our opinion is asked.

The question is one not now to be discussed on principle merely. There are certain recent well-known judgments by which the matter must be held to be ruled. It is settled, as I think, by these authorities, that an exemption from public taxation is not possessed merely in respect of the property sought to be assessed being under the charge of public trustees, or used, in a general sense, for the benefit of the public. It is necessary to this exemption that the property be in the occupancy of the Crown for the purposes of the Crown, or, as it has been otherwise expressed, occupied by Government for Government purposes. A familiar illustration is derived from the case of buildings occupied as Government offices—the Post-office, the Admiralty, the Horse Guards, and the like. The present case does not come within this category. The Crinan Canal is no doubt vested in public Commissioners for public uses, that is to say, it is so vested for the purpose of any of the public who choose to take advantage of the navigation, doing so on payment of the fixed rates and duties. Therein it is not used by or for behoof of the whole public, but only of a certain portion of them, who pay for the benefit. I consider it to be now firmly established that this is not equivalent to Crown occupancy for Crown purposes, but something entirely different, and that property so held is liable to rating, and the rates just form part of its ordinary outgoing charges. I need not more specifically refer to the decision in England regarding the Mersey Navigation, or the judgments in this Court and the House of Lords with regard to the Leith Docks and Glasgow Harbour, and latterly the University of Edinburgh. These are familiarly known.

[647] The specialty which has been supposed to exist in the present case lies in the amount of debt owing (as is assumed) to the Treasury on account of the Crinan Canal, which places, as was argued, the Commissioners of the Caledonian Canal in the position, *quoad* the Crinan Canal, of trustees for Government for repayment of this debt. But I think there is here a twofold error. According to the course of the transactions I conceive that the debt previously incurred by the Crinan Company was substantially wiped away by the canal being taken in lieu of it, under the Act 11 & 12 Vict. c. 54. The canal, no doubt, thus came in room of the money debt. But in place of its being kept in the form of a security for debt, it was statutorily made over to the Commissioners of the Caledonian Canal, not as trustees for the Treasury, but as holding both in property and administration for the purposes of navigation, with an obligation on these Commissioners to employ all the proceeds of the canal in maintaining and improving the subject of their trust. Such being the case, the prior debt incurred for the canal becomes, in my apprehension, of no sort of relevancy in the present question. Indeed, even if there still were debts on the Crinan Canal payable to Government, it would not, as I think, affect our present

conclusion. For the hingeing point in the case is the use which is made of the canal, and that this is not a use for Crown or Government purposes. Few things of public utility, like the Crinan Canal, have come into existence without aid from the public purse, either afforded by a vote of Parliament amongst the supplies of the year, which does not infer repayment, or by means of a statutory loan sanctioned by Parliament. But this is of no moment towards exempting from taxation, if the occupancy is not for Crown or Government purposes, but, as here, for the purposes of navigation on the part of those who pay for the benefit by statutory rates. This circumstance I consider decisive against any plea of exemption.

I am therefore of opinion that the first question should be answered in the affirmative, the second in the negative.

The third and remaining question is, whether the valuation of the canal and its appurtenances is to be regulated by the Act 39 Geo. III. c. 27, or, which is the only alternative, by the General Valuation Act for Scotland, 18 & 19 Vict. c. 91. I can have no doubt on this question. I consider the Valuation Act 18 & 19 Vict. to have superseded and set aside any previous enactments on the subject, and this very emphatically in the case of railways and canals. I am, therefore, of opinion that this question should be answered in the negative.

THE COURT accordingly answered the first of the questions appended to the special case in the affirmative, and the second and third questions in the negative, and found the parties of the second part liable in expenses.

MACLACHLAN & RODGER, W.S.—JAMES HOPE Junior, W.S.—Agents.

No. 113. X. MACPHERSON, 647. 20 Mar. 1872. 1st Div.—Lord Mackenzie, B.

SIR GEORGE DOUGLAS CLERK, BART., Pursuer.—*Fraser—Watson.*
GEORGE EDWARD CLERK AND OTHERS, Defenders.—*Sol.-Gen. Clark.*

Entail—Prohibition—Lease—Minerals—Statute 6 *&* 7 *Gul. IV. cap.* 42, *sec.* 1.—By a deed of strict entail executed in 1782 the heirs of entail were prohibited from communicating the level of the coal on the estate to any neighbouring colliery. In an action at the instance of the heir in possession against the substitute heirs of entail to have it declared that he and the mineral tenant were entitled during the currency of the lease to communicate the coal levels to an adjoining colliery, *held* that the prohibition not being necessary for the preservation of the entailed estate, or its transmission to succeeding heirs, the heir in possession was entitled to communicate the level, in so far as such communication might be necessary or beneficial to the working out of the minerals on the estate, and not permanently detrimental to the mines, but subject to the condition that the communication should be built up whenever the purpose of the [648] communication should have been served, so as to prevent the flow of water from the adjoining mines.

The pursuer of this action was heir of entail in possession of the lands of Lasswade and others, under a deed of strict entail executed by Sir James Clerk of Penicuick in 1782, which, among other prohibitions, contained the following:—"With this limitation and provision also, that it shall not be lawful to nor in the power of my said heirs of tailzie, or any of them, to sett tacks (for any period whatever) of the whole or any part of the coal lying under and beneath the whole lands and barony of Lasswade, for any term whatever, nor to communicate the level of the said coal of Lasswade to any neighbouring colliery."

By statute 6 & 7 Gul. IV. cap. 42, passed in 1836, it is enacted (sec. 1) that notwithstanding any prohibitory, irritant, and resolutive clauses contained in any entail made in accordance with the provisions of the Act 1685, cap. 22, it shall be lawful for the heir in possession "to grant tacks of any mines and minerals contained in such lands and estates for any period not exceeding thirty-one years."

By virtue of this statute the whole minerals under part of the entailed estate

in the neighbourhood of Loanhead were in 1866 let to the Shotts Iron Company by the late Sir George Clerk, then the heir of entail in possession, for the period of thirty-one years.

The lease contained a clause in these terms:—"And it is hereby expressly provided and declared that the lessees and their assignees, and subtenants shall on no account communicate any of the coal workings or levels within the foresaid lands to any adjoining proprietor; but this prohibition is not intended to apply to their works for raising and manufacturing iron, and that the said lessees may communicate their works for raising and manufacturing iron, but not coal, to neighbouring lands, the minerals of which may be let to them; and should the lessees also become lessees of the minerals in any of the adjoining properties, they shall have liberty to use the pits, hill-grounds, and railways, &c., on the foresaid lands, in so far as that can be done in conformity with the provision and declaration above written, for similar purposes, upon their satisfying the said Sir George Clerk or his foresaids that the minerals raised from the different properties will be properly distinguished, and upon paying to the said Sir George Clerk or his foresaids one penny sterling per ton of 22½ cwt. for all other minerals that shall be raised from the pits in lands belonging to other parties, and carried over the lands belonging to the said Sir George Clerk."

In 1869 the Shotts Iron Company became lessees of the minerals in the lands of Dryden, belonging to Colonel Archibald Trotter, adjoining the mineral field at Loanhead, let to them by Sir George Clerk, and in January 1870 the company applied to the agent for the late Sir James Clerk, who was then the heir in possession of the estate, for leave to communicate the level of the Lasswade colliery to the neighbouring workings in the Dryden estate.

The application was in these terms:—"The Shotts Iron Company's mineral workings in the lands of Loanhead, which have been carried on for some time from pits and mines on the east side of the village of Loanhead, are approaching a 'slip' or 'dyke' near the western boundary of Loanhead estate, known in the district as the 'Burghlee Dyke.' The minerals to the west of this 'slip' or 'dyke,' although the same as on the east side, are not of sufficient extent in Loanhead lands alone to warrant the necessary expense for opening up and working the same; and it is a question with the mineral tenants whether they would not be better to restrict their workings entirely to the east side of Burghlee Dyke, and [649] leave the western portion of the mineral field unworked. This, however, they are very unwilling to do, as they consider it would be more advantageous to both landlord and tenants that the whole area of this mineral field should be worked simultaneously. In order to do this properly the minerals in the adjoining lands of Dryden, belonging to Colonel Trotter of The Bush, would require to be worked along with and from the same pits and mines as the minerals in Loanhead to the west of the Burghlee Dyke, before referred to; but although the Shotts Iron Company have the right under their lease of Loanhead minerals of working the ironstone in the manner described, they are prohibited from working the coal in the same way; and this prohibition will, if adhered to, operate very injuriously for the interests of both landlord and tenants, because the same expenditure in sinking and fitting pits and mines would, if that prohibition were removed, enable the tenants to work both coal and ironstone; but, on the other hand, with such a prohibition, it is not worth while for the tenants to incur such an expenditure for the sake of working the ironstone alone. If the prohibition was removed the tenants would immediately conclude an arrangement with Colonel Trotter for working the whole of his Dryden minerals from pits and mines to be situated near the western boundary of Loanhead lands, so that the whole of the minerals in the lands of Loanhead to the west of the Burghlee Dyke before referred to would be worked from such pits and mines simultaneously with the minerals on the east side of said dyke from the pits and mines now at work near Loanhead village, and the gross output of minerals from Loanhead estate would, in this way, be increased about 50 per cent., and that from a part of the mineral field which cannot be worked advantageously except in connection with Dryden minerals. Besides, the whole of the Dryden minerals raised from these pits and mines would be subject to a wayleave which might be expected to run from £100 to £300 per annum. Nor would any permanent injury whatever be done to Loanhead mineral field by such an arrangement, because it would be an easy matter to provide for the building up of any temporary connection that might be made between the workings on the east and west

sides of Burghlee Dyke, which is undoubtedly the natural boundary of Loanhead mineral field to the west. What I would suggest then is, that this matter should be referred to the mining engineer for the landlord (Mr. Geddes) for his consideration, and if he reports that what I have proposed is fair, reasonable, and practicable, and for the mutual advantage of both landlord and tenants, then that an application should be made to the Court to grant the necessary powers to Sir James Clerk's curator to modify the lease as desired,—the Shotts Iron Company, of course, bearing all the expenses of the remit to the engineer, and of the application to the Court."

As suggested in this letter, Sir James Clerk's *curator bonis* obtained from Mr. Geddes a report, which was as follows:—"The provision in the entail not to communicate the 'level of said coal of Lasswade to any neighbouring colliery' had, no doubt, in view to prevent adjoining mineral fields getting the benefit of what is understood in mining by day-level drainage, which at Loanhead has long existed to a depth of 40 fathoms from the surface at the engine pit. The propriety of such a prohibition at the date of the entail was probably great and obvious. Draining mineral fields by steam power was then greatly more costly and less familiar to coal-owners and tenants than now, and the prohibition being only of coal levels, we may infer that ironstone, and at all events 'blackband,' was not known to exist at Loanhead, and thus communication of ironstone levels is not forbidden by the entail. It is clear, however, that to communicate the ironstone levels of Loanhead to Dryden implies and would [650] practically give to Dryden minerals the full benefit the coal levels could confer. At present, and apparently for years to come, the ironstone of Loanhead is to be of chief importance, and the source of far greater benefit to the parties interested than the coal, though much coal will, I trust, be worked during the lease. It is expedient, in my view, to encourage the tenant's operations in ironstone in every practicable way, and Mr. Ormiston's suggestion for working that portion of it west of 'Burghlee Dyke' (probably 30 acres), in conjunction with Dryden, should, I think, be adopted, because that is not likely to diminish Shotts Company's workings in Loanhead, and they offer to pay way-leave on all Dryden minerals worked by the joint pit, which may amount to a considerable sum yearly. Moreover, to decline the proposal is likely to leave those acres of ironstone west of the dyke long unproductive to the proprietor of Loanhead; and it is practicable at the termination of the lease, if then desired, to build off the communicating mines through Burghlee Dyke, which I have no doubt the tenants would undertake to do from time to time—probably first after they had worked the ironstone all to the rise of the day-level, next when a deeper drainage by steam power enabled the ironstone to be all worked up to the day-level (say from 60 fathoms below it), and again after another (third) section of the ironstone west of the dyke is worked off at 100 fathoms below the day-level, and so on with deeper sections they might attain. It is, however, for consideration whether the farm tenant can validly object to minerals of an adjoining estate being brought to and calcined upon his farm lands. If he can, then the privilege of communicating the levels and working Dryden minerals by a joint pit on Loanhead could only be given to Shotts Iron Company on condition that they engaged to settle with the farmer, and keep the proprietor of Loanhead free of damage; and assuming this accomplished, it seems to me for the advantage of Sir James Clerk, and the heirs of entail succeeding him, to grant what Shotts Company propose, as, under an obligation, to build up the mines of communication in the way suggested, to the satisfaction of Sir James' engineer, no positive evil or disadvantage is likely to accrue to the estate. No doubt Dryden would be benefited by the communication of mines, but it would be paid for by the way-leave, and the advantage to Dryden would terminate when the mines were built up; and it should be seen that the proprietor of Dryden has agreed to the proposed communication of mines, and that no claim can come against Loanhead in respect of said communication."

In these circumstances, Sir James Clerk having died, his successor, Sir George Douglas Clerk, raised this action against the substitute heirs of entail, to have it judicially declared that notwithstanding the prohibition contained in the deed of entail he was entitled to communicate the level of the Lasswade coal workings to the neighbouring colliery of Dryden, and to authorise his tenants to make such communication.

The pursuer pleaded;—(1) The prohibition to communicate the level of the coal of Lasswade is no longer binding upon the heirs of entail, the same being subsidiary

to the prohibition against setting tacks of coal, which prohibition is now no longer operative. (2) The said prohibition against communicating the level of the coal is null and void, as imposing an undue restraint upon property, without any corresponding interest to protect. (3) The heirs of entail having no interest in enforcing the prohibition, they have no title to do so, and decree ought to be pronounced in terms of the conclusion of the summons.

Defences were lodged for Colonel Henry Clerk, one of the substitute heirs called to the succession after the pursuer. He pleaded;—(1) The whole defenders should be assoilzied from the whole conclusions of the [651] summons, in respect that the proposed communication of level of the coal of Loanhead to the colliery of Dryden is expressly and effectually prohibited by the entail libelled, and that said prohibition has not been relaxed by any subsequent legislation, or other competent authority. (2) The proposed operation being not only not advantageous, but, on the contrary, prejudicial to the interests of the whole heirs of entail other than the pursuer, Sir George Douglas Clerk, the defenders should be assoilzied from the whole conclusions of the summons.

In obedience to a remit by the Lord Ordinary, before answer, Mr. John Mackenzie, mining engineer, Glasgow, reported, *inter alia*, that the various seams of minerals crossed the boundary line between the two properties in unbroken planes, dipping in the direction of the Lasswade field about 55 degrees off the horizontal line. "On the south-west boundary of Lasswade there are about 30 acres of minerals too distant to be worked to advantage through Loanhead pit, and should be worked by a new pit in the locality of that boundary; but the present tenants will not likely be at the expense of a new fitting there, unless they had the privilege of working Dryden minerals by the same pit. The proprietor of Lasswade would thus get these 30 acres of minerals worked immediately, were the power of communicating with Dryden granted. Besides getting these minerals—coal and ironstone—worked, the proprietor would get the benefit of a considerable amount of way-leave tonnage on the Dryden minerals worked through these fittings. The prohibition appears to apply only to coal levels and workings, and not to ironstone or other minerals. If it applied to all minerals as well as coal it would be so far a safeguard for the Lasswade workings against water from workings in neighbouring properties, but if the communication be permissible in a seam of ironstone or other workable mineral, such as oil shales, or limestones, or fireclays, then the prohibition is quite useless, and of no benefit at all, as the workings in the two properties can be as effectually connected, so far as drainage is concerned, in the ironstone or other mineral seam as in the coal. The communications of the coal-workings and coal-levels in the estate of Lasswade with the Dryden estate cannot be prejudicial to the succeeding heirs of entail, because it would facilitate the working of Dryden materials as well as those of Lasswade, thereby avoiding the necessity of taking the whole supply out of Lasswade and exhausting the minerals there more rapidly than they would be if both properties were worked together."

Thereafter the Lord Ordinary reported the case to the Inner-House, with the subjoined note.*

---

* NOTE.—(After a narrative embodying the facts above set forth)—"The Lord Ordinary has thought it right to report the case to the Court instead of deciding it, not only on account of the novelty and importance of the question, but because the action has been raised in consequence of the views expressed by the Court on the report of the Lord Ordinary (interlocutor dated 25th June 1870, *ante*, vol. viii. 904), in an application presented under the Pupils Protection Act by the *curator bonis* of the last proprietor for authority to modify the lease of the Shotts Iron Company, by removing the prohibition therein contained against communicating the levels of the coal of Lasswade to the Dryden colliery.

"The first question is, what is the meaning and object of the limitation in the deed of entail? The Lord Ordinary considers that it was not inserted for the purpose of limiting the operations of the heir in possession in winning the coal of the Lasswade coal-field. It appears to him that, in order to prevent the communication of the level in the coal in Lasswade to any neighbouring colliery, a barrier of coal would require to be left at the march of the estate, and that the object of the limitation was to exclude the water of neighbouring collieries from the Lasswade coal-field, and to secure

[652] Argued for the pursuer;—The communication of the level of the coal workings is an act of ordinary administration necessary for the enjoyment [653] of the

---

to the heirs of entail in personally working [652] the Lasswade coal the sole benefit of day-level drainage by means of the Mavisbank level, which has long existed in the Lasswade coal-field to a depth of forty fathoms or thereby from the surface at the engine pit. But this limitation, which was, it is thought, intended for the benefit of the heirs of entail, is now found to be injurious. If effectual, it will prevent the beneficial working of the coal and other minerals in the thirty acres of ground situated to the west of the Burghlee Dyke, and it will also deprive the heir in possession of the benefit of a considerable amount of revenue, which he would derive from a wayleave on all the Dryden coal and other minerals carried through the intended workings in these thirty acres, and brought to the surface by means of a pit which would be sunk therein, if it is lawful to open a communication between the coal-workings in the two estates. The limitation, then, is truly an interference with the beneficial administration and management of the estate by the heir in possession. Further, it does not confer any corresponding advantage upon succeeding heirs. The only advantage from the limitation is that which arises from excluding by a barrier the water of the Dryden coal-field from the Lasswade coal-field, which, as the dip of the strata is to the south-east, would flow into the Lasswade workings when these happened to be deeper than the workings in Dryden. But this advantage would not be obtained, because, as there is no prohibition in the entail against communicating the levels of the ironstone, oil shales, limestone, and fire-clays, in the lands of Lasswade to neighbouring collieries, the limitation in the deed of entail is, according to Mr. Mackenzie's report, 'quite useless, and of no benefit at all, as the workings in the two properties can be as effectually connected, so far as drainage is concerned, in the ironstone or other mineral seam as in the coal.'

"The question then arises, whether the limitation is so fenced by virtue of the provisions of the Act of 1685, c. 22, as to prevent the heir in possession working out the coal to the march of the Lasswade estate, and for a valuable consideration communicating the levels of the Lasswade coal to the Dryden colliery. It is no doubt made lawful to proprietors by the Act 'to tailzie their lands and estates, and to substitute aires in their tailzies with such provisions and conditions as they shall think fit, and to affect the said tailzies' with prohibitory, irritant, and resolutive clauses against alienation, the contraction of debt, and the alteration of the order of succession. But does the Act make every condition and provision which may be invented by an entailer binding upon the heirs of entail, and in particular a provision like the present, which imposes an undue restraint upon the heir in possession, and is hurtful to his beneficial enjoyment of the estate, and which is not calculated to carry out the express prohibition mentioned in the Act, or to secure the succession of the substitute heirs in terms of the tailzie?

"Further, it is to be observed that the limitation is an integral part of the clause prohibiting tacks of the coal. But by the statute 6 & 7 William IV. cap. 42, sec. 1, it is enacted, that 'notwithstanding any prohibitory, irritant, and resolutive clauses contained in any entail' pursuant to the Act 1685, cap. 22, it shall be lawful for the heir in possession 'to grant tacks of any mines and minerals contained in such lands and estates for any period not exceeding thirty-one years.' Is the pursuer, by virtue of this statute, entitled to grant a lease of the whole Lasswade coal to the Dryden march? because, if he is, the tenant may work it all out, and so defeat the limitation *in* regard to the communication of the coal levels.

"After anxious consideration the Lord Ordinary has come to the conclusion that the limitation in question does not prevent the pursuer, Sir George Douglas Clerk, from communicating, for onerous causes, the levels of the coal of Lasswade to the Dryden colliery, and from permitting, for onerous causes, the Shotts Iron Company to make such a communication. It will be observed that the pursuer does not, in the conclusions of his summons, limit the right he seeks to have declared to the grant*ing of* onerous deeds.

[653] "The benefit to the heir in possession by the coal-workings in Lasswade and Dryden being made to communicate would be the increased income arising from the immediate working of the thirty acres of coal and ironstone to the west of the Burghlee Dyke, by means of a pit in these thirty acres, and from a considerable amount

mineral estate, and, although prohibited by the entail, is justifiable according to the principle laid down in the case of leases, which, although a species of alienation, are sanctioned from necessity.* Moreover, the prohibition against communicating the level was merely ancillary to the prohibition against letting the coal, which had been rendered nugatory by the Act 6 & 7 Will. IV. cap. 42. Except in so far as fettered by the entail, the heir in possession was fiar of the estate, and at common law was entitled, if he chose, to remove the barrier between his and the adjoining coal-field.† The entail contained no prohibition against communicating the level of the ironstone workings and of the minerals other than coal. The defenders have no interest to oppose the conclusions of the action, for if the coal be not available to the pursuer neither can it become available to his successors.

Argued for the defender;—Although restrictions on the use of property are not to be extended by implication, yet where limitations exist they are to be construed according to the usual and legal import of the words.‡ Power to communicate the level could not be granted by the Court (1), because it was contrary to an express prohibition in the entail; and (2), because the pursuers' object was to work out the minerals with undue rapidity, to the prejudice of succeeding heirs. Neither a life-renter at common law nor an heir of entail is entitled to work minerals to the exhaustion of the estate,§ which would be equivalent to alienation. The prohibition was purposely designed to guard against this, and to protect the estate.

At advising,—

LORD PRESIDENT.—The summons in this action concludes to have it found and declared that the pursuers have full right and power to communicate the level of the coal of Lasswade to the neighbouring colliery of Dryden, notwithstanding any prohibition contained in the deed of entail under which the pursuer, Sir George Clerk, holds the estate; and further, that the pursuers have full power and authority to permit their tenants of the minerals in the lands of Lasswade to communicate the coal workings and levels to the neighbouring estate of Dryden, to enable them thereby "to make use of the said coal workings and levels for carrying off the water from the mineral field, so as to facilitate and admit of raising minerals from the said estate of Dryden." Now, it may be a [654] question whether the pursuers are entitled to decree in these terms, or only in some more limited form; but the first point to be determined is, whether they are entitled to prevail at all. The deed of entail contains this limitation—"that it shall not be lawful to, nor in the power of, my said heirs of tailzie, or any of them, to sett tacks (for any period whatever) of the whole or any part of the coal lying under and beneath the whole lands and barony of Lasswade, for any term whatever, nor to communicate the level of the said coal of Lasswade to any neighbouring colliery." One part of this restriction is no longer binding, because the statute 6 & 7 Gul. IV. cap. 42, renders it lawful for an heir of entail in possession to grant tacks of mines and minerals in the estate for any period not exceeding thirty-one years.

The Lord Ordinary seems to be of opinion that, as a necessary consequence of the restriction against granting leases being removed by this statute, it follows that the prohibition of the entail in regard to communicating the coal-levels has become

---

of way-leave on the Dryden coal and minerals brought to the surface by means of that pit. The defender avers that this would be prejudicial to the interests of succeeding heirs of entail, by leading to the unduly rapid exhaustion of the minerals. That is the only prejudice averred in defence. Such an objection is not, it is thought, a sufficient answer to the pursuer's claim, in so far as regards onerous deeds, because the object of the limitation was not to prevent or retard the operations of the heirs of entail in winning the coal, but, on the contrary, to facilitate these operations, and, through the benefit arising from the day-level drainage afforded by the Mavisbank level, to enable them, when selling their coal in the market, to compete on favourable terms with other proprietors."

* Sandford, p. 300–2.

† Wemyss *v.* Hope, Feb. 7, 1809, F. C.; Crawford *v.* Dickson, 1824, 2 S. 667 (N. E. 560, affd. 2 W. and S. 354); Kames' Elucidations, Art. 42; Egerton *v.* Brownlow, 1853, 4 Clark, H. L. Cases, p. 41, per Lord St. Leonards.

‡ Gordon *v.* Gordon, Jan. 24, 1811, F. C.

§ Muirhead *v.* Young, 1858, 20 D. 592.

abortive, being merely auxiliary to the other. I confess I am not able to concur in that view of the matter as affording a sufficient ground for judgment, for I do not think that the two restrictions are necessarily dependent upon each other. The power conferred by the statute of letting the coal might still be qualified by the prohibition to communicate the level, and the decision of the case must, I think, turn upon some other consideration; but we have, at all events, advanced so far towards a conclusion, that we are dealing with the case of an heir of entail entitled to lease the minerals on the estate, and that being so, the question arises, whether, if there had been no limitation in the entail, the heir could have authorised his lessee to communicate the coal-levels to the adjoining field? Now, that I think depends upon circumstances. The effect might be to ruin the estate. Of course, no fee-simple proprietor who was in his senses would allow that, and I think that, without any special prohibition in an entail, the heir in possession, or his tenant, could be restrained from doing that which would manifestly prove detrimental to the estate. But then the case may be quite otherwise, and, as far as we can see, the exercise of the power which, in the present instance, the heir in possession seeks to vindicate, would not be an imprudent or extraordinary proceeding; but, on the contrary, we have the decided opinions of men of skill to the effect that the communication of the coal-levels, so far from proving disastrous to the estate, is highly expedient, and is justified by strong reasons. I am of opinion, therefore, that if the deed of entail contained nothing to the contrary, the heir in possession could not be restrained from authorising a communication of the level, and I think that this view is corroborated by the decision in the first branch of the Bredisholm case (Muirhead *v.* Young, June 13, 1855, 17 D. 875). But then the deed of entail does contain an express prohibition against doing this very thing, and it is said that that prohibition was introduced for the purpose of leaving a barrier which would protect the Lasswade colliery against an influx of water from the workings on the adjoining estate. Now, it is true that the prohibition applies only to the coal-levels, so that the heir in possession, if not otherwise restrained, may communicate the levels of the ironstone, fireclay, shale, and other minerals, and the prohibition as to the coal would thus be rendered ineffectual for the very purpose for which it is said to have been intended. I do not think, however, that is quite conclusive of the question, because the prohibition, although insufficient to attain the object of the entailer, might still be binding upon the heirs as a condition of their right; but, on the whole, I am of opinion, although not without some difficulty, that it is not binding. It is in no way auxiliary to any of the cardinal prohibitions of the entail. If it had been of that nature, I should have said that it must be enforced. But the statute of 1685, as interpreted by a long series of decisions, places the heir in possession in the position of a fiar, except in so far as his right is limited by the fetters of the entail; and as the exercise of the power here claimed does not involve an alienation of the estate, I am of opinion that the pursuer is entitled to a judgment in his favour, although not exactly in terms of the conclusions of the summons, but that he should be found and declared to be at liberty to communicate the level only in so far as necessary to the beneficial working of the coal, and not prejudicial to the Lasswade mines. I observe [655] that the Lord Ordinary expresses an opinion that the pursuer would be entitled to decree, with this restriction, that the power should be exercised only for onerous causes. These words, however, do not exactly express my meaning, and, should your Lordships concur with me, I think our interlocutor should be in the form which I have indicated, or in similar terms.

Lord Deas.—I agree with your Lordship that if the communication of the level were to entail very serious or detrimental consequences upon this entailed estate it ought not to be allowed to take place.

I have no difficulty with reference to the prohibition of letting the coal, because I think that restriction is entirely removed by the statute referred to by your Lordship. At the same time, I do not think that settles the question as to communicating the level.

Now, there is no doubt that a communication of the level is attended with certain risks, because the result must be that the whole of the water from the higher property must come down upon this estate, and if proper precautions are not taken this may drown the whole mineral field. But all the men of skill whose evidence we have before us are of opinion that such precautions are not matter of difficulty, and, moreover, that the excavations may be effectually built up at any time.

I should have been doubtful of that if they had not said it expressly, but they have done so, and on that footing I concur in allowing the proposed communication to be made. Had the skilled opinions been otherwise—for instance, if it were to be necessary that all this water should be permanently removed by pumping—I would have considered that this would be a very unreasonable burden to lay upon subsequent heirs of entail.

It does not assist to relieve me from my difficulty that there is no such prohibition with regard to iron and other minerals, but only with regard to coal. I would not allow one heir of entail to incur the risk of flooding the mineral field, merely that he might be able to excavate more during his lifetime. But, assuming that these levels can be built up, I concur in permitting what is here proposed.

I see that Mr. Geddes, who is a cautious and trustworthy witness, says in his letter to Sir James Clerk's curator, "it is practicable at the termination of the lease, if then desired, to build off the communicating mines through Burghlee Dyke, which I have no doubt the tenants would undertake to do from time to time."

Now, I am humbly of opinion that this should be made a condition of the decree of declarator, and while I concur with your Lordship that decree should not go out in terms of the first conclusion of the summons, but under the second conclusion only, I think that this should be subject to any further conditions which may occur to your Lordship as necessary for safety in framing the interlocutor.

LORD ARDMILLAN concurred.

LORD KINLOCH.—By the entail under which the pursuer, Sir George D. Clerk, holds the lands of Lasswade it is declared "that it shall not be lawful to, nor in the power of, my said heirs of tailzie, or any of them, to set tacks for any period whatever of the whole or any part of the coal lying under and beneath the whole lands and barony of Lasswade for any term whatever, nor to communicate the level of the said coal of Lasswade to any neighbouring colliery." The prohibition to let leases of coal is removed by the statute 6 & 7 Will. IV. c. 42, which gives power to let leases of minerals for thirty-one years, notwithstanding the prohibitions of any entail. The question now raised is, how the remaining prohibition "to communicate the level of the said coal of Lasswade to any neighbouring colliery" is to be dealt with.

I am of opinion that this prohibition is ineffectual, in respect that it is not a prohibition which can competently be fenced by irritant and resolutive clauses. It is not every clause which may be put into an entail which can be so fenced. Some are sanctioned by long usage, and their close connection with the object of perpetuating families, such as the obligation to bear a particular name and arms. [656] But, generally speaking, it may be said that it is not within the competency of an entailer to dictate the whole future administration of his estate, and enforce his dictates by irritant and resolutive clauses. Entails are not intended to regulate administration, but to prevent alienation; and it is well known that it is mainly as forming acts of alienation that extraordinary acts of administration, such as granting long leases, have been disallowed. This clause about the non-communication of levels I consider simply as a direction in regard to administration. I do not see that it can be considered, in any rational view, a matter touching on alienation. There is no alienation implied in communicating a level. It may be a good thing or a bad thing in itself in regard to the wellbeing of the entailed estate. Properly speaking, it is good or bad according to circumstances. In the present case there is the strongest evidence from men of skill that the communication of the level will be to the great benefit of the entailed estate. But however this may be, it is simply a matter of administration, and not capable of being enforced by irritant and resolutive clauses. If the entailer had declared that his entailed estate should never (any part of it) be put under crop, or that some particular kind of crop should never be grown on it, I suppose no one would contend that the prohibition could be enforced by irritant and resolutive clauses. If he had declared that there should never be any communication on the surface between the entailed property and the next adjoining estate,—that there should never be a road from the one into the other, but always a wall of 20 feet high kept up between the properties,—I think he would have engrossed an ineffectual prohibition. And so equally in the present case.

It was suggested that, even without any express prohibition, an heir of entail was bound to avoid communicating a level, as an act equivalent to throwing away the protection of the property against over-drainage, like knocking down an embank-

ment on the bank of a turbulent stream. To test this argument all reference to the subject must be supposed left out of the entail; and how, then, would matters stand? I cannot for a moment suppose it competent to a succeeding heir of entail, on mere general grounds, and without any express prohibition, to have the heir in possession interdicted in all circumstances (for such is the demand) from communicating a level. The reason is that there is nothing in the nature of the case making the act always one of injury to the entailed estate. It does not necessarily follow that the lower workings will be drowned. The reports of the scientific men prove that arrangements may be made so as not merely to avoid all injury, but to produce large benefit to the entailed estate. Two adjoining heirs of entail may so contrive as to benefit both estates equally. It is, no doubt, conceivable that the act may be threatened to be performed in such a way as to create injury; so may every possibly beneficial act. In such a case there may be special means of prevention applicable to the special circumstances. But what the defender here asks us to do is to pronounce that, in no circumstances whatever, can there be a communication of level. I cannot so find. With regard to the special circumstances the reports are all in favour of the measure. I am of opinion that, both on the general point and with reference to the special circumstances, the pursuer is entitled to decree of declarator.

I would only add that I do not proceed on the terms of the statute 6 & 7 Will. IV. c. 42. That statute permits leases of minerals. But the communication of levels is not a necessary incident of a lease. There may be a lease, and a beneficial lease, without such communications. I cannot infer from a permission to lease a permission to communicate levels. To do so is to beg the question. But the more general ground on which I have proceeded is sufficient for the determination of the present case.

The following interlocutor was pronounced :—" Find, decern, and declare that the pursuer, Sir George D. Clerk, Bart., as heir of entail in possession of the entailed lands of Lasswade, has, notwithstanding any prohibition contained in the deed of entail under which he holds the said estate, power to communicate the level of the coal of Lasswade to the neighbouring colliery of Dryden, belonging to Colonel Robert Archibald Trotter of Dryden, [657] in so far as such communication may be necessary or beneficial to the working out of the minerals in the lands of Lasswade, and not permanently detrimental to the Lasswade mines, but under the condition that as soon as the purpose for which such communication of level is made shall have been served, the pursuer and the other heirs of entail and their lessees shall be bound effectually to build up and close such communication so as thereafter to prevent the water generated in the Dryden mines from flowing down in the Lasswade mines."

STUART NEILSON, W.S.—JOHN W. TAWSE, W.S.—Agents.

No. 114. X. MACPHERSON, 657. 20 Mar. 1872. 1st Div.—Lord Gifford, M.

THE CALEDONIAN RAILWAY COMPANY, Pursuers.—*Watson—R. Johnstone.*
THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, Defenders.—*Sol.-Gen. Clark—Balfour—Asher.*

Joint Stock Company—Railway—Statute—Obligation.—In 1849 the C. Railway Company leased the B. Railway for 999 years at a fixed rent. In 1851 an Act of Parliament was obtained, providing that in consideration of an abatement of this rent the C. Company should issue to the shareholders of the B. Railway Company £82,500 of their ordinary stock, which was then very much below par. In 1869 the C. Company and the G. and S.-W. Railway Company obtained an Act of Parliament, by which the latter was admitted to an equal interest in the lease of the B. line on condition of paying half the rent, and repaying to the C. Company " a sum equal to one-half of all sums expended by the C. Company on capital account prior to the vesting period in connection with the B. Railway." *Held* (*diss.* Lord Kinloch) that the £82,500 of stock allotted to the B. Company was to be regarded as a sum expended by the C. Company on capital account, and that the G. and S.-W.

Railway Company was bound to repay to the C. Company one-half of the nominal value thereof, and not the value at which the stock stood in the market at the date of allotment.

This action, raised by the Caledonian Railway Company against the Glasgow and South-Western Railway Company, concluded, *inter alia*, for declarator, "that the sum of £82,500 of the stock or ordinary share capital of the pursuers set apart and appropriated by them for the Glasgow, Barrhead, and Neilston Direct Railway Company, under and in terms of 'The Caledonian Railway Arrangements Act, 1851,' was and is a sum expended by the pursuers on capital account prior to the 1st day of August 1869, in connection with the Glasgow, Barrhead, and Neilston Direct Railway, within the meaning of the 4th section of 'The Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint Line) Act, 1869'; and that the defenders, under and in terms of the said last-mentioned Act, are bound to repay to the pursuers, *inter alia*, a sum equal to one equal moiety of said sum of £82,500."

The following narrative is taken from the opinion of the Lord President:—"The decision of this case involves the consideration of several Acts of Parliament, and of the history of a line of railway which now connects Glasgow and Kilmarnock by a new and more direct route than that which originally connected these two places. Both the Caledonian Company and the Glasgow and South-Western Company had been directing their attention to the desirableness of a direct route between Glasgow and Kilmarnock for some time. The Caledonian Company had acquired [658] certain short lines of railway, which in combination almost completed such a direct route. The South-Western Company, on the other hand, were about to apply to Parliament for powers to make a line under the name of the Glasgow and Kilmarnock District Railway. In these circumstances the directors of the two companies came to be of opinion, that they had much better make this a joint concern, and avoid an unnecessary and somewhat disastrous competition for the traffic between Glasgow and Kilmarnock; and the result was an arrangement which was embodied in the statute passed in the year 1869. The general scheme of that arrangement is quite intelligible. The Glasgow and South-Western, on the one hand, were to abandon their proposal to obtain parliamentary powers to form a complete new direct line, and the Caledonian, on the other hand, were to give the South-Western an equal share with themselves in the line which they were in the course of completing. Now, in order to make the Caledonian connection between Glasgow and Kilmarnock complete there were five different portions of railway property that required to be thrown into the joint concern. There was, first of all, what is called the Barrhead Railway, which the Caledonian Company held under a lease for 999 years from the company which made the line; then there was the Barrhead Extension line, which was the property of the Caledonian Company itself. There was, in the third place, what is called the Crofthead line, which was to be acquired from the Crofthead Company, and the means of acquiring that line was very much in the hands of the Caledonian Company, who had a very large interest in it as shareholders. In the fourth place, there was a portion of the Caledonian Company's south-side station at Glasgow which was necessary to be appropriated for the Kilmarnock direct line; and in the fifth place, there was a small portion of that Kilmarnock direct line which the South-Western Company were about to apply for powers to make. All these five portions of railway property were necessary to make up the joint concern which was to be worked in common by the two railway companies now before us; and the plan on which this sort of partnership was projected was, that the two companies should have an equal interest for the future in this line between Glasgow and Kilmarnock, and that there should be, as regarded the past, an equal division of all expenditure and of all liabilities.

"Such was the general scheme, and the clauses of the Act of 1869, I think, show very plainly that this was the scope and intention of the whole proposal. In the 4th section of that statute the Caledonian Company's interest in the Barrhead Railway is vested in the two companies in consideration of the South-Western Company repaying to the Caledonian Company a sum equal to one-half of all the sums expended by the Caledonian Company on capital account in connection with that line; and the fifth section provides in regard to the Barrhead line that the South-Western Company are to relieve the Caledonian Company of one-half of the rent which they were to pay during the 999 years' lease to the Barrhead Company. Then, as regards the

Barrhead Extension, in like manner the 7th section provides that the South-Western Company shall pay to the Caledonian a sum equal to one moiety of the cost incurred by that company in respect of the Barrhead Extension Railway. Then the Crofthead line was in like manner, by the 8th section, vested in the two companies upon consideration of the South-Western paying to the Caledonian Company one-half of the amount of deposit and call previously paid up by the Caledonian Company on the shares held by them in the Crofthead Company, with interest, and so forth, [659] the interest of the Caledonian Company in the Crofthead line being that merely of large shareholders. And in the 11th section the portion of the south-side station of the Caledonian Company in Glasgow is in like manner to belong to the two companies, in consideration of the South-Western Company paying the Caledonian Company one-half of the expense of constructing that portion of the station. And so, as regards all these different lines or pieces of property which previously belonged to the Caledonian Company, there is an undertaking on the part of the South-Western to pay one-half of the cost. On the other hand, by the 21st section of the same statute the Caledonian Company are to pay to the South-Western one-half of the costs incurred by the South-Western Company in prosecuting their project for the making of the Kilmarnock direct line, and all the cost that they have incurred, particularly about that portion of the Kilmarnock direct line which was to be used as part of the line of the two companies jointly.

"All this goes to show that the principle upon which this agreement was completed was an equal division of the whole cost of the different pieces of property, which were necessary to be brought together for the purpose of making up the direct line between Glasgow and Kilmarnock. One of the undertakings of the South-Western Company under this Act, as I have already mentioned, was an undertaking to pay one-half of the rent which the Caledonian Company were bound to pay to the Barrhead Company under their lease for 999 years, and the amount of that annuity or rent had been originally fixed in the lease and in the Act confirming the lease at £16,500. It had afterwards been restricted to £11,437 in a way which must be more particularly attended to, the difference of £5062, 10s. having been redeemed by the Caledonian Company.

"The question which is before us is whether the cost of that redemption is chargeable under the 4th section of the Act 1869, to the extent of one-half, against the South-Western Company. The original lease, which was authorised by an Act passed in 1849—the lease by the Barrhead Company to the Caledonian—was arranged upon this footing: The Caledonian were to pay 6 per cent. of a dividend to the Barrhead shareholders upon £150,000 of original shares. These were the original shares in the Barrhead line, and over and above that 6 per cent. dividend they were to pay half profits when the dividend of the Caledonian Company exceeded 6 per cent. There was another set of shares in the Barrhead line, not original but additional shares, amounting also in all to £150,000, and upon these the Caledonian Company were taken bound to pay a dividend at the rate of 5 per cent. Now, the result of these two dividends, 6 per cent. on £150,000 of stock and 5 per cent. on another £150,000 of stock, but excluding the prospective profits above the 6 per cent. dividend, amounted just to £16,500, which accordingly was fixed in the Act of 1849 as the annuity or rent to be payable by the Caledonian Company during the subsistence of the lease. And this annuity or rent of £16,500 was accordingly paid or payable from 1849 to 1851, the date of what is called the Caledonian Arrangements Act.

"The circumstances that led to the passing of the statute of 1851 are sufficiently notorious. The Caledonian Company had got into great embarrassments, very much in consequence of the large amount of guaranteed and preference shares which they were obliged to find the means of paying dividends for out of a meagre exchequer. The consequence was that without the assistance of Parliament, and the consent of some of these preferential shareholders and creditors, they were quite unable to go on with the management of their affairs; [660] and the Act of 1851 was passed to relieve them of this embarrassment. There was an arrangement made at that time, and given effect to in the Act of 1851, between the Caledonian Company and the Barrhead Company in regard to the rent or annuity of £16,500 to which I have already referred. That arrangement is provided for in two clauses of the Act of 1851 to which it is necessary particularly to advert. The 26th section provides that, in lieu of the fixed dividends and contingent increase thereof by 'the Caledonian Railway (Glasgow, Barrhead, and Neilston Direct Railway Lease) Act, 1849,' made

payable to the Glasgow, Barrhead, and Neilston Direct Railway Company for behoof of the proprietors of shares in that company, the company (pursuers) 'shall pay to the Glasgow, Barrhead, and Neilston Direct Railway Company, for behoof of the said proprietors, for a period of three years, reckoned from the 1st day of August 1851, a fixed annuity of £10,425; and from and after the expiration of that period, and in perpetuity thereafter, "a fixed annuity of £11,250."' That was afterwards raised to £11,437, 10s. by an Act passed in 1853, and for the purposes of the present case it comes to the same thing, save that that larger sum had been inserted in this clause. The effect then of this 26th clause was to reduce the annuity of £16,500 to £11,437, 10s. The 59th clause provides that 'for providing the amount of stock to be set apart and apportioned as after-mentioned in respect of the abatement from the aforesaid guaranteed and preferential dividends respectively, there shall be and is hereby added to the existing ordinary share capital of the company (pursuers) additional stock to the extent of £667,054, and such new stock shall, together with the sums of £2,100,000 and £637,500 hereinbefore mentioned, constitute and be the ordinary share capital (including therein the consolidated stock) of the company, except in so far as any part of such share capital shall be extinguished in manner hereinafter mentioned; and the holders of such new stock shall be entitled to the like privileges as the holders of existing consolidated stock, and to no other.'

"The new stock so to be created is disposed of by the immediately following section, the 60th, and among other persons who are to receive issues of the new stock are the shareholders of the Barrhead Railway Company:—'Out of the said new stock, the directors of the company shall, immediately after the passing of this Act, set apart and appropriate the sum of £135,000 for the said Clydesdale Railway Guaranteed Company, the sum of £100,000 for the said Greenock Railway Guaranteed Company, the sum of £126,000 for the said Wishaw Railway Guaranteed Company, the sum of £82,500 for the said Glasgow, Barrhead, and Neilston Direct Railway Company.' And then there is another apportionment of stock to certain £10 guaranteed shareholders; and this section provides, 'and the amounts of stock so set apart for the several companies hereinbefore mentioned shall be forthwith assigned to or registered in the names of such persons as shall, at the time of the passing of this Act, be entitled as ordinary shareholders to participate in the benefit of the fixed annuities hereby made payable to the said companies respectively, rateably and in the proportion of their respective interests therein; and the amount of stock so set apart for the holders of the said £10 guaranteed or preference shares shall be forthwith assigned to and registered in the names of such holders respectively, rateably and in proportion to the number of such shares held by them respectively at the date of the passing of this Act; and such several companies and persons shall be held and deemed to have paid up the full nominal amount of such stock so apportioned to them.'

[661] "Now, taking these sections in connection with the previous section 26, which I read, the result is this,—that the price paid by the Caledonian Railway Company for the redemption of £5062, 10s. of the annuity payable to the Barrhead shareholders is £82,500 worth of stock of the Caledonian Company. That stock becomes the property of the Barrhead shareholders, to whom the annuity redeemed had been previously payable, and they became, to the extent of £82,500, and each in proportion to the amount to which he was entitled of the annuity redeemed, shareholders of the Caledonian Company, to the same effect as if each of them had paid up the whole nominal amount of such stock so apportioned. In short, they are just placed in the same position as if they had been original shareholders of the Caledonian Company for the amount of stock so assigned to them. Now, such being the nature of the arrangement made between the Caledonian Company and these Barrhead shareholders, the question occurs whether this portion of the cost of the Barrhead lease to the Caledonian Company is chargeable against the South-Western Company under the 4th section of the Act of 1869; or, in other words, whether the cost of redeeming a portion of the rent of the Barrhead lease is to be chargeable to the extent of one equal moiety against the South-Western Company. And this brings us back again to the construction of the 4th section of the Act of 1869, which requires a more minute examination for this purpose. It provides that 'The South-Western Company shall repay to the Caledonian Company a sum equal to one equal moiety of all sums expended by the Caledonian Company on capital account prior to the vesting period in connection with the Barrhead Railway, after deducting therefrom all sums, if

any, received by the Caledonian Company in respect of the sale of lands acquired for the purposes of the Barrhead Railway, and on such repayment being made all the estate, property, rights, privileges, powers, and authorities which are possessed, held, or enjoyed, or are exerciseable by the Caledonian Company, of, or in respect of, or in connection with the Barrhead Railway, and the stations, sidings, works, and conveniences of whatever description, and generally all other subjects of every description falling under the said lease of the Barrhead Railway, or the Acts relating thereto (excepting the lands, if any, sold as aforesaid, or paid for by the South-Western Company to the Caledonian Company, under the provisions of this section), are, together with the said lease itself as from the vesting period, vested in the two companies jointly, for their joint and separate use and benefit, on equal terms in every respect, but under burden of the said rent or annuity of £11,437, 10s., and subject to the provisions hereinafter contained, and shall and may be possessed, held, used, exercised, and enjoyed by them and each of them, for and during the residue of the term of 999 years for which the Barrhead Railway is leased to the Caledonian Company, as fully and freely in every respect as if the name of the South-Western Company had been originally inserted in the before-mentioned lease, and the Barrhead Lease Act, 1849, as joint lessee with the Caledonian Company.'

"The 5th section provides for the division of the rent between the two companies in conformity with the declaration in the 4th section that the Barrhead Railway is to vest in the two companies. Now, it must be kept in view that in addition to the issue of stock under the Act of 1851, for the purpose of redeeming a portion of the annuity payable by the Caledonian to the Barrhead, the Barrhead line and its lease had cost the Caledonian Company very large sums of money directly expended; and it would appear from the capital account of the company that these [662] amount to somewhere about £360,000. So that the terms used in this 4th section must of course have been used with a special view to that large direct expenditure of money. But the question is, whether these, though so used with a special regard to that direct expenditure of money, are not also sufficient to embrace the expenditure which consisted in the issue of that £82,500 worth of stock. They are certainly more directly and literally applicable to the one kind of expenditure than to the other. The words are, 'all sums expended on capital account in connection with the Barrhead Railway.' The South-Western Company contend that these words cannot be made to embrace the £82,500 worth of stock given to the Barrhead shareholders as the price of redeeming a portion of the annuity previously payable. The Caledonian Company, on the other hand, maintain that these words do embrace that stock."

The defenders averred, *inter alia*, that in 1867 and 1868 the officials of the two railway companies had various meetings to consider how a saving of expenditure of capital by both companies could be effected. "Preliminary to these meetings a memorandum in the following terms of the total expenditure on the Barrhead Railway, initialed by the accountant of the Caledonian Company, was handed by the secretary of the Caledonian Company to the secretary of the South-Western Company:—

'Caledonian Railway, 302 Buchanan Street, Glasgow,
'15th November 1867.

'Memorandum from Accountant's Office to Secretary Barrhead Railway.

'Total expenditure to 31st July 1867	£369,388 17 0
'Deduct amount of Barrhead Company's capital shares, £275,000, and loans, £25,000	300,000 0 0
'Thus expended by Caledonian Company . . .	£69,388 17 0
'Add Crofthead extension	21,585 5 9
	£90,974 2 9

'The annual amount of annuity payable to the Barrhead Company by the Caledonian is—

'On old shares, £150,000 @ 4½ per cent.	£6,750 0 0
'On new shares, £125,000 @ 3¾ per cent. . . .	4,687 10 0
'Init. G. G.	£11,437 10 0'

"The above sum of £369,388, 17s. is the sum shown in the published accounts of the Caledonian Company as the sum expended on the Barrhead Railway at 31st July 1867, and it does not include either of the two sums of which a moiety is sued for."

They averred, further, that the subsequent negotiations proceeded on the understanding that this memorandum showed the whole expenditure of the pursuers on the Barrhead Railway; that a memorandum of arrangements and a formal deed of agreement entered into in November 1867 and December 1868 were founded on said memorandum; and that in certain amounts of expenditure under the said section 4, furnished by the pursuers to the defenders since the passing of the Act of 1869, no mention was made of the sums in respect of which the present action was raised.

The pursuers pleaded;—(2) The amount of stock set apart and [663] appropriated by the pursuers for the Glasgow, Barrhead, and Neilston Direct Railway Company, under section 60 of the Caledonian Railway Arrangements Act, 1851, constitutes a sum expended by the pursuers on capital account in connection with the Barrhead Railway within the meaning of section 4 of the Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint Line) Act, 1869, and the defenders are therefore bound, in terms of said Act, to repay to the pursuers a sum equal to one equal moiety of said amount. (3) The said sum of £4000 paid by the pursuers to the said Glasgow, Barrhead, and Neilston Direct Railway Company, under section 39 of the Caledonian Railway Arrangements Act, 1851, was also one of the sums expended by the pursuers on capital account in connection with the Barrhead Railway, and under and in terms of said section 4 of the Joint Line Act of 1869, the defenders are bound to repay to the pursuers a sum equal to one equal moiety thereof.

The defenders pleaded;—(2) The defenders are entitled to absolvitor, in respect that neither the stock of the nominal value of £82,500, alleged to have been set apart, nor the £4000 alleged to have been paid by the pursuers, were sums expended by them on capital account in connection with the Barrhead Railway within the meaning of section 4 of "The Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint Line) Act, 1869." (3) The pursuers are not entitled to have decree of declarator or payment with reference to the moiety of the said stock or sum of £82,500, as concluded for, in respect that they have already, in manner above-mentioned, derived benefit to the full value of the stock transferred to the Barrhead Company. (4) The whole negotiations and agreement of the pursuers and defenders having proceeded upon the understanding by both companies, and in reliance on the part of the defenders, induced by the representations of the pursuers, that the whole sums expended by the pursuers on capital account in connection with the Barrhead Railway. were correctly stated by the pursuers in the memorandum of 15th November 1867 aforesaid, the defenders are entitled to absolvitor. (5) Even assuming the pursuers to be entitled to have the said stock of the nominal value of £82,500 dealt with as expenditure on capital account in connection with the Barrhead Railway, the said stock cannot, in the account between the pursuers and defenders, be stated at a higher value than its selling price when delivered to the Barrhead Company, or, at all events, than the selling price at the time when the pursuers were *ex hypothesi* entitled to have a moiety stated against the defenders in account; and in the stating of any account the pursuers must deduct the amount of the dividends of which they were relieved under the said Arrangements Act of 1851. (6) In no view can the pursuers obtain decree of declarator or payment as concluded for with respect to the foresaid sum of £4000, in respect that the same formed a charge not upon capital, but upon revenue account.

The Lord Ordinary pronounced an interlocutor (5th December 1871), in which he found, decerned, and declared "in favour of the pursuers, in terms of the first declaratory conclusion of the summons, in reference to the sum of £82,500 of the stock or ordinary share capital of the pursuers, but assoilzies the defenders from the second declaratory conclusion of the summons in reference to the sum of £4000 therein mentioned: Decerns and ordains the defenders to make payment to the pursuers of the sum of £41,250 in manner provided by the 'Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint Line) Act, 1869,' with interest thereon at the rate of 5 per cent. per annum from 1st August [664] 1869 and until paid: *Quoad ultra* assoilzies the defenders from the other conclusions of the action,

excepting the conclusion for expenses, and decerns: Finds the pursuers entitled to expenses," &c.*

* "NOTE.—The question in the present case turns upon the true meaning and construction of section 4 of the 'Caledonian and Glasgow and South-Western Railways (Kilmarnock Joint Line) Act, 1869,' which provides, 'The South-Western Company shall repay to the Caledonian Company a sum equal to one equal moiety of all sums expended by the Caledonian Company on capital account prior to the vesting period in connection with the Barrhead Railway.'

"There is no dispute as to a variety of sums which admittedly fall under this clause, consisting of sums of money actually paid away by the pursuers in connection with the 'Barrhead Railway,' or of costs actually spent by the pursuers thereon. All these, it is admitted, must be divided, and one-half thereof repaid by the defenders to the pursuers.

"But besides cash actually paid, the Caledonian Railway Company have given off no less than £82,500 of their ordinary capital stock to the shareholders of the Barrhead Railway, and this as a consideration for reducing the rent payable to said shareholders for 999 years from the sum of £16,500 per annum to £11,437, 10s. per annum. The £82,500 of stock was really a redemption of a portion of the tack-duty or annuity which the Caledonian Company had become bound to pay under the Barrhead Lease Act of 1849. The stock so given off or appropriated was part of a larger quantity of stock which was created by the Arrangements Act of 1851, and this stock was created to the extent of £82,500 for the express purpose of being given off to the Barrhead shareholders, 'in respect of the abatement from the aforesaid guaranteed and preferential dividends,' that is, in respect, *inter alia*, of the diminution of the foresaid fixed tack-duty or annuity from £16,500 to £11,437, 10s.

"This £82,500 of stock was actually given off to the Barrhead shareholders, as appears from the certificates in process, and the Caledonian Company has ever since paid dividends thereon.

"Now, although in strictness this £82,500 of stock has not been spent or disbursed in cash, the Lord Ordinary thinks that it fairly falls under the expression 'expended on capital account.' It has been added to the Caledonian Company's capital. They are indebted in the amount to the Barrhead shareholders or their successors, and they must pay dividends thereon in all time coming. Though this is not cash disbursed, it is fairly 'capital expended,' and comes within the meaning and intendment of the clause.

"The construction which the Lord Ordinary has adopted is the only construction in accordance with the true meaning of the statutory contract into which the pursuers and defenders entered. The Act of Parliament is just a statutory contract, and is subject to the same equitable rules of interpretation.

"By the Act of 1869 the two companies were in time coming to be joint proprietors of this Barrhead line, and the condition of the bargain was, that as the pursuers had in substance bought it, the defenders should repay them half the price and half the considerations of every kind which the Caledonian had given for it. Now, the capital allocated to the Barrhead shareholders was really just as much part of the price or cost as money expended upon the line, and it would be very unfair if the defenders should get half of a line paid for by capital, without repaying half that capital. It will be observed that the defenders get the full benefit of the redemption of part of the tack-duty or annuity, for in all time coming they are to pay one-half, not of the original tack-duty of £16,500, but only of the reduced tack-duty of £11,437, 10s. It follows that if they get the benefit of half the redemption, they must pay half the redemption money.

"An attempt was made by the defenders to show that they had been deceived or entrapped into the bargain by the £82,500 capital stock being kept out of view in the communings which preceded the statute.

[665] "The Lord Ordinary is of opinion that he cannot look at these communings to cut down the statute, or even to control or interpret its provisions. It is quite fixed that discussions in Parliament, or its committees, and still less preliminary communings between the parties, cannot be referred to as controlling or over-riding the words of a statute. If there has been fraud or essential error the only remedy is a new application to Parliament.

"In the present case, however, there is really no room for any allegation of error.

[665] The defenders reclaimed. At advising,—

LORD PRESIDENT.—(After the narrative above quoted)—The construction contended for by the South-Western Company is liable to this objection, which, however, is not in itself conclusive, that there would be something very unequal and inequitable in the result for which they contend. The contract between the two companies, as I said before, proceeds upon the principle of a perfect equality, on the one hand, in the interest which the two companies are for the future to have in the line, and on the other in a perfect equality of the distribution of past expenditure and existing liabilities. Now, it is in vain to say that the issue of that £82,500 worth of stock to the Barrhead Company cost the Caledonian Company nothing, because it certainly involves them in a very large future liability. They are bound to treat the Barrhead shareholders, in respect of these shares so issued, as shareholders who have paid the full nominal value of their shares; and the consequence is, that these shareholders are to be entitled in all time coming to payment of an equal dividend with all the other shareholders of the Caledonian Company. What the Barrhead Company did and consented to in 1851 was simply this, in place of an annuity of £5000 or thereby, they took these shares as representing the annuity converted into capital at the rate of 6 per cent. as nearly as may be, and as regards the interest upon that capital, or the yearly produce of that capital, they consented to follow the fortunes of the Caledonian Company. That is the true nature of the transaction. But then the necessary result of that is, that the Caledonian Company are under an obligation to pay dividends upon these shares owned by the Barrhead shareholders, equal in all respects to the dividends they pay to their own shareholders of the ordinary consolidated stock. Therefore the Caledonian Company certainly come under a very serious liability in respect of that issue of shares, or in other words, it has cost them a great deal to redeem that portion of the annuity previously payable to the Barrhead Company. If that annuity had not been so redeemed the rent payable under the Barrhead lease would have continued to be £16,500, and if this bargain between the two companies now before us in 1869 had been concluded before that annuity was so redeemed, or supposing that annuity had never been redeemed at all, then the way in which the agreement between the two [666] companies must have been carried out must have been this, that under sec. 4 the South-Western Company would have had to pay, as they admit they have now, one-half of the £360,000 of money directly expended by the Caledonian Company, and one moiety of the rent. Therefore, in all equity and fairness, it appears to me that this sum of £82,500 falls within the scope and object of the 4th section of the Act of Parliament, and any difficulty which arises from the words used appears to me to be very slight. It is said that this £82,500 cannot in any proper sense be called a sum expended, and if these words were taken alone it may be admitted that they are not the best words that could be selected to describe what was done by the Caledonian Company in the issue of these shares. But when you take the other words in the section along with that—"sums expended by the Caledonian Company on capital account in connection with the Barrhead

---

The whole prior statutes were before the parties, and are narrated in the joint Act of 1869. These Acts plainly disclose the £82,500, and its appropriation; and although the sum is omitted in the jottings which seem to have passed between the parties, this has arisen from an imperfect examination of accounts which were really before both the contracting parties.

"The £4000 is in a different position; that sum is not expenditure of capital. It is not capital given off or appropriated at all. It is a payment on account of past-due dividends, and therefore a payment from revenue, and not from capital.

"An ingenious argument was submitted, founded on the fact that the Caledonian stock was greatly below par in the market when the £82,500 was given off. It is then said to have been selling at 27/30 per cent. The Lord Ordinary cannot give any weight to this circumstance; the full amount of £82,500 was given off; and though the real value at that date might be under par, as it is now greatly above par, it is the nominal value,—the amount of indebtedness, which can alone be looked to, and not the accidental value in the market. The full sum of £82,500 has been 'expended on' that is debited to capital account.

"The question as to the £4000 has not caused any extra expense, and the Lord Ordinary has not thought it right to modify expenses."

Railway"—the difficulty to my mind disappears, and disappears chiefly, I must say, because of the reference to capital account. Every one knows what is meant by capital account in dealing with railway companies. A sum expended on capital account is a sum which properly appears on the discharge and credit side of the capital account of the company, and I think everything may be called a sum expended on the capital account which is entitled to appear on that side of the account. Now, how does this stand with reference to these shares? The capital of an incorporated company consists, in the first place, of the share capital, that is to say, the full nominal amount of the whole shares into which the stock of the company is divided; and second, of money borrowed under the authority contained in Acts of Parliament. That is the debit side of the capital account. Now, in order to square the capital account it is absolutely indispensable that every one of the shares which go to make up the share capital on the debit side should be accounted for or written off on the other side; and therefore this £82,500 of new shares issued under the authority of the Act of 1851 being necessarily embraced on the debit side as part of the share capital of the company, required of necessity to be written off, or, in other words, to appear as an article of discharge or credit upon the other side of the account. And, accordingly, it does so appear in all the capital accounts of the company year by year up to the passing of the Act of 1869. In addition to the £360,000 of money expended on the Barrhead line there is also on the credit side of the capital account stock issued under the Arrangements Act for abatement of guaranteed dividend, £638,000 odds. That is the stock issued under the 59th section of the Arrangements Act, and which includes the £82,500 issued to the Barrhead shareholders, I think, therefore, that the true construction of the 4th section of this Act of 1869 is that the South-Western Company must pay to the Caledonian Company one-half of the sum so expended on capital account in connection with the Barrhead line.

But then another question is raised by the defenders, whether, in estimating the liability of the South-Western Company under this 4th section of the statute, the shares issued in 1851 to the Barrhead shareholders are to be taken at their full nominal amount, or whether they are to be valued with reference to the market price of Caledonian ordinary shares in 1851, when the arrangement was made, or alternatively in 1869, when this contract was made between the two railway companies now in Court. Now, this also is a question of very considerable importance. The contention of the defenders is, in the first place, that it would be quite unfair and improper to take the shares issued in 1851 as if they were of the value of £82,500, when in point of fact such shares—that is to say, shares of the same kind—ordinary Caledonian consolidated stock—were only bringing in the market somewhere about £27 or £28 a-share; and I must say there is a good deal of plausibility in that contention. But a very slight examination, I think, is sufficient to show that this defence is quite untenable. The Caledonian Company, in issuing these shares, incurred a certain liability, and that liability can never be discharged. It remains for all time a liability upon the Caledonian Company, and affecting all its ordinary shareholders. And that liability is this, it is to pay to these Barrhead shareholders upon the new shares issued by them the same dividend as is paid to the ordinary shareholders of the Caledonian Company, whatever that dividend may be. It may be small at one [667] time, but it may be large at another time. In 1851 it was so small that the stock was much depreciated in the market; but all experience shows that both depression and prosperity in railway stocks are apt to be temporary and liable to fluctuations. The true liability of the Caledonian line could never be measured by the price of stock at any one particular period. That is impossible. The price of the stock in the market is influenced by a great variety of considerations and accidents, and everybody knows that the share market is subject to very sudden change. If anybody had offered in 1851 to fulfil the Caledonian Company's obligation of giving these shares to the Barrhead Company, by purchasing up £82,500 worth of the ordinary share capital of the company in the market, what effect would that have had on the selling price? Probably a very important effect indeed; and that just shows how little the selling price of the stock at any one particular time can by possibility measure the liability of the Caledonian Company to the Barrhead shareholders, or the interest of the Barrhead shareholders in the Caledonian Company. It is not a thing that can be estimated as at any particular time. In point of fact, we know that at this moment these same shares are selling above par, and it would be just as reasonable

if it had so happened that in 1869, when this contract was entered into, the shares had been above par, the Caledonian Company had proposed to the South-Western Company that it should pay not the one-half of £82,500, but the one-half of the market price of these issued shares as at the date of the contract. That would have been plainly inadmissible, and so, I think, is the other proposal. In short, you can only take this sum of £82,500, if you are to take it as an item expended on capital account in connection with the Barrhead line at all—you must take it by ascertaining and measuring the indebtedness of the Caledonian Company in respect of that issue of shares, and it can be measured, I apprehend, in no other way than by the proper, or what is popularly called the nominal, value of these shares, but which is nominal only in this respect as regards the £82,500, that the money was not actually paid for the Barrhead shareholders to the extent of £100 a-share, but value to that extent was given by the Caledonian on the surrender of the annuity previously payable. The Barrhead shareholders therefore gave full value for the £100 shares that they had paid, and the Caledonian Company, on the other hand, gave the £100 shares without qualification, as being to all effect and in all time coming of the same value as the other £100 shares, all the calls upon which had been paid up by the shareholders.

I am therefore of opinion that the Lord Ordinary's interlocutor is well founded, and that the Caledonian Company are entitled to decree for one moiety of this sum of £82,500.

LORD DEAS.—In 1869 the Caledonian Railway Company held a lease for 999 years of the Barrhead Railway, and by the Act of Parliament passed in that year they became bound to communicate the benefit of that lease and of all right they had to the Barrhead Railway to the South-Western Railway Company, upon condition that the South-Western Company should pay to the Caledonian Company one-half of all sums expended on capital account in connection with the rights they had acquired to the Barrhead Railway.

Two questions arise for decision here: in the first place, whether anything is to be reckoned as due by the South-Western Company to the Caledonian Company in respect of the shares which had previously been given off by the Caledonian Railway Company to the Barrhead shareholders for redemption of a portion of the rent? and, second, if anything is to be so reckoned, how it is to be estimated? With reference to these two questions, after the full explanations given by your Lordship, I shall be able to state my opinion very shortly.

The lease of the Barrhead Railway was obtained by the Caledonian Company in 1849, the lease being for 999 years, and the rent £16,500 per annum. In 1851 it was found that the Caledonian Company had come under obligations to the Barrhead Company, and to various other railway companies, beyond what it was possible for them to meet, and the Act of 1851 was obtained to diminish these obligations, and to enable the Caledonian Railway Company to go on, [668] with a view to the benefit of the public as well as of the shareholders. The Act of 1851 sets forth in the preamble, amongst other things, that certain other companies were willing, and had agreed with the Caledonian Railway Company, to abate a portion of the sums "annually payable to them on certain terms and conditions, and it is expedient that such agreement should be sanctioned and confirmed by Parliament"; and it goes on further to narrate that, in consequence of the inadequacy of the Caledonian Company's funds and revenues to meet the various claims upon them, loss and detriment was threatened to all parties interested, for which it was expedient to provide some remedy. Then, with a view, in particular, to their position in connection with the Barrhead Railway Company, it was provided by sections 59 and 60 that it should be lawful for the Caledonian Company to create a certain amount of additional stock, and out of that new stock to allot a certain proportion to the companies there mentioned, including the Barrhead Railway Company, upon the condition that "such several companies and persons shall be held and deemed to have paid up the full nominal amount of such stock so apportioned to them." And upon that footing £82,500 of that new stock was allotted to the shareholders of the Barrhead Company as the consideration for their renouncing the rent payable to them by the Caledonian Company to the extent of £5063, 10s., that is to say, reducing the rent from £16,500 to £11,437. That was the footing upon which the settlement was made between the Caledonian Railway Company on the one hand, and the Barrhead Railway Company on the other, under the Act of 1851. Matters remained in the same state in 1869, when the Parliamentary agreement under the Act passed in that year was made between the Caledonian Railway

Company on the one hand, and the South-Western Company on the other—the substance of that agreement, so far as we have here to deal with it, being that the South-Western Company were to be entitled to the joint benefit, along with the Caledonian Company, of the lease and of all the rights which they had acquired over or in connection with the Barrhead Railway; and the condition on which the South-Western Company was to obtain the one-half of the benefit was that which is expressed in section 4 of the Act of 1869, that the South-Western Company shall repay to the Caledonian Company a sum equal to one equal moiety of all sums expended by the Caledonian Company on capital account prior to the vesting period in connection with the Barrhead Railway, after certain deductions—the vesting period being the 1st of August immediately following the passing of the Act; and the question which arises is, whether, under that condition of repaying the Caledonian Company one-half of all they had expended in connection with the Barrhead Railway Company, there is included anything at all for the consideration given by the Caledonian Company in 1849 to the Barrhead Railway Company for a reduction of that rent, and, if anything is to be allowed, how that is to be estimated?

The whole difficulty as regards the question whether anything is to be allowed for that or not arises from the words which are used being words expressive of an obligation to repay sums expended on capital account, in place of words clearly expressive of an obligation to bear one-half of all the considerations, of whatever kind, which had been given by the Caledonian Company in regard to the lease. The consideration which was given was £82,500 of the new stock of the Caledonian Company. That that stock was worth something is not doubted. That it was a valuable consideration given by the Caledonian Company to the South-Western Railway Company on the one hand, and for which they got a valuable consideration upon the other, is equally undoubted. But it is said that that consideration did not consist of sums expended by the Caledonian Company, and at all events did not consist of sums expended by them on capital account, and therefore that it does not fall within the words of this section.

I confess I have no difficulty in holding, with your Lordship, that this consideration was given on capital account, and I have nothing to add on that subject to what your Lordship has said.

The greater difficulty is whether the consideration given can be held to be sums expended, and upon that question, although I admit that it is attended with considerable difficulty, I have arrived at the opinion expressed by your [669] Lordship, that the real meaning of this clause is, that whatever consideration the Caledonian Company might have given to the Barrhead Company prior to the vesting period under this Act, the South-Western Company were to bear one-half of it. That is a view which really does not become any better or worse by amplifying observations upon it. It is a question of the fair meaning of this agreement. This Act is just a parliamentary agreement, and it is to be construed like any other agreement, according to the fair meaning of the parties; and taking into view the position of those railway companies which your Lordship has fully explained, and the object and effect of the agreement, I cannot entertain much doubt that it really was intended that whatever the cost might be, and whatever shape or form it might be in, the South-Western Company, who were to get one-half of the whole advantages, were to bear one-half of the whole cost. The only way, I think, in which the opposite conclusion could be arrived at would be by holding that the South-Western Company were to get the benefit of the lease at the reduced rent of £11,437, which was the existing rent at the date of the Act of 1869. Now, I think that is not the meaning of the agreement. It is quite plain that if this had been a sum of money paid by the Caledonian Company to the Barrhead Railway Company in 1851—if it had been a sum of money which they had paid in order to redeem the amount of rent, it seems to me perfectly plain that under the very words of this statute the South-Western Company must have paid the one-half of that, and, if so, it becomes clear that it was not upon the footing of getting the one-half of the lease at the reduced rent without consideration that this agreement was made. If the agreement had been made on that footing, then although the Caledonian Company had paid ever so much in 1851 to reduce that portion of the rent the argument would have been equally the same as it is here, that the South-Western Company having bought on the footing of the rent as it stood, were not liable for the money paid. Now, that cannot be contended. What the South-Western are to pay to the Caledonian Company is the one-half of all that was expended in all time past for the acquisition of these

rights. It does not matter whether they paid it in 1849 or 1851; it is all sums that they had expended prior to the vesting period. When you couple that with what we find in the end of the section, I think it becomes still more difficult to hold that they were to have the benefit without paying one-half of the consideration for that benefit, because the agreement bears that upon this condition of payment the South-Western Company were to come into the benefit of that railway for and during the residue of the term of 999 years, for which the Barrhead Railway is leased to the Caledonian Company, as fully and freely in every respect as if the name of the South-Western had been originally inserted in the before-mentioned lease and the Barrhead Lease Act, 1849, as joint-lessee with the Caledonian Company. They are to come into the lease as the lease stood in the Barrhead Lease Act, 1849—that is to say, they are to come into the lease at a period when the rent was £16,500 per annum, and if it had not been for the subsequent arrangement between the Caledonian Company and the Barrhead Company the rent would have remained at £16,500 as it was at first, and they must necessarily have been liable for one-half of that rent. The only way in which that is changed is by the agreement made long after the commencement of the lease; some years after the period at which you must suppose the name of the South-Western Company to be in the lease, it is changed by an agreement entered into by which the rent is reduced by upwards of £5000 a-year, in respect of this consideration given by the Caledonian Company to the Barrhead Company. I think it is impossible, therefore, to come to the conclusion that there is nothing to be allowed.

There still remains the puzzling question how that consideration is to be estimated. I confess that I have had a good deal of difficulty upon that question, but I have settled at length pretty clearly into the same view with your Lordship, that there is no other way of extricating that question but by taking what is called the nominal amount of those shares at the time they were issued, according to the view taken by the Lord Ordinary. There is no doubt, as his Lordship has pointed out very clearly, that the consideration which the Caledonian Company gave in 1851 to the Barrhead Company was a valuable con-[670]-sideration—that is to say, they became bound to pay them in all future time the same amount of dividend as they were to pay to their own shareholders, and they became bound to do that under the Act of Parliament, which compelled the Barrhead Company to take the £82,500 stock at its full nominal value, the same as if they had been paying every shilling of it. Upon the other hand, the Caledonian Company got a full consideration for that by the reduction of the rent to the extent of upwards of £5000 a-year, amounting to more, I think, than 6 per cent. upon the £82,500; and it is into the benefit of that transaction that the Glasgow and South-Western Company are now introduced to the extent of one-half. They are getting the full benefit of that reduction, whatever the Caledonian Company gave for it. They have nothing to complain of in an equitable point of view there. Suppose they paid £82,500, they are getting the reduction of rent to the extent of £5000 a-year, which, if that transaction had never taken place, they must have been liable for. If the original lease had stood unaltered, and they had been named in it in 1849, they would have been liable for the whole of that £16,500 of rent if it had not been for this reduction. The shareholders of the Barrhead Railway Company, who had no choice but to take that £82,500 at its fall value, got an obligation which, as your Lordship has pointed out, might not have been adequate. It turns out, however, to be adequate enough, because, although the price or the value of the Caledonian stock in the market in 1851 may not have been at par, it is now above par; and if we take any other period than 1851, we must take 1869, in which it was approaching par, and it might, as your Lordship has observed, have been a great deal more than par. Now, suppose it had been then a great deal more than par, the South-Western Company would not have thought it was equitable that they should have been charged with the one-half of that increased value; and if they were not to be charged with the one-half of that increased value, I do not see how they can claim the benefit of its having been then under par. Therefore, taking it as at 1869 plainly will not do. The alternative would be to take the value of it as at 1851. It is said to have been about £27 a-share in 1851. I presume that is before the Arrangements Act was passed. It has not been stated that, after the Arrangements Act was passed, which placed the Caledonian Railway Company's affairs on a different footing, it so remained.

Solicitor-General.—Oh, yes; it remained for a considerable time below par.

LORD DEAS.—Well, let that be so. I had not understood it to be so. Certainly, whatever the market price may have been, it was worth a great deal more immediately after the Arrangements Act was passed than it was before it.

Solicitor-General.—It was 15 before it.

LORD DEAS.—Whatever may have been the state of the market, it does not follow that the Legislature would have authorised the creation of new stock to be given out at £27 a-share, nor does it follow that the Caledonian Company would have given out their new stock at £27 a-share. There is no reason to suppose that, if it had not been for this enactment, under which the Barrhead shareholders were bound to take it as if they had paid up every sixpence of it, the power to create new stock would have been given, or the power to dispose of it would have been exercised. We cannot go into that. In every point of view, therefore, I think the only consistent mode of estimating the consideration, and that which appears upon the whole to be consistent with the fair construction of this parliamentary agreement, is to take it, as the Lord Ordinary has done, at the full nominal value which these shareholders are held to have paid for it under the very words of that enactment.

LORD ARDMILLAN.—I concur so entirely in the opinion expressed by your Lordship in the chair that I really feel it unnecessary to make any additional remarks. The two leading questions raised are—(1) What is the effect of the transfer of the Caledonian shares to the Barrhead Company? and (2) What is to be held as the value of that transfer of shares? That by the transfer of [671] £82,500 of the capital stock of the company the pursuers effected, in 1851, an arrangement with the Barrhead Railway Company, by which they, being lessees of the Barrhead Railway for a term of 999 years, reduced the rent from £16,500 to £11,437, 10s., is beyond all doubt. That the defenders, the South-Western Company, when in 1869 they made this statutory agreement with the Caledonian Company, were aware of the transaction and of the reduction of rent, or redemption of fixed dividend to the Barrhead Company, which had been thus effected, is equally clear. If the defenders had entered into the agreement with the pursuers before the date of the Caledonian Arrangements Act of 1851, and without getting the benefit of the transfer of the £82,500 of stock, they must have arranged for payment to the Barrhead Company of a rent or fixed dividend of £16,500 a-year. There is no doubt that, by the arrangement made by the pursuers, and the transfer of their stock, the position of the defenders was materially improved—improved to the extent of their share in the redemption affected. In 1869 the two companies, the Caledonian and the South-Western, became by statutory contract, following on an express agreement, the joint lessees—substantially the joint proprietors—of the Barrhead Railway from the date, and on the conditions expressed in the statute. There was nothing unfair or unreasonable in this transaction of redemption and transfer of shares. The sum was what might be expected as sufficient to purchase up an annual payment of about £5063. If, therefore, the transfer of this stock was a "sum expended on capital account,"—that is, on capital account of the Caledonian Railway—then I think that the defenders are bound to repay to the Caledonian Company "one equal moiety" of that sum. Now, reserving for a moment the question of amount or value in money of the shares transferred, I am of opinion that the transfer of shares made under the powers of the Caledonian Railway Arrangements Act of 1851, and made for the purpose of acquiring fully the right, and the profitable possession and use, of the Barrhead Railway for a period which was substantially in perpetuity, was truly a "sum expended on capital account." It was beneficially expended—it was expended not on revenue account, but on capital account—it was expended under statutory powers, and for a statutory purpose—and as a transfer of shares it was a handing over of money's worth, and corresponding dividends have since been paid. It was truly an expenditure in purchase *pro tanto* of the Barrhead Railway, by redemption of the dividend or tack-duty, to the extent of about £5000. Your Lordship's clear explanation on this point is, to my mind, entirely satisfactory. I think this was a payment "on capital account"; and I also think that it was a "sum expended." The defenders got the benefit of this. They, to the extent of a half, pay £5000 less rent to the Barrhead than they would otherwise have done. Is it the meaning of this Act of 1869 that the defenders, now the joint lessees, shall get this benefit, purchased by the pursuers, and get it at the cost of the pursuers? Shall they be relieved of half the annual rent redeemed by this payment or transfer and yet not repay to the pursuers half the redemption money?

I agree with the Lord Ordinary in holding that for this plea of the defenders there is no foundation in the statutes, and that, apart from the statutes, there is no authority and no equity to support it; and I have nothing to add to what your Lordship has explained, except to say that I agree in the view which Lord Deas has taken of the effect of the Act of 1869 in planting the defenders in the lease of the Barrhead line as at the date of that lease in 1849. At that time the rent was £16,500, and the reduction has been effected by this transfer.

On the second question, relating to the value at which the transferred shares should be estimated, I have had some difficulty; and I was greatly impressed by the able argument of the Solicitor-General. But I have now come to the conclusion that the Lord Ordinary is right.

The shares were of fluctuating value in the market, but of abiding indebtedness as regards the company. In 1851 the shares were below par. I believe they are now above par. It appears to me that it is really impossible to follow the fluctuation of the shares. The Caledonian Company must, as regards their obligation, recognise their nominal value—their value at par—and must pay dividend proportioned to that value, which remains amid all market fluctuations [672] the standard of their proper indebtedness. The transfer of shares being equivalent to a "sum expended," the value of the transfer is the amount of indebtedness. No one suggests that a market value above the nominal value can be taken into consideration, and why should a lower market value be taken when a higher is not. I think that, for this question, the only fixed and unchanging value—the basis for dividends, and the standard of the company's indebtedness—is the value at par.

LORD KINLOCH.—I have found great difficulties in the way of adhering to the Lord Ordinary's interlocutor, and these difficulties have not yet been overcome.

The question arises out of a transaction engaged in by the two companies who are parties to the present process in the year 1869, and which is embodied in the Act of Parliament passed that year. A part of this arrangement consisted in the companies becoming joint lessees in a lease of the Barrhead Railway, held for 999 years by the Caledonian Company. The rent exigible for this lease at the date of the arrangement of 1869 was £11,437, 10s. per annum. Accordingly, in declaring the lease vested jointly in the two companies, the 4th section of the statute sets it forth as so vested "under burden of the said rent or annuity of £11,437, 10s." And the 5th section enacts that "as from the vesting period the South-Western Company shall pay to the Barrhead Company and shall free and release the Caledonian Company of the payment of an equal moiety of the rent or annuity of £11,437, 10s., now payable by the Caledonian Company to the Barrhead Company, and such payment shall be made at the times, and in the proportions, at and in which the said rent or annuity is now payable by the Caledonian Company to the Barrhead Company."

As to the price or consideration for which the South-Western Company was to acquire their joint interest in this line the 4th section enacts, "The South-Western Company shall repay to the Caledonian Company a sum equal to one equal moiety of all sums expended by the Caledonian Company on capital account prior to the vesting period in connection with the Barrhead Railway Company, after deducting therefrom all sums, if any, received by the Caledonian Company in respect of the sale of lands acquired for the purposes of the Barrhead Railway." The joint vesting is declared to take place on such payment being made.

The question now raised is, what is to be held included in the "sums expended by the Caledonian Company on capital account prior to the vesting period in connection with the Barrhead Company." Up to a certain point there is no dispute between the parties. The Caledonian Company had advanced a large sum of money in the construction or improvement of the Barrhead line. The amount was stated in the negotiations of 1869 as being anterior to 31st July 1867 the sum of £369,388, 17s., deducting from which the Barrhead Company's capital, which was of course to be primarily employed in making the line, there was left a sum of £69,388, 17s. at the credit of the Caledonian Company. There is no controversy as to the South-Western Company being liable in one-half of this amount. So far the words of the statute are fairly and reasonably satisfied.

But a further demand is made, and is sought to be enforced by the present action, on the part of the Caledonian Company. The original rent payable by that company for the lease of the Barrhead line was £16,500 per annum. In 1851, eighteen years

before the transactions of 1869, the Caledonian Company had fallen into embarrassment and was unable to meet its obligations. An Arrangements Act was passed in that year 1851, one of the enactments of which was that the rent payable to the Barrhead Company should be reduced by about £5000 per annum, and that, as compensation *pro tanto* for this reduction, the Barrhead shareholders should have allocated amongst them £82,500 of new Caledonian Company's stock created by authority of the Act. This arrangement was carried out. At this time, it is said, the Caledonian Company's stock was worth no more in the market than about £25 for the £100 share, so that not much was got by the transaction at the time, though the stock has since largely [673] risen. The Caledonian Company now claim that the South-Western Company should pay them a sum of £41,250, as one-half of this amount of stock. For this sum the Lord Ordinary has granted decree in favour of the Caledonian Company.

I have great difficulty in finding that there is here, in terms of the Act, "a sum expended by the Caledonian Company on capital account in connection with the Barrhead Railway," and this whether I have regard to the words of the Act, or to its spirit and presumable intention. Certainly this allocation of Caledonian Company's stock is not directly or literally a "sum expended." No money whatever was expended by the Caledonian Company. There was merely a formal issue of what at this time was almost absolutely worthless stock. No doubt this issue involved an obligation to pay the holders of the stock what dividend the Caledonian Company might be able to pay on the stock so allocated. If the present claim had been for repayment of the half of the sum payable annually in name of dividend on this stock it would have had more feasibility. But no such claim is made, or is supposed to lie. The annual liability of the South-Western Company is admittedly restricted to one-half of the existing rent of £11,437, 10s. But, not being liable in repayment of any part of the yearly dividend, I am at a loss to see how they should be liable in any part of the nominal capital of the stock, which, much less than the dividend, holds the character of a "sum expended."

There are strong grounds, as I think, for maintaining that the transaction of 1869 was engaged in without any reference to the arrangements of the Caledonian Company in 1851. These arrangements were substantially just a composition with their creditors. They got their debt to the Barrhead Company reduced from £16,500 to £11,437, 10s. per annum. The composition they paid was the allocation of £82,500 of worthless Caledonian stock to the Barrhead shareholders. In other words, whilst giving up £5000 a-year of rent, these shareholders were, by way of compensation, made Caledonian shareholders to the extent of £82,500 of stock. But what had the South-Western Company to do with this composition arrangement in 1869? They found the Caledonian Company lessees of the Barrhead line at an existing rent of £11,437, 10s. They are to be fairly held, I think, to have transacted on the footing of this being the rent under the lease; in other words, to have dealt with the Caledonian Company for a lease running at this rent, and nothing else. Accordingly, the statute of 1869 expressly limits their yearly liability to one-half of this rent of £11,437, 10s. Admittedly they are not liable for the yearly difference of £5000 between this and the original rent. Yet it seems little else than charging them with this yearly difference when they are asked to pay the capitalised sum by which the difference is represented.

The main argument in support of the claim rests on an assumption that by the transaction of 1869 the South-Western Company became bound to pay to the Caledonian Company all the sums they had laid out in the acquisition of this lease, and that this allocation of Caledonian stock was just part of the cost of acquiring the line, being the sum paid to buy up the abatement of rent from £16,500 to £11,437. But to say that the transaction involved a repayment of all paid by the Caledonian Company towards acquiring the line is, with all deference, simply to beg the question in issue. There is no evidence of this beyond what is contained in the words of clause 4, and the question still returns, what is comprehended in the words "sums expended on capital account"? It is, with deference, illogical, first to assume that the South-Western Company were to repay all that the Caledonian Company had expended in any way, and then to bring the stock in question under the category of a "sum expended." I see nothing impossible or unreasonable in supposing that the South-Western Company were not to pay all that the Caledonian Company had paid, and.

in particular, were to have nothing to do with the composition arrangement of 1851. Whether they had or not is to be determined, not by an assumption one way or other, but by a sound construction of the term "sums expended on capital account in connection with the Barrhead Railway." The whole question lies here.

[674] The pursuers have not satisfied me that the present claim is comprehended in these words. I think that if it had been intended to comprehend this allocation of stock under the name of a "sum expended," it would have been clearly and unequivocally so stated. This it very plainly is not. The sum claimed is not a "sum expended," except by a construction which I cannot help considering somewhat forced. I do not think it, in any sound sense, a sum expended "on capital account." These words, I think, do not allude to any capital account kept by the Caledonian Company, nor indeed to any account, considered as a document kept either by one company or another. An expenditure "on capital account" I consider merely to express the kind of expenditure, and to denote it as that which properly and usually comes out of capital. The sums laid out by the Caledonian Company in the construction and improvement of the Barrhead line clearly come under this category. But I do not think the claim now made can be reasonably brought under the description. Finally, I do not think that what is now sought is "repayment" in any sound sense. Repayment is the counterpart of payment—it is the undoing of what payment effected. What was done by the Caledonian Company was not to pay money, but to allocate Caledonian stock. It is not now proposed to cancel the stock so issued to the extent of one-half, which is the only act which, in the circumstances, would be correctly called repayment. The whole stock of £82,500 is to remain with the Barrhead shareholders as issued. The Caledonian Company are not to be relieved from the half of this stock, but they are to have £41,250 of actual present cash put into their pockets, to do with and dispose of as they please. I cannot consider this "repayment" in any reasonable, or in the statutory sense.

It cannot but be held somewhat confirmatory of these views that in two several accounts rendered by the Caledonian Company to the South-Western, posterior to the vesting, and in which the sums actually expended on the line are comprehended, no mention is made of the claim now put forward. This may not be by itself conclusive; but in a matter of doubtful construction it is, to say the least, a strong circumstance against the interpretation of the pursuers.

My conclusion is, that the pursuers have not satisfactorily established their claim in the present process. Whether or to what effect these arrangements of 1851 were taken into view when the transaction of 1869 was concluded, we have, as already said, no evidence to show, except what lies in the words employed in section 4 of the Act of 1869. I have a strong impression that these arrangements were wholly thrown out of sight in the transaction of 1869, the rent simply being taken at the current rate of £11,437, 10s., without the South-Western Company being in any way implicated in the allocation of Caledonian shares, by which the reduction was obtained in 1851. Any glimpses we have of the negotiations lead towards this inference. But, at any rate, the pursuers are bound to make it clear that the claim now urged falls by legitimate construction under the words employed in section 4. In my apprehension they have not succeeded in doing so, and therefore the defenders are entitled to absolvitor.

THE COURT pronounced the following interlocutor:—"Having advised the reclaiming note for the defenders against Lord Gifford's interlocutor of 5th December 1871, No. 25 of process, and heard counsel for the parties, adhere to the said interlocutor, and refuse the reclaiming note: Find the pursuers entitled to additional expenses: Allow an account," &c.

HOPE & MACKAY, W.S.—GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—Agents.

[*Affirmed*, 1874, 1 R. (H. L.) 1.]

No. 115. X. MACPHERSON, 675. 20 Mar. 1872. 2d Div.—Sheriff of Ayrshire, I.

JAMES WALLACE (Inspector of the Poor of St. Nicholas or City Parish, Aberdeen), Pursuer and Respondent.—*Watson—Keir.*

WILLIAM TURNBULL (Inspector of the Poor of the Parish of Stewarton), Defender and Appellant.—*Sol.-Gen. Clark—Burnet.*

Poor—Settlement—Residence—Husband and Wife—Statute 8 *&* 9 *Vict. c.* 83 (*Poor Law Act*), *secs.* 70, 71, *and* 72.—*Held* (1) that a husband had acquired a settlement in a parish by five years industrial residence therein, although during part of that time his wife, who had been deserted by him, had been receiving parochial relief from another parish; and (2) that the parish in which the husband had acquired a residential settlement was liable to reimburse the parish for advances subsequently made to his wife.

This action was raised in the Sheriff-court of Ayrshire by James Wallace, inspector of the poor of the parish of St. Nicholas or City Parish, Aberdeen, against William Turnbull, inspector of the poor of the parish of Stewarton, Ayrshire. The summons concluded for payment of £10, 18s. 3d., outlay and expenses incurred by the pursuer in maintaining a pauper named Mary Davidson or Kerr from 20th of July 1869 to the date of the summons, and for her future aliment.

The following facts were admitted or proved:—Mary Davidson or Kerr was the wife of David Kerr, who was born in the pursuer's parish (St. Nicholas), Aberdeen. David Kerr, who was married in 1829, deserted his wife at Aberdeen in the year 1855. At that date he had a residential settlement in the parish of Old Machar, Aberdeen. Mary Davidson or Kerr, shortly after her husband's desertion, applied to Old Machar for parochial relief. Old Machar granted her temporary relief for a few months prior to 14th January 1856, at which date she ceased to be chargeable, and supported herself for nearly, but not quite, five years. She again fell into poverty, and became chargeable to the parish of Old Machar on the 27th of October 1860, and received relief up to the 5th of February 1861, when she removed to the pursuer's parish (St. Nicholas). In consequence of David Kerr's continuous absence from Old Machar since 1855 a statutory notice of chargeability was sent by that parish to the pursuer's parish (St. Nicholas) upon the 27th of October 1860, on the ground that the pauper's husband had lost his residential settlement in Old Machar, and that the pursuer's parish was bound, as his admitted birth parish, to relieve Old Machar of his future maintenance. The pursuer, in belief that he was bound to relieve Old Machar from the date of the statutory notice in October 1860 until the pauper's removal to the pursuer's parish in February 1861, repaid Old Machar its advances during that period, amounting to £1, 8s. From the 4th of February 1861 up to the date of the summons Mary Davidson or Kerr had received relief from the pursuer's parish. From the year 1863 to the raising of the action David Kerr resided in the defender's parish (the parish of Stewarton), and had not recourse to common begging by himself or his family, and never received or applied for parochial relief. On the 26th day of January 1869 the pursuer sent a statutory notice of the chargeability of Mary Davidson or Kerr to the defender, and intimated his claim of relief in terms of stutute.

The pursuer pleaded;—(1) The pauper, the said Mary Davidson or Kerr, otherwise Caird, being the wife of a domiciled Scotchman by marriage, has acquired the parochial settlement of her husband. (2) The said David Kerr, otherwise Caird, having, at the date of said summons, resided for five years and upwards continuously in the said parish of Stewarton, has thereby acquired a residential settlement for himself and his wife in [676] that parish. (3) The defender, as representing the parish of the residential settlement of the said David Kerr, otherwise Caird, is liable to repay and relieve the pursuer's parish of the alimentary advances to the said Mary Davidson or Kerr, otherwise Caird, as well as of the other expenses sued for.

The defender pleaded;—(1) The said David Kerr or Caird, at the date of his deserting his wife, having acquired a residential settlement in the parish of Old Machar, his wife, on becoming entitled to relief in 1855, was properly chargeable on the parish

of her husband's settlement. (2) In consequence of having so deserted his wife, the said David Kerr or Caird became in relation to her as civilly dead, and the said Mary Davidson or Kerr, otherwise Caird, was thenceforward capable of acquiring a settlement, or retaining, notwithstanding his absence, the settlement in Old Machar which she had derived from him.

The Sheriff-substitute (Anderson), after findings in fact, pronounced this judgment:—"Finds as matter of law that the said Mary Davidson or Kerr, a married woman deserted by her husband, and unable to support herself, was entitled to relief from the parish of her husband's settlement: Finds the said David Kerr's settlement, when his wife became chargeable as a pauper, was either Old Machar or the pursuer's parish, and that for the decison of the present case it is unnecessary to determine which: Finds that though the said David Kerr has resided for more than five years in the defender's parish without personally receiving parochial relief, he has not thereby acquired an industrial settlement in Stewarton, in respect that his deserted wife has, during the whole period, been in the receipt of parochial relief from the pursuer's parish: Therefore assoilzies the defender," &c.

The Sheriff (Campbell) recalled this interlocutor, and found "in point of law that the said David Kerr acquired and still possesses a settlement in the defender's parish; that the settlement of the husband is also the settlement of his wife, and that there is nothing in the present case to warrant the conclusion that the said Mary Davidson or Kerr had, during the period for which relief is sought, or has at present, any other legal settlement than that of her husband: Therefore finds the defender liable to relieve the pursuer in terms of the conclusions of the summons, and decerns accordingly: Further, finds the pursuer entitled to expenses," &c.

The defender appealed, and argued;—(1) The distinction between an original and derivative settlement relates only to the mode of acquisition. In whatever mode it may be acquired the settlement is that of the person receiving relief, and is fixed at the date of receiving relief. The deserted wife having in this case received relief from the parish legally bound to support her when she fell into poverty, it was impossible for her thereafter to acquire another settlement. The position of a wife was in this respect the same as that of a child. (2) Alternatively, the husband was pauperised by his wife receiving parochial relief, and he therefore had not acquired a settlement in Stewarton. (3) In any case, the husband being an able-bodied man, this action should have been directed against him.*

Argued for respondent;—(1) A settlement acquired by marriage is not in the same position as the settlement of a child; for the marriage tie is [677] indissoluble, while the parental tie is naturally dissolved by the acquisition of an industrial settlement by children. The general rule that a wife's settlement follows her husband's admits of only one exception arising from the necessity of the case, viz., when a foreigner without a settlement deserts his wife. (2) A man cannot be pauperised except by parochial relief legally given to himself. (3) It is admitted on record that the deserted wife was a proper object for relief.†

At advising,—

LORD JUSTICE-CLERK.—The facts of the case are these: A married woman was deserted in 1855 by her husband, who had an industrial settlement in the parish of Old Machar. She received parochial relief from Old Machar. In 1856 she found means to support herself. Thereafter she again became chargeable, and her husband having lost by absence his settlement in Old Machar that parish sent her to the parish of St. Nicholas, Aberdeen, the birth settlement of her husband, and that parish supported her from 1860 to 1869. In 1868 it came to the knowledge of the parish of St. Nicholas that the husband was living in the parish of Stewarton, Ayrshire, and had acquired a residential settlement there. The parish of St. Nicholas accordingly sent to the

* Hay *v.* Doonan, June 25, 1851, 13 D. 1223; Hay *v.* Skene, June 13, 1850, 12 D. 1019; Palmer *v.* Russell, Dec. 1, 1871, *ante*, 185; Beattie *v.* Adamson, Nov. 23, 1866, *ante*, vol. v. 47; M'Crorie *v.* Cowan, March 7, 1862, 24 D. 723; Masons *v.* Greig, March 11, 1865, *ante*, vol. iii. 707; Carmichael *v.* Adamson, Feb. 28, 1863, *ante*, vol. i. 452; Cochrane *v.* Kyd, June 16, 1871, *ante*, vol. ix. 836.

† Gray *v.* Fowlie, March 5, 1847, 9 D. 811; Beattie *v.* Adamson, *ut supra*; Jack *v.* Thom, Dec. 14, 1860, 23 D. 173; Petrie *v.* Meek, March 4, 1859, 24 D. 614; 8 & 9 Vict. c. 83, sec. 70.

parish of Stewarton a notice that they were supporting the wife, and calling upon them for relief in terms of section 72 of the Poor-Law Act. The defence stated for the parish of Stewarton raises two questions—1st, Was the wife a proper subject for parochial relief? and 2d, Supposing that she was, which parish is liable?

I am of opinion that she was a proper subject for parochial relief. The parish of Old Machar was bound to relieve her, and if she was properly transferred to St. Nicholas that parish was also bound to support her. I do not desire to say anything in regard to the case of a man deserting his wife, and going to a neighbouring parish in order to avoid the expense of supporting her. In such a case I by no means say that the parochial board are bound to admit the wife to relief. But no such case arises here. The parish of St. Nicholas, therefore, was bound, in the first instance, to afford her relief.

The next question is, what parish was the true debtor in the relief? As a general rule, the obligation to support the husband includes the obligation to support the wife. The settlement of the wife follows the settlement of the husband. I do not think any of the cases are opposed to this view. The case of Palmer, to which we were referred, was under the Lunacy Act, and the judgment proceeded on the words of that Act. In the case of M'Crorie the husband was a foreigner, with no settlement in this country. The necessity of finding a settlement led to falling back on the birth settlement of the wife.

Holding, then, that the settlement of the husband of the wife is in the parish of Stewarton, what is the right of the parish of St. Nicholas? If the wife had lived in the same parish as her husband she would not have been a proper subject of relief. But the Poor-Law Act gives no power to remove the pauper to another parish until that parish acknowledge its liability to relieve the pauper. If the parish of St. Nicholas had refused to acknowledge their liability, Old Machar had no power to remove the pauper. I think St. Nicholas was not bound to go against the husband.

The parish of St. Nicholas has given relief in an administrative capacity, and, having given the statutory notice, I think their claim for relief must be sustained from the date of that notice.

LORD COWAN.—I think the judgment of the Sheriff is well founded. As to the general principle, there can be little doubt. Then, are there specialities in this case? I hold that a wife's settlement follows that of her husband. I cannot agree with the argument that the wife's settlement is fixed.

The appellant's second argument was that the husband was the party against [678] whom the parish which has granted relief ought to proceed. I do not think this contention is well founded in the present case. I guard myself, however, against being understood to hold that such a contention might not prevail in cases where the husband might be easily got at. I do not wish to go further into this case. I entirely concur.

LORD BENHOLME concurred.

LORD NEAVES.—I am not prepared to dissent from the judgment proposed.

The law in this matter is on an unsatisfactory footing. The case is this:—Here a wife of an able-bodied man, with a claim on nobody but her husband, is deserted by him. She comes to the parochial authorities of Old Machar and asks to have life sustained. The parish gives her relief, and she is afterwards transferred to the parish of her husband's settlement by birth. All the parish of St. Nicholas asks is to have the expenses which have been already incurred. I think it is entitled to these.

This interlocutor was pronounced:—"Find it proved that Mary Davidson or Kerr, a married woman, became in 1856 chargeable, in respect of being left destitute by her husband, an able-bodied man, to the parish of her husband's settlement by residence, Old Machar: Find that shortly thereafter the husband lost by absence his residential settlement in Old Machar, and his wife was sent on and accepted by the pursuers, the parochial board of the parish of St. Nicholas, which was the parish of the birth settlement of the husband: Find that the pursuers continued to give relief to the wife until the end of 1868: Find that in that year it came to the pursuers' knowledge that the husband was residing and had acquired a residential settlement in the parish of Stewarton, in the county of Ayr, and that on the 26th of January 1869 the pursuers gave a notice to the parochial board of that parish, in terms of the 71st section of the Poor-Law Act: Find that the defenders denied their liability, and did not remove the wife to the parish of Stewarton: Find that the account sued

on was incurred by the pursuers in furnishing aliment to the wife and endeavouring to discover the husband: Find that the settlement of the wife was in 1869 in the parish of her husband's settlement: Therefore dismiss the appeal, affirm the judgment appealed from, and decern: Find the respondent entitled to expenses, and remit," &c.

M'EWEN & CARMENT, W.S.—WEBSTER & WILL, S.S.C.—Agents.

[*Commented upon*, Milne *v.* Henderson and Smith, 1879, 7 R. 317. *Observed upon*, Hunter *v.* Henderson, 22 R. 331.]

No. 116. X. MACPHERSON, 678. 20 Mar. 1872. 2d Div.—M.

MRS. JANE TUCKER CRAWFORD OR EWING.—*N. C. Campbell—Watson.*
HUMPHREY EWING CRUM EWING.—*Sol.-Gen. Clark—Marshall.*

Liferent and Fee—Casualties of Superiority—Ground-Annual—Grassum.—A testator directed the trustees named in his settlement to convey certain lands in liferent to one person, and in fee to another. Parts of the lands had been feued out for a yearly stipulated sum, and a sum to be paid every twenty-fifth year in lieu of casualties. Other parts of the lands had been disponed under contracts of ground-annual, stipulating for a certain yearly payment, and a like sum in name of grassum every twenty-fifth year. *Held* that the fiar had right (1) to the sums payable every twenty-fifth year under the feu-contracts, as being payments in lieu of casualties; and (2) to the "grassums" payable under the contracts of ground-annual, as being of the nature of extraordinary profits.

This special case was presented by Mrs. Jane Tucker Crawford or Ewing, widow of the late James Ewing, Esq., of Strathleven, in the [679] county of Dumbarton, and Humphrey Ewing Crum Ewing, Esq., of Strathleven.

The late James Ewing, Esq., of Strathleven, died on or about 29th November 1853, leaving a general trust-disposition and settlement, dated 9th September 1844, whereby he conveyed to trustees, for the purposes therein mentioned, the whole lands, estates, &c. By the third purpose the testator directed his trustees to execute and deliver a regular deed or deeds disponing and conveying his lands and estate of Levenside, &c., to Mrs. Jane Tucker Crawford or Ewing, his spouse, in liferent, during all the days and years of her life, in the event of her surviving him, but so long as she continued his widow allenarly, and to and in favour of the heir-male of the body of the said James Ewing and his heirs and assignees whomsoever; whom failing, the heir-female of the body of the said James Ewing and her heirs and assignees whomsoever; whom failing, to the said Humphrey Ewing Crum Ewing, and the heirs-male of his body, &c., in fee. The said James Ewing left no heirs of his body. After his death the trustees made up a feudal title to the lands and estate of Levenside, now called Strathleven, and then, by disposition bearing date the 7th December 1854, they disponed and conveyed the same to Mrs. Jane Tucker Crawford or Ewing "in liferent during all the days and years of her life, but so long as she continued the widow of the said James Ewing allenarly." Mrs. Ewing was duly infeft on this disposition in September 1855. Certain portions of the estate which were held burgage had been disponed by Mr. Ewing and his predecessors for building purposes, in contracts of ground-annual in usual form, "under the real burden of the payments," &c., "of a yearly ground-rent or ground-annual of £ from and after the said term of Whitsunday, to be paid or uplifted and taken by them furth of and from the subjects above disponed, or any part thereof, readiest rents, mails, and duties of the same, and that at the term of Whitsunday yearly, and the like sum of £ in name of grassum to be paid at the expiration of every twenty-fifth year only, from and after the said term of Whitsunday, over and above the ground-annual for the said year." Another portion of the estate of Strathleven consisted of the superiority of various feus. In the greater part of the feu-dispositions or contracts the casualties

of superiority payable at the entry of heirs and singular successors were taxed at a duplicand of the feu-duty. But in some of the larger and more important feus granted to linen printers or others, for the purpose of their business, the reddendo clause in the feu-contracts was differently expressed, the lands being holden for the yearly payment of a sum in name of feu-farm duty, and the vassals and their successors paying to the superior and his heirs and successors a sum on the expiry of every twenty-five years from the term of entry, and that in lieu of the casualties, legal or conventional, which might arise, due to the granter and his foresaids as superiors of the subjects. Mrs. Ewing, in virtue of the liferent conveyance in her favour, had drawn the ground-annuals, and feu-duties payable under the contracts of ground-annual and feu-contracts, and she maintained that as liferentrix she was entitled to the sums payable as grassums under the contracts of ground-annual, and to the sums payable every twenty-five years under the feu-contracts. Humphrey Ewing Crum Ewing was fiar of the said estate of Strathleven, and vested in the superiority thereof, and disputed the right of Mrs. Ewing to such grassums and periodical payments, and maintained that they were payable to him.

The questions of law were :—" 1. Whether during the survivance of the liferentrix the grassums becoming payable under the said contracts of ground-annual belong to her or to the fiar ? 2. Whether, during the survivance of the liferentrix, the sums becoming payable periodically at [680] intervals of twenty-five years under the said feu-contracts belong to her or to the fiar ? " *

At advising,—

LORD BENHOLME.—The subjects which fall under this trust-estate comprehend two portions, first, a part of the estate which is feued, and secondly, a part which is granted for ground-annuals. And there are presented to us two distinct questions, each of difficulty,—one relating to one part of the estate, and the other to the other. In regard to the feus, we are told in the case,—" In the greater part of the feu-dispositions or contracts the casualties of superiority payable at the entry of heirs and singular successors are taxed at a duplicand of the feu-duty. But in some of the larger and more important feus granted to linen printers or others, for the purpose of their business, the reddendo clause in the feu-contracts is differently expressed, the lands being holden for the yearly payment of a sum in name of feu-farm duty, and the vassals and their successors paying to the superior and his heirs and successors a sum (either the same or less than the yearly feu-duty) on the expiry of every twenty-five years from the term of entry, and that in lieu of the casualties, legal or conventional." Your Lordships therefore see that in the one case there is a mere taxing of a duplicand, leaving the time of payment dependent on the entry. In the other case the casualties are taxed and appointed to be paid every twenty-five years without reference to entry. Then, as regards the ground-annuals, the contracts of ground-annual contain a clause stipulating that the subjects are granted under the real burden of a yearly payment of a certain sum, and a like sum in name of grassum to be paid every twenty-fifth year. Now, in these circumstances, and this state of title, the questions set forth in the case are—1st, whether do the grassums belong to the liferentrix or the fiar ? and 2d, whether, during the survivance of the liferentrix, the sums becoming payable periodically at intervals of twenty-five years under the said feu-contracts belong to her or to the fiar ?

I shall proceed to examine the case of the feu first.

It presents less difficulty than the other. On this part of the case the *ratio decidendi* is to be found in the circumstance that the casualty arises as a consideration to the superior on the fulfilment by him of the duty imposed on him of giving an entry to his vassal's heir. Now, this taxed sum is in lieu of a casualty, and, in consequence of this, we have a safe ground for finding that the duplicands or fixed payments must go to the person who would have been entitled to the casualties, namely, the fiar as superior.

As to the other question, I am of opinion that the grassums also belong to the fiar. I have more difficulty, however, in regard to this question. In regard to the

* *Authorities for Mrs. Ewing* :—Ersk. 2, 9, 42 ; Rollo *v.* Irvine, July 27, 1803, 4 Paton, 521.

Authority for Mr. Ewing :—Cumming's Trustees *v.* Cumming, Feb. 26, 1824, 2 S. 743 (N. E. 620).

former question, there was the circumstance of superiority to guide us. The superior was the only person entitled to give an entry, and so was entitled to the duplicand for doing so. There is no such circumstance in regard to the ground-annuals. Therefore our former *ratio decidendi* fails us. I am therefore at a loss where to look for assistance. I cannot doubt that both payments are real burdens; but that does not solve the question to whom does the grassum belong. Is it reserved to the fiar, or does it go to the liferenter? There is, however, an analogy, which, I think, may guide us, namely, the case of a bonus arising on bank or other stock. It has been decided that it does not belong to the liferenter. Your Lordships know that the House of Lords differed from the Court of Session upon the point. There the question was whether the bonus went to capital or whether it was annual profit. The House of Lords held that a bonus was an addition to capital. It is true that that decision was not uninfluenced by the fact that the liferenter, though not entitled to claim the bonus, was entitled to claim interest upon the bonus. That part of the decision proceeded on the [681] view that the bonus was an accession to the capital. Now a grassum can never be in that position, and there is, therefore, no *ratio decidendi* exactly of that kind in the present case. But the case is as similar as any I know of; and as I cannot find any more satisfactory grounds on which to rest our decision I am inclined to adopt the English rule of law, by which extraordinary profits, such as a bonus, are to be reckoned as the property of the fiar, and to hold that a grassum is of that nature. I therefore think that the grassum must go to the fiar.

The other Judges concurred.

This interlocutor was pronounced:—"The Lords having heard counsel on the special case for the opinion of the Court for Jane Tucker Crawford or Ewing and Humphrey Ewing Crum Ewing are of opinion, and find on question 1st, that during the survivance of the liferentrix the grassums becoming payable under the contracts of ground-annual in question belong to the fiar; 2d, that during the survivance of the liferentrix the sums becoming payable periodically at intervals of twenty-five years under the feu-contracts in question belong to the fiar; and decern accordingly, and find no expenses due."

M'EWEN & CARMENT, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 117. X. MACPHERSON, 681. 20 Mar. 1872.* 1st Div.—Lord Ormidale, B.

CARL DIETRICH JULIUS SEITZ, Pursuer.—*Sol.-Gen. Clark—Balfour.*
JAMES BROWN AND COMPANY, Defenders.—*Shand—Mackintosh.*

Reparation—Obligation—Agreement.—B. and Company, paper-makers, agreed to adopt in their works a process to be communicated to them by S., a practical chemist, for effecting certain improvements in the manufacture of paper, if satisfied with the process after seeing it in operation at certain other works. The process was not the subject of a patent, and was not represented by S. as a new invention. S. was to supply drawings, teach the men employed how to work the process, and superintend its introduction; and was to be paid either in proportion to the profit effected during the first year, or a slump sum. B. and Company inspected the process in operation, and, without saying whether it was satisfactory or not, introduced in their works a process substantially the same, but without employing S. In an action of damages for breach of the agreement, *held*, after a proof, that the defenders having resolved to introduce in their works a process practically identical with that referred to in the agreement, and which they had seen in operation, were bound to employ the pursuer in terms of the agreement, and having introduced it without employing him, were liable in damages.

C. D. J. Seitz, a practical chemist, sued James Brown and Company, paper-

* Decided Feb. 9, 1872.

makers at Penicuik, for damages for breach of an agreement between them. The agreement was embodied in the following missive letters :—

" Eskmills, Penicuik, 13th August 1868.

" Messrs. James Brown and Co.

" Dear Sirs,—I hereby agree to communicate to you and inform you of the method by which I boil down and otherwise manufacture the strong leys resulting from the boiling of esparto grass ; to supply you with all general and working drawings requisite for the efficient construction and erection of the complete working plant for your mill ; to generally superintend the work during progress, and to teach your men the complete process, until all is in thorough working order ; to at once communicate and show you my method for preventing the smell nuisance about the furnaces whilst drawing the charges, and incinerating the recovered ash in the heap, as it can be applied to your present plant.

[682] " In consideration of the above you agree to pay to me the sum of £60 as soon as I have shown you how to avoid the smell nuisance from the charges during the time of drawing and incineration in the heap, and to adopt my complete process and manufacture of soda (if you are satisfied with the process when working at Messrs. Young, Trotter, and Son's mill), on the following terms :—

" 1st, You to pay me, my heirs, administrators, or assignees, one month after starting the complete process at your mill, for travelling and other incidental expenses, the sum of £50.

" 2d, You to pay me, my heirs, administrators, or assignees, quarterly or half-yearly (in your option), the net profit effected by the process and suggestions for the period of twelve months (one year) from date of starting the entire process, in full discharge of my claim for ever.

" 3d, The net profit is to consist of the difference between what the boiling of your grass has cost you during the one year, whilst my process has been in operation, and what it would have cost you by boiling the grass with 60% caustic soda, at the rate of eighteen pounds of such soda per cwt. of grass, at the price of £16 (sixteen pounds) per ton of such soda. The recovery process is to be charged with ten per cent., 10%, for the wear and tear on the capital expended on the plant required for your process, with 5%, five per cent., for interest on foresaid plant, house, and chimney, with the cost of the coal, salt-cakes, lime, and labour, during the twelve months.

" In the event of the re-using of the soda produced by my process proving detrimental to your manufacture, you are to have it in your power to make it into soda-ash, according to my plans, I receiving one year's net profit resulting from the method.

" You take in hand to reduce the quantity of your ley to about 1000 gallons for every ton of esparto, more or less, that being about the quantity used at other mills.

" I guarantee you that the entire process is in my own hands, and that I will take all responsibility as regards any action or proceedings against you on account of using the recovery process at your mills.

" In case of any dispute or difference arising between us concerning the meaning or intention of this agreement, or anything herein referred to, the same shall be referred to the decision of two arbitrators, viz., James Birrell, Esq., Valleyfield Mills, Penicuik, appointed by you, and Robert Slight, Esq., of Chirnside, N.B., appointed by myself, who, in case they cannot agree, shall appoint an umpire, whose decision shall be final and binding on both of us in all respects.

" The foregoing agreement includes the leys from ten or twelve tons of rags p. week.

" The £60 received by me this day is to be deducted from the first payment you make to me on account of the twelve months' net profit.

" You are to have the option of paying to me a lump sum of £1500, fifteen hundred pounds, four months after starting the complete process, which will be in full discharge of all claims excepting the £50 for expenses.—Yours truly, C. SEITZ."

" We agree to the above. JAMES BROWN AND CO."

The pursuer averred that the defenders, after seeing the pursuer's process in operation at Messrs. Young and Company's mill, had adopted it without employing the pursuer, and that they refused to implement the agreement.

The defenders averred that they had seen the pursuer's process, but were not satisfied with it, and that they had not adopted it.

The defenders pleaded ;—(2) The said agreement being conditional upon the

satisfaction of the defenders with the pursuer's process as seen [683] in operation, and the defenders not having been satisfied with said process, the said agreement is not binding upon the defenders.

A proof was led, the import of which appears from the opinions of the Judges.

The Lord Ordinary pronounced this interlocutor:—"Finds as matters of fact—(1) That by the memorandum No. 7 of process, dated 13th August 1868, it was agreed between the pursuer and defenders, *inter alia*," [terms of agreement here given]: "(2) That, by said memorandum, it was also agreed between the pursuer and defenders that, in case of any dispute or difference arising between them concerning the meaning and intention of said agreement, or anything therein referred to, the same should be referred to the decision of the two arbiters therein named and appointed by the parties respectively, who, in the event of their differing in opinion, should have the power of appointing an umpire: (3) That the defenders did, on or about the 9th or 10th of March 1869, visit and inspect the pursuer's process or method of manufacture as in operation in Messrs. Young, Trotter, and Son's mill at Chirnside, referred to in said agreement, and found the same to be satisfactory: (4) That the defenders, in breach of their foresaid agreement with the pursuer, failed to communicate their satisfaction to the pursuer, and give him an opportunity of supplying them with all general and working drawings requisite for the efficient construction and erection of the complete plant for their mill, and generally of superintending the work during its progress, and teaching their men the complete process until all was in thorough working order, and, acting on the knowledge they obtained at Chirnside and otherwise, proceeded to adopt in their mills the pursuer's said method or process of manufacture, and to construct or set up in their establishment the machinery or apparatus necessary for bringing said method or process into practical operation, and this they have accordingly accomplished: (5) That although called on by the pursuer to implement their agreement with him, by paying him what he was entitled to in consequence of their having adopted in their mills his said method or process of manufacture, with the relative machinery or apparatus, or, at any rate, to enter with him into an arbitration for having their differences settled in terms of said agreement, the defenders have refused to comply with these demands; and (6) That the pursuer has, in the circumstances now stated, and by and in consequence of the defenders' breach of agreement and acts and conduct, sustained loss and damage to the extent of £905: Therefore finds that the defenders are in law liable to the pursuer in said sum of £905, with interest thereof at the rate of 5 per cent. per annum from the date of citation to this action till paid, and decerns: Finds the pursuer entitled to expenses," &c.

The defenders reclaimed. Counsel were heard on the proof.

At advising,—

LORD PRESIDENT.—This is an action for breach of the contract contained in two missives of agreement which passed between the parties to the cause. As this contract itself is not in a very formal shape, and is of a very unusual kind, it becomes indispensable for us to ascertain the intention of the parties at the time of making, and their object in entering into, the agreement.

The defenders are paper-makers on the North Esk, and they, in common with all the other paper-makers on that river, had been disturbed in their manufacture by complaints of proprietors against the pollution of the river. The case of the North Esk has been more prominently before the public and the Court than that of any other river, and we are therefore tolerably familiar with the circumstances connected with its pollution. The pollution of the river occurred mainly through the escape into it of the refuse from certain processes employed in the manufacture. [684] Amongst these were the leys of the esparto. The esparto is boiled in a strong solution of soda, termed oxide of sodium. After the boiling is finished, and that part of it which is to be converted into paper taken out, the refuse consists of this solution of soda, combined with a large quantity of organic matter coming from the esparto. This combination is of a very offensive and polluting character, and when escaped into the river it affected the amenity of the district to a considerable extent. The consequence was the raising of an interdict by the riparian proprietors, in which the paper-makers went to trial upon an issue, and were unsuccessful, and lost a verdict after a long and very serious trial. They thereafter applied themselves to the problem of getting rid of their leys in some other manner than by discharging them into the

stream. The process of incineration had been tried before, and their attention was now still more directed to it, for the makers were honestly striving to get rid of the leys without nuisance. The manner in which this process of incineration works is very simple. The liquid portion is first evaporated, and then the rest is consumed, and escapes by combustion through the chimney. The small residuum after this combustion ought to be carbonate of soda in a perfectly pure state. If the combustion is perfect the carbonate of soda will be pure, or so pure as to be available as an article of commerce, and will be so good that it can be converted into caustic soda, and used again in boiling down esparto. The soda-ash or product of this process of combustion was sold by the defenders before this agreement was entered into, and they realised a price for it, but not such as they would have had it been good enough to be re-used in their own operations; for the purchase of caustic soda is a large item in the working of a paper-mill, and if the same can be used again a great saving of expense is effected, independently of the saving in carriage. It was therefore an object to all paper-makers to succeed in incinerating their leys in such a way that the result would be the production of soda in such a form that it could be re-used in their works. Now, the defenders, at the time they entered into this agreement, were not succeeding in the operation of incineration to this extent. It was indeed said at one time, when using the process known as Richardson's and Irving's, they were re-using the soda. But it is a fair inference from the fact of their having abandoned it that it was not satisfactory in its result. However this may be, they were not at the time re-using their soda, and did not see their way to doing so at a profit. For this reason they were willing to listen to the proposals of the pursuer, who told them that he had been very successful in the erection of incinerators elsewhere, the result of which was that paper-makers using his method were succeeding in what the defenders had in view. Everybody knew that the desideration was to make as great a combustion as possible in the incineration. Everybody knew that the effect of this process was to throw off the organic and leave the inorganic particles. Therefore complete and perfect combustion was the thing to be aimed at.

Now, it has been represented that the pursuer claimed a new principle at the foundation of his process, and represented himself as in possession of a new invention, and that he told the defenders that what he proposed to use was a new invention known only to himself. This is a mistake on their part. No doubt a great deal of loose and inaccurate language was used by the parties, and the defenders may very reasonably have been misled. But when we come to the agreement itself it is not at all clear that the pursuer guaranteed or intended to guarantee the communication of a new invention. I rather think all he undertook was to put up a new incinerator of better construction, the practical result of which would be the effecting of the defenders' object.

The agreement itself requires to be considered. The pursuer undertakes to communicate to the defenders his method of boiling down leys. He undertakes further to supply them with working drawings requisite for the erection of the plant necessary for the process, to superintend generally the erection, and to teach the defenders' men the use of the process. And there follows another matter. He undertakes at once to communicate to the defenders his method for preventing the smell nuisances about the furnaces when drawing the charges. Now, that is the undertaking on the part of the pursuer, and there is no allusion [685] there to a new process or invention. All that he undertakes is, when read in the light of the previous correspondence, &c., the communication of a process which shall insure certain practical results.

The counterpart of this agreement on the defenders' side is the immediate payment of £60 for the prevention of the smell nuisance. And they bind themselves further to adopt "my complete process and manufacture of soda (if you are satisfied with the process when working at Messrs. Young, Trotter, and Son's mill)." It is right, in the meantime, to observe, that if they approve the process and adopt it in their works, it is implied that they are bound to employ him in terms of the preceding clauses to erect the necessary apparatus, &c., or at least to superintend the erection. Now, the terms on which this is to be done are—that they pay him £50 down one month after the complete process is started at their works, and that they pay him also one year's net profit or saving effected by the use of the process. Then follows a statement of the way in which the net profit is to be ascertained. Then there is a provision that if they find the re-using of the soda produced by the

process detrimental to their manufacture, they are to have it in their power to make it into soda-ash according to his plans, he receiving one year's net profit as before. The defenders then undertake to reduce the quantity of their leys to 1000 gallons to each ten of esparto. There is then a provision for arbitration in case of disputes, which seems to have turned out ineffectual. And finally, there is an arrangement whereby the defenders may pay down, if they prefer it, £1500 in lieu of the first year's profits in the working of the process.

Now, one cannot help seeing that this agreement was drawn upon very fair and reasonable terms as regards the interests of both parties. The defenders were very well protected against the erection of a useless apparatus, for until it proved successful the pursuer was to get nothing. On its succeeding in its object depended his hopes of remuneration. Nor was that to extend beyond one year's profit. On the other hand, if the incineration turned out a greater success than was expected, then the defenders had the option of buying him off with £1500. Now, as I said before, what the pursuer undertook to do was not to communicate a new invention, but a process which would have the practical result of effecting the object at which the defenders were aiming. The defenders, on the other hand, I think, undertook, not that they would act upon his suggestions in any event, but only that, if satisfied, they would adopt them and employ him. Whether they had it in their power, however satisfied they were with the process, to refuse to go on, it is not necessary here to decide; but I am disposed to think that they might be entitled to say, "Well, we have seen this process, and are satisfied with its working; but, on the whole, are not disposed to go into it." If they had taken this position, I am not prepared to say they could have been compelled. But that is not the position they took. They went to Chirnside as agreed; they saw an incinerator at work there. There is no evidence that they expressed satisfaction or the reverse, for the evidence is not conclusive on that point. But what they saw there was undoubtedly the process which the pursuer had represented to them. It was an incinerator that produced complete combustion, and the difference between it and the one at Eskmills was, that the latter produced a pasty substance, which afterwards hardened so as to require to be broken with a hammer, and was accompanied with a very offensive smell when drawn off the furnaces. It could indeed be sold, but not re-used for boiling esparto. What they saw produced at Chirnside, on the other hand, was a powdery ash, quite different in substance from that at Eskmills, easily dissolved, and available for sale or re-use. They saw the whole of this process, and saw also that there was no nuisance by way of smell.

Now, I think that, whatever the opinion of the defenders might be, it is impossible to dispute that there was at Chirnside, and in practical use, an incinerator which produced the effects aimed at by all in the trade. It is to be regretted that after this some communications did not take place between the parties as to whether or not the defenders were to employ the pursuer in terms of the agreement. It is a pity also that the defenders did not give the pursuer an opportunity of going to Chirnside with them. There is no great blame in this, but [686] still it is to be regretted. After their return from Chirnside, I am inclined to think that the defenders might have made no change in their works at all; they might have abandoned altogether the idea of purifying what remained after this process of incineration. They were, I think, entitled to do this; but what they were not entitled to do was, to adopt the method of the pursuer, which they saw at Chirnside, and employ some one else to put up the apparatus. The question is, whether that is what they did. Now, there is a good deal of contradictory evidence as to what the defenders really did. They seem inclined to represent that there was no difference between their furnaces and those they saw at Chirnside, except the balling furnace, of which they did not approve. This matter of the balling furnace bulks most unnecessarily largely in the proof. Besides this, they say they saw nothing at Chirnside which they had not got already. Possibly that may be the case. But it was never at any time held out to them that the pursuer's incinerator was different from the one they had got, but only that it was a very good one, and fitted for its purpose. The defenders, however, came back from Chirnside, and began making alterations upon their works, and all they did was intended to produce more perfect combustion in order to effect the purpose they originally had in view. It is, moreover, very clearly shown that all their alterations were in the direction of what they had seen at Chirnside. But

for a time, and while they were employing Law and Dunn, there was no very great change in the incinerator or in its results. In 1870, however, they began to re-use their soda, and they did so in consequence of having got it in a purer state, owing to a change in their apparatus, which undoubtedly made it much more like that at Chirnside.

If the evidence had stopped there the result would not have been very satisfactory; but one piece of evidence remains to be noticed, and that is, that they put up a new incinerator in the year 1870, and employed a Mr. Arnott to build it. Now, he was a skilful man, and it was very natural for them to employ him, as he was the inspector appointed by the river proprietors after the interdict case at their instance, and one of their chief objects was to satisfy him. But then, unfortunately, Mr. Arnott was thoroughly acquainted with the pursuer's incineration, and highly approved of it. He has recorded that fact in his journal. Mr. Arnott accordingly, having full information from the pursuer about his process, very naturally availed himself of the knowledge he had acquired, and it would have been very extraordinary under the circumstances if he had not. We must further keep in mind that there was no doubt as to the success of the pursuer's incinerator. He had been successful at Chirnside, and at the works of several other leading paper-makers both in Scotland and England, who all come here to testify to the success of Mr. Seitz's process. And it is clear that if anybody were employed to put up an incinerator, the first thing he would do would be to make himself acquainted with Mr. Seitz's process. Now, Mr. Arnott had got the information required, and the consequence was, that he put up at Eskmills an incinerator identical with that put up a short time before by the pursuer at another mill well known to Mr. Arnott. We have this from the evidence and from the drawings. The result of that undoubtedly is, that the defenders had, by this course of action, got in August 1870, at their works at Eskmills, just such an incinerator as the pursuer would have erected for them had he been employed in terms of the agreement. The question is, whether they were entitled to employ Mr. Arnott, and not the pursuer, and there I think the defenders are entirely in the wrong. If they wanted such an incinerator they were bound to employ Mr. Seitz, and pay him the stipulated remuneration according to the agreement. They have not done so, and therefore they must be held liable for breach of contract.

A good deal has been said of the conduct of the defenders in this matter, and it was represented to us by their counsel that charges were made against them which involved their character for fair dealing and honesty. I do not know if this was intended by the pursuer. But I see no foundation for it at all. They merely misunderstood the agreement, and did not see that if they put up an incinerator after Mr. Seitz's method they were bound to employ him. I am very glad to be able to say that I think this is the foundation of the whole case, nor [687] do I think that there is any ground for imputing improper motives to the defenders. I therefore concur in the Lord Ordinary's judgment. In the assessment of damages, however, he has made a slight mistake, which will have to be corrected before a final judgment is pronounced.

LORD DEAS and LORD ARDMILLAN concurred.

LORD KINLOCH.—I have found considerable difficulty in making up my mind in this case, which is a very peculiar one. But I have come to rest in the conclusion arrived at by your Lordships.

There is no question here as to a patent right. The agreement between the pursuer and defenders is not of the nature of a license to use a patented invention. It is, nevertheless, quite a competent agreement. The pursuer, a man of scientific skill, had devoted much time and attention to an endeavour to discover how paper-makers might, after using the caustic ley employed in the preparation of esparto grass, recover and re-use the soda which lost its causticity in the process, in place of carrying this away, either as useless rubbish, or for such sale as it might command. He considered himself to have hit upon a process better adapted for this end than any previously employed. He does not pretend that all the details of this process were inventions of his own. It is not necessary to his case that any one of them should be so. What he says is, that by a combination, previously unpractised, he secured the desired result better and more economically than was previously accomplished. It is altogether impossible, in the face of the evidence before us, to deny merit to the pursuer's process. For he brought before us partners or managers of no less than six or seven

paper-making houses who had adopted his process, paying him a consideration for the use of it, and who testify to its being used effectually and profitably. The proposition by the pursuer to the defenders was that they should, in like manner, use his process in their works, and take the benefit of his services in setting it a-going, giving him for remuneration the first year's saving effected by the process, estimated by the amount actually expended in boiling the grass compared with a fixed sum of £16 per ton of soda, reckoned on an expenditure of 18lbs. of soda to each cwt. of grass, which was taken to represent the previous cost. In the option of the defenders they might pay a lump sum of £1500 within four months after starting the process, in full of all claims by the pursuer. Nothing could be more fair and reasonable, as nothing can be more clearly competent, than such an agreement.

The written agreement, which is signed by both parties, and bears date 13th August 1868, contains no specification of the pursuer's process, and no reference to any other document for such specification. The pursuer simply refers to "the method by which I boil down and otherwise manufacture the strong leys resulting from the boiling of esparto grass." But in order to fix what was the process agreed about, it is represented to be that in operation at the mill of Messrs. Young, Trotter, and Son, at Chirnside, one of the firms which had already bargained with the pursuer on the subject. It was agreed that the defenders should inspect the process as there in operation, and, if satisfied on such inspection, should adopt it at their own mills. The bargain was "to adopt my complete process and manufacture of soda, if you are satisfied with the process when working at Messrs. Young, Trotter, and Son's mill, on the following terms."

I entertain a strong opinion that if, on seeing the process in operation at Chirnside, the defenders expressed dissatisfaction with it, and intimated that, in respect of such dissatisfaction, they declined proceeding with the contract, they were entitled to break it off, without incurring pecuniary liability. On the other hand, if satisfied with the process, they were bound to adopt it, or pay the stipulated sum. It is scarcely necessary to say that if they were in reality satisfied with the process, and in reality adopted it, they were bound to the pursuer, and could not escape liability by withholding expressions of satisfaction, or using depreciatory language, or by any other way, ostensibly but not really, repudiating the process.

The defenders went to Chirnside on the 8th or 9th January 1869, and had [688] the fullest opportunity of inspecting the pursuer's process as there in operation. Unquestionably, they never gave utterance to any formal expression of satisfaction. They have adduced themselves as witnesses to prove that when they saw the pursuer they rather expressed themselves dissatisfied,—at least to the effect of saying that they saw nothing new except in one point; and that this novelty they were not disposed to adopt. There is contradictory evidence as to what passed. I cannot hold it proved that the defenders intimated to the pursuer, in clear and unambiguous terms, that they were dissatisfied with the process, and declined going on with the agreement, which I think it was incumbent on them to do if they meant to avoid responsibility. On the other hand, the pursuer has not established any distinct and formal expression of satisfaction, so as, on that account, to hold them bound by the contract.

The case of the pursuer is rested on the alleged fact that the defenders really adopted the process, and so became responsible to him for the stipulated consideration. And here it is that I find the pinch of the case to arise. There can be no doubt, as I think, that if the defenders adopted the process in its substance and material details, this will be equivalent to the satisfaction contemplated by the contract. On the other hand, if the process was not in substance adopted, it would not raise a case of pecuniary responsibility if in one or other of the subordinate details the defenders acted on a hint derived from their visit to Chirnside. For the pursuer, who had not patented his process, laid himself open to his views being taken advantage of by others, without his having against them any pecuniary demand. His case lies on agreement only; and he cannot bring himself within the scope of the agreement unless he proved that in all the substance of the thing his process was adopted by the defenders.

I have had considerable difficulty in coming to a satisfactory conclusion on this matter of fact. It does not appear that, following on their visit to Chirnside, the defenders executed any general process of renovation of their works. But I think

it clearly proved that very soon after that visit they made considerable alterations on their apparatus, and all in the direction of bringing into practical operation the process of the pursuer as exhibited at Chirnside. Such alterations are proved to have been made in March to May 1869, and again in August 1870, down to early in the year 1871. By these alterations, I think, they brought into operation the substantial parts of the process practised at Chirnside, more particularly the coal-pockets, the lowering of the roof of the furnace and of the fire-bridge, and the mode in which the heat was made to operate, with other details. One thing is extremely clear, that by dint of these alterations they accomplished the great result aimed at of recovering and re-using the soda, and re-using it to profit. It is established by the proof that although originally they had attempted to recover and re-use the soda yet that they had for years discontinued doing so. They could accomplish this result satisfactorily neither under one process or another; and were not recovering and re-using the soda when they made their agreement with the pursuer in August 1868. They were enabled to do so not sooner than March 1870, after they had made considerable alterations on their works, all in the line of the pursuer's process. The final result of the alterations I think fairly expressed by one of the scientific witnesses (Mr. Wallace), when he says—"The apparatus in the new house at Eskbank and that at Chirnside were similar, in fact practically identical. They seemed to be identical in all essential respects."

I am of opinion that this is sufficient to satisfy the condition of the agreement between the pursuer and defenders. I do not think it material that the defenders did not immediately proceed to embody the Chirnside process in one general renovation of their works, but attained the result by a series of successive alterations. I consider it to be enough if they ended in bringing that process into practical operation in its essence and substance. Nor do I think it enough to say, as the defenders said very urgently, of this or the other detail, that it had nothing new in it, but could be seen elsewhere, and had even been aimed at by the defenders themselves. The case is not one of a patent right; and it is not the least necessary to the success of the pursuer that he stamps his process with the character of an original invention. It was the combination of a variety of details, [689] more or less known before, to a beneficial practical effect, which constituted the pursuer's process. If after their agreement with the pursuer the defenders made alterations on their works which ended in a process "practically identical" with that at Chirnside, I am of opinion that they are bound to pay to the pursuer the stipulated consideration. Their satisfaction with that process is testified in the most conclusive manner. And as, by the agreement, they were bound, if satisfied, to adopt the process, under the direction and superintendence of the pursuer, paying to him the stipulated remuneration, I think they cannot, by not employing him and doing the same thing at their own hand, get rid of their obligation to pay him the agreed-on sum.

One great difficulty raised by the defenders lay in the assumption that the main feature of the pursuer's process consisted in having two hearths or furnaces, side by side, with an opening from the one into the other, through which the stuff was thrust, to sustain in the second furnace a process of incineration additional to that sustained in the first. I think it clearly appears that this double hearth was a part of the pursuer's process, as exhibited at Chirnside, and in the pursuer's apprehension a not unimportant part. I think it also clear that the defenders did not adopt this part of the process; for the proceeding spoken to by Dennis was not the construction of a double furnace, with an opening between, but of a wholly separate incinerator 80 to 100 yards off, to which the stuff was carried under exposure to the atmosphere, and so without the main benefit of the double furnace. But I am satisfied on the evidence that this double furnace did not form so essential a feature of the pursuer's process that its omission prevented its being said that the process was adopted. The primary object of the second furnace was to make ball-soda, either to be sold in the market or used in the after processes; and it was whilst not so occupied that it was to serve the purpose of an additional incinerator, which might be a convenience, but was not essential to the process, which could be sufficiently carried through with only one incinerator. This part of the pursuer's scheme went rather to the diminution of the cost than the efficacy of the process. So far as concerned the recovery and re-use of the soda, it was just as effectually accomplished without this double furnace as with it, and the double furnace has been in fact generally discontinued. It cannot,

I think, be said that the omission to adopt this double furnace amounted to a non-adoption of the pursuer's process, the process being truly adopted in all its substance and materiality.

I am therefore of opinion that on the question of liability the Lord Ordinary's interlocutor should be affirmed. On the point of damages, I think it should be only altered to the effect of correcting the *error calculi* made in taking £14, 10s. per ton as the price of soda, in place of the £16 of the contract, and of deducting the £60 paid to account.

I think it only fair to the defenders to say, in conclusion, that I see no evidence to warrant the inference that they consciously and intentionally broke their agreement with the pursuer. I am satisfied that they believed, in good faith, that the contract was no longer binding. They simply acted, as I believe, under a misapprehension. Their misapprehension probably arose either from supposing that the double furnace was an essential part of the pursuer's process, or from supposing that unless the process was a new and original invention the contract did not hold good. In these respects I conceive them to have been mistaken, and in consequence to have incurred pecuniary responsibility. But I consider the question to involve mere legal obligation, and in nowise moral character.

The following interlocutor was pronounced:—"Recall the said interlocutor in so far as it finds that the damage sustained by the pursuer amounts to £905, and decern therefor, with interest: Find that the pursuer has suffered loss and damage through the defenders' breach of contract amounting to £1125: Decern against the defenders for payment to the pursuer of the sum of £1125 accordingly: *Quoad ultra* adhere to the said interlocutor, and refuse the reclaiming note."

G. & H. CAIRNS, W.S.—J. & R. MACANDREW, W.S.—Agents.

SUMMER SESSION.

No. 118. X. MACPHERSON, 690. 14 May 1872. 1st Div.—Lord Mackenzie, B.

ROBERT CURROR AND OTHERS (Lamond's Trustees), Nominal Raisers.—*Millar—Watson.*

ALEXANDER FREDERICK CROOM, Real Raiser and Claimant.—*Sol.-Gen. Clark—Maclean.*

Process—Reclaiming Note—Judicature Act, 6 Geo. IV. c. 120, sec. 17—Court of Session Act, 1868, 31 & 32 Vict. c. 100, secs. 53 and 54.—Section 17 of the Judicature Act enacts that, "in pronouncing judgment on the merits of the cause, the Lord Ordinary shall also determine the matter of expenses so far as not already settled, either giving or refusing the same in whole or in part." The Court of Session Act, sec. 53, enacts that "it shall be held that the whole cause shall be decided in the Outer-House when an interlocutor has been pronounced by the Lord Ordinary, which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or decerned for." By sec. 54 reclaiming notes are incompetent until the whole cause has been decided in the Outer-House, unless the leave of the Lord Ordinary be first had and obtained.

After various interlocutors, dealing with the merits of the competition in a multiplepoinding, the Lord Ordinary pronounced an interlocutor, whereby he preferred a claimant to the balance of the fund *in medio*, decerned against the nominal raisers for payment accordingly, and appointed parties' procurators to be heard on the question of expenses. *Held* that, as the Lord Ordinary's interlocutor had not

determined the question of expenses, it could not be regarded as a final judgment, and that it was not competent to reclaim against it without leave of the Lord Ordinary.

Croom, a creditor of the deceased Malcolm Lamond, brought this multiplepoinding, in which various questions were raised as to the amount of the estate for which Lamond's trustees, the nominal raisers, were bound to account. By a judgment of this Court (March 8, 1871, *ante*, vol. ix. 662) it was held that they were not entitled to take credit in a question with Croom for certain sums paid by one of their number, and that the fund *in medio* fell to be enlarged by the amount of these sums, for which the nominal raisers were personally liable. The cause having been remitted to the Lord Ordinary, his Lordship pronounced an interlocutor on 1st August 1871 containing certain findings with respect to the ascertainment of the amount of the fund *in medio*, including interest, remitting the accounts of trust-expenses to the Auditor for taxation, and appointing an amended state of the fund *in medio* to be lodged by the nominal raisers in accordance with the said findings. On 17th November 1871 his Lordship approved of the amended state of the fund *in medio*, approved of the Auditor's report on the nominal raisers' account of expenses, found the nominal raisers entitled to credit for the taxed amount of law expenses, being £85, 8s. 8d., and to interest on £58, 8s. 5d. thereof at 5 per cent. per annum from 11th March 1867, and appointed the nominal raisers to lodge a state showing the free balance of the fund after giving effect to these findings.

Thereafter, on 1st December 1871, the Lord Ordinary pronounced this interlocutor :—" The Lord Ordinary, in respect of no objections, approves [691] of the state of the fund *in medio*, No. 327 of process, and ranks and prefers the claimant, Alexander Frederick Croom, to the sum of £23, 0s. 10d., being the balance of the fund *in medio* in the hands of the nominal raisers appearing thereon ; decerns against the nominal raisers for payment accordingly ; appoints parties' procurators to be heard on the question of expenses."

On 14th December 1871 Croom presented this reclaiming note against the interlocutors of 1st August, 7th November, and 1st December 1871.

At calling in the roll counsel for the reclaimer were proceeding to argue against certain findings with regard to interest in the interlocutor of 1st August when the Court called attention to the question whether any of the interlocutors were competently before them, in respect that the Lord Ordinary's leave to reclaim had not been obtained.

Counsel were then heard on this question, with reference to the recent cases of Bannatine's Trustees *v.* Cunninghame, May 25, 1869, *ante*, vol. vii. p. 813 ; and Cowper *v.* Callender, Jan. 19, 1872, *ante*, p. 354.

LORD PRESIDENT.—There are three interlocutors prefixed to the reclaiming note for the purpose of being reviewed. It is not said that the first and second of them could have been reclaimed against without leave. The only contention, then, must be that the third of these interlocutors can be reclaimed against without leave, and has the effect of bringing up the two preceding interlocutors. The question whether this interlocutor, dated 1st December 1871, can be reclaimed against without leave is an important one, depending on the 53rd section of the Act of 1868. What the Lord Ordinary has done is to dispose finally of the competition. His Lordship " approves of the state of the fund *in medio*, No. 327 of process, and ranks and prefers the claimant, Alexander Frederick Croom, to the sum of £23, 0s. 10d., being the balance of the fund *in medio* in the hands of the nominal raisers appearing thereon ; decerns against the nominal raisers for payment accordingly ; appoints parties' procurators to be heard on the question of expenses." Now, as regards the merits, apart from the matter of expenses, this is a complete interlocutor, and if adhered to there can be no further discussion as to the merits of the competition. But expenses are not disposed of, and the 17th section of the Judicature Act is thus not literally complied with by the interlocutor. That section requires that " in pronouncing judgment on the merits of the cause the Lord Ordinary shall also determine the matter of expenses so far as not already settled, either giving or refusing the same in whole or in part." That section has been lately held in a case in this Division * to entitle the Lord Ordinary to reserve

* Bannatine's Trustees *v.* Cunninghame, Jan. 11, 1872, *ante*, p. 317.

the question of expenses, and so to separate his final judgment into two interlocutors. But until both matters are disposed of there is not a complete final judgment in the sense of the 17th section of the Judicature Act. Now, when the merits are disposed of and the expenses are not, is it competent to reclaim? The objection is that it is not a judgment disposing of the whole cause, because by this 17th section the whole cause is not disposed of until the expenses are disposed of. Here the 53d section of the late statute comes in, the phraseology of which I find it impossible to get over. That clause provides "that it shall be held that the whole cause has been decided in the Outer-House when an interlocutor has been pronounced by the Lord Ordinary, which, either by itself, or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause." That means although there have been questions raised which the Lord Ordinary has not found it necessary to dispose of in order to reach the final judgment on the cause. "But," the section proceeds, "it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified or decerned for." Thus a judgment disposing of the merits and finding expenses due is such an [692] interlocutor, but nothing short of this. It is further important to notice that this very section contemplates that a final judgment may consist of more interlocutors than one; and if the party here had waited for the question of expenses to be disposed of he might have reclaimed against the interlocutor disposing of the expenses, and his reclaiming note would have brought up the whole cause. But he has stepped in prematurely, and reclaimed against the half of a judgment on the whole cause. I think the plain meaning of the Act is against the competency of reclaiming at this stage without leave.

The other Judges concurred.

The following interlocutor was pronounced:—"Refuse the reclaiming note as incompetent, in respect it is presented without leave of the Lord Ordinary, and in respect the interlocutor of 1st December 1871, though disposing of the merits of the competition, does not dispose of the expenses of process: Reserve the expenses of this reclaiming note to be disposed of by the Lord Ordinary along with the other expenses of process."

J. & R. MACANDREW, W.S.—LAURENCE M. MACARA, W.S.—Agents.

No. 119. X. MACPHERSON, 692. 14 May 1872. 1st Div.—Lord Gifford, M.

PETER ROBB AND ANOTHER (Robb's Trustees), Pursuers.—*Guthrie Smith—R. V. Campbell.*

THOMAS ROBB, Defender.—*Scott—Robertson.*

Trust—Title to sue—Titles to Land Consolidation Act, 1868 (31 & 32 *Vict. c.* 100, *sec.* 20).—A holograph testamentary writing contained bequests of certain heritable subjects and a nomination of trustees in these terms,—"My wish is that Peter Robb be one trustee and Alexander Smith be the other." *Held* that the trustees named had a title to sue an action of declarator for the purpose of establishing the validity of the trust, and completing their own title to the subjects.

Succession—Settlement—Relevancy.—In an action concluding for declarator that a writing holograph of and signed by a person deceased, bequeathing his heritable property and nominating trustees, which had been delivered to a law-agent, was a valid settlement, *held* that the heir-at-law was not entitled to a proof of his averment that the writing was not regarded by the writer as his settlement, and that he had handed it to his law-agent not to be retained as a settlement, but in order that a formal will might be written out.

The late James Robb died on 2d March 1871, survived by an only son, the defender. He was proprietor of some house property in Dundee. On the 3d November he

executed a holograph settlement of this property in the following terms :—" Dundee Nov 3/69, I James Robb Proprietor and owner of a Property on the west side of hilltown Dundee Presently Numbered 36 38 & 40 I do hereby bequeth to my two Nephews namely John and Alex Robb 8 houses Belonging to me withe the ground in frunt of Each tenemant," &c. " My Nephews Can add to the said Property as Much as the Pleas and my wish is that Peter Robb Be one trustee and Alex. Smith be the other and Thomas Robb my Son he may get from John Robb his Son and Propriter of said Propert £3 10 yearly and from Alex. Robb £3 10 yearly," &c. " Witness my hand James Robb Propriter of the above minchned Property JAMES ROBB."

At the date of the testator's death this writing was in the possession of his law-agent.

After the testator's death Thomas Robb obtained himself served heir in general to his father, and uplifted the rents of the said subjects, refusing to recognise or give effect to the holograph writing. In order to establish its validity in terms of the Titles to Land Consolidation Act, 1868, secs. 20 and 21, and at common law, and to carry it into operation, the trustees [693] named in the will, and Margaret Ruthven or Robb, one of the persons to whom the heritable property was bequeathed, brought this action against Thomas Robb and other parties interested in the succession of James Robb. The conclusions were, *inter alia*, for declarator that the holograph writing was a valid conveyance and settlement in favour of the pursuers as trustees ; that James Robb did not die intestate as regards his right to the said subjects, and that the succession thereto was regulated by the foresaid settlement, and that the pursuers were entitled to complete titles for vesting them in his rights therein ; that the defender, Thomas Robb, was bound to make up a title as heir-at-law and convey to the said trustees, &c. In their averments the pursuers set forth the terms of the holograph writing and of James Robb's titles.

The defender, Thomas Robb, none of the other parties called having entered appearance, averred,—(Stat. 3) " In 1869 the defender's father entertained an unpleasant feeling towards him, in consequence of an unfounded belief that the defender had encouraged his second wife's father in a litigation which he had entered into with him ; and while the late Mr. Robb was labouring under this misconception, and at the instigation of the pursuer, Peter Robb, the writing, called by the pursuer a settlement, was written, but in whose handwriting the defender cannot say. Although this document was thus written, it was never at any time considered by the late Mr. Robb as his settlement, nor as the final writing disposing of his succession, but was intended to be gone over by him with his law adviser, and, after deliberation, reduced into a formal shape. The defender's father thereafter discovered that he had been mistaken in thinking that the defender had encouraged, or had any concern with, the litigation in question." (Stat. 4) " Shortly after said document was written the deceased Mr. Robb had a meeting on the subject with his legal adviser, Mr. Stephen, writer, Dundee, and read it over to him, whereupon Mr. Stephen expressed his disapproval of it, and it was then arranged that Mr. Stephen should write out a will for him in proper legal form. Accordingly, the deceased handed the said document to Mr. Stephen, not to be retained by him as a settlement, but in order that a will might be afterwards written out, for doing which Mr. Stephen awaited the deceased's final instructions as to how he proposed to deal with his property. Mr. Stephen, however, never received any instructions, and the deceased died without having executed any settlement. Mr. Stephen at no time imagined the said document as a settlement, or as delivered to him as such." (Stat. 5) " The deceased lived up to his death on friendly and intimate terms with the defender, and, in the presence of other parties, spoke of the defender as being his heir, and the person who was to succeed to his whole property. He did so on repeated occasions after the alleged delivery of said writing, and, *inter alia*, within a fortnight of his death, in presence of William Phillip, joiner, Dundee. He never regarded said writing as his settlement, or as settling the succession to his property, but believed that the defender would take up the whole as his heir-at-law, in the event of his giving no further instructions to Mr. Stephen to make out a will for him."

The pursuers pleaded, *inter alia* ;—(1) The pursuers are entitled to have the validity and effect of the said James Robb's settlement, and their position as trustees and beneficiary respectively, established and determined by decrees as concluded for.

(2) The pursuers are entitled, in terms of their summons, to require the defenders, as successors of the said James Robb in the sense of the said Act, to execute all conveyances usual and necessary to vest the pursuers for their respective interests in the full right and place of the said James Robb.

[694] The defender pleaded, *inter alia*;—(1) No title to sue. (2) There being no constitution in the writing founded on of any trust in the pursuers' favour giving them a right to interfere with said property the action should be dismissed; and *separatim*, the nature of the trust, if any, being vague and indefinite and ambiguous, no effect whatever can be given to it. (5) The said writing being of no force or effect whatever as a *mortis causa* conveyance, the action ought to be dismissed. (6) The said writing having, as in a question with the defender, been presumably executed on death-bed, does not constitute a valid alienation from him of his otherwise legal rights; and *separatim*, the pursuers must prove the date of the writing, and that it is holograph of the alleged granter. (7) The said writing not being expressive of the true and final intention of the granter, and not having been delivered or intended or regarded by him as a final instrument, cannot receive effect.

The Lord Ordinary allowed the parties a proof of their respective averments, and afterwards pronounced this interlocutor:—"The Lord Ordinary, having heard parties' procurators for the pursuers and for Thomas Robb, the only defender who has lodged defences, and having considered the closed record, proof adduced, and whole process, repels the defender's objection to the pursuers' title to sue: Finds and declares that the holograph will or settlement of the deceased James Robb, dated 3d November 1869, No. 12 of process, was, at the death of the said James Robb, and is now, valid and effectual as a *mortis causa* settlement of the whole of the heritable property which belonged to the said deceased James Robb at the time of his death; and finds and declares that the heritable property of the said deceased James Robb belongs to and falls to be distributed among the parties named in the said holograph will in exact terms thereof, and under the conditions therein specified, and to this extent and effect decerns against the said Thomas Robb in terms of the first declaratory conclusions of the action: Further, under the seventh conclusion of the action, decerns against the said Thomas Robb for the sum of £25, being the estimated nett rents uplifted by the said Thomas Robb: Finds it unnecessary, as in a question with the said Thomas Robb, to give any decree against him in terms of the other conclusions of the action, excepting the conclusion for expenses: Finds the said Thomas Robb liable to the pursuers in expenses, but only from the date of lodging his defences, and remits the account of said expenses, when lodged, to the Auditor of Court to tax the same and to report, and decerns: Further, and in regard to the whole defenders who have not lodged defences, being the whole defenders other than the said Thomas Robb, decerns, finds, and declares against them in absence in favour of the pursuers, Peter Robb and Alexander Smith, in terms of the first alternative of the first, second, fifth, and sixth conclusions of the action: Finds no expenses due by the defenders who have not lodged defences, and decerns." *

---

* "NOTE.—This action is somewhat complicated in its details, but the Lord Ordinary has endeavoured to extricate the various conclusions in the decree now pronounced. In regard to everybody except the defender, Thomas Robb, the decree is a mere decree in absence, which the pursuers take at their own risk, and subject to all the conditions under which a decree in absence is taken. The Lord Ordinary gives no opinion as to whether some of the defenders who have not appeared might or might not successfully resist some of the conclusions. Probably they have been well advised not to appear in any subordinate question, but to leave the validity of the will to be tried by the heir-at-law, Thomas Robb.

"The true and almost the only question tried before the Lord Ordinary was the validity of the document, No. 12 of process, as the will of the late James Robb. The Lord Ordinary has not much difficulty in holding that that docu-[695]-ment is a valid and effectual will or *mortis causa* settlement, effectually regulating the disposal and distribution of the heritable property therein mentioned.

"(1) The Lord Ordinary thinks it completely proved that the document is holograph of the testator, and bears his signature and subscription. An attempt was made to throw doubt on the genuineness of the subscription, but the Lord Ordinary thinks that this attempt entirely failed, and that the complete holograph character

[695] The defender reclaimed, and argued;—The pursuers have no title to sue, in respect that the writing, even if it be a valid settlement of the sub-[696]-jects,

of the document is entirely proved, not only by the evidence as to handwriting, but the other evidence in the case as to the delivery and history of the document.

"(2) The Lord Ordinary thinks that the document is by its terms and conception, and apart from extrinsic evidence, a valid and effectual will. He thinks it bears to be so on the face of it. It is not a mere jotting of instructions to make a will, but its words imply the full and final settlement of the succession referred to therein. Its form and the solemnity of its signature point to the same result, and the Lord Ordinary can scarcely doubt that if the document had been found in the deceased's repositories at his death it must have received effect as a will. It is true that it does not contain *de præsenti* words of conveyance, but this is no longer necessary in *mortis causa* deeds under the recent Titles to Land Act, 1868.

"(3) A keen and ingenious attempt was made to show that although not strictly mere instructions in point of form the document was converted into mere instructions by the terms and circumstances attending its delivery to Mr. Stephen. It was argued with great ingenuity that being delivered to Mr. Stephen merely in order to make out a formal deed the document ceased to be anything more than mere instructions, which were never carried into effect, and it was said that this view was confirmed by the subsequent actings of the testator.

"The Lord Ordinary cannot give effect to this contention. The defender's view was supported by ingenious criticism on the evidence of Mr. Stephen, part of whose evidence the Lord Ordinary was asked to believe, and part he was asked to disregard, or rather to read as precisely opposite to what Mr. Stephen said. The Lord Ordinary cannot do this. Mr. Stephen, it is true, is a person somewhat eccentric in manner and in language, and perhaps in conduct, but the Lord Ordinary sees no reason to doubt his honesty, or that he was speaking the truth, and he believes Mr. Stephen's evidence, that while the deceased was quite willing that Mr. Stephen should put the will in a more formal shape, by inserting the descriptions of the property, and correcting or amending its language, the deceased at the same time insisted that the will, as written out and signed by him, should be his will, and should not, in any degree or in any particular, be altered by Mr. Stephen.

"According to the evidence of another witness, Mr. Peter Robb, the testator had signed the document, No. 12 of process, for the express purpose of making it effectual as a will, and it would be very strong to hold that the testator, merely by assenting to Mr. Stephen's proposal that a more formal deed should be prepared, cancelled and destroyed, or rendered of no effect, the informal deed upon which he was then relying. The Lord Ordinary's view is that the informal deed subsisted, notwithstanding the very proper proposal that a more formal and regular deed should be extended to the same effect.

"(4) It was next contended that even if the delivery to Stephen did not *per se* cancel the writ or convert it into mere instructions, still the testator, by his subsequent conduct, showed he did not intend it to receive effect.

"There may be cases where a testator, without either actual cancellation of a will, or the execution of a new deed, may be held to have destroyed a will. For example, where he directs the agent or custodier to destroy it, and some cases of this kind were referred to. The Lord Ordinary is of opinion, however, that the present case does not come up to implied cancellation or destruction. A strong case must always be made out when the document remains entire and in the lawful custody of an agent or depositary. In the present case, neither Mr. Stephen [696] nor anybody else was asked to destroy the document. The testator never had any reason to suppose that it was destroyed, and even if he had lost sight of it, or seemed to have forgotten it, this would not be enough to invalidate it as a will.

"It is true that there is evidence that the testator intended to make a new will. He had made an appointment for the very day on which he died, with Mr. Calder, for a meeting to give Mr. Calder instructions for a new will. But this is just the ordinary case of a testator intending to make a new will, or to alter his will, but not doing it. A mere proposal to make a new will will not cut down the existing one so as to let in the heir-at-law.

makes certain specific bequests, which can only be sued for by the beneficiaries themselves. The proof showed that the writing in question was not intended by the testator to be his settlement, but was handed to the agent that a will might afterwards be written out, for which, however, instructions were never given. Even in the case of a probative deed it is competent to prove that it was delivered to a person for the purpose of being destroyed, or of having another deed executed superseding it.

At advising,—

LORD PRESIDENT.—This action has been raised by the persons named as trustees in the will in question, and by Margaret Ruthven, one of the persons to whom the heritable property was bequeathed. Several defenders are called, among others the children of Thomas Robb, the principal defender, who are the persons chiefly favoured by the will, but being in pupilarity, and with an interest adverse to their father, appear as defenders and not as pursuers. I notice these things in connection with the fact that the only defender who has entered appearance is Thomas Robb, and the judgment pronounced against him is a judgment in terms of the first declaratory conclusions of the summons, and the judgment against the other defenders is necessarily one in absence. The result of that judgment is, that Thomas Robb has no interest in the will, or in the heritable succession of his father.

The first objection minuted for the defender against the action was, that the two trustees named in the deed have no title to sue. I think they have a good title. What their precise rights or powers are under the settlement is another question. But they are named in this deed, and invested with a trust, which, if they accept, they are bound to administer; and as trustees, however slight their duties may be, they have a perfectly good title. To say that they are not entitled to maintain this action is tantamount to saying that if Thomas Robb had brought the action against them in the form of a reduction they would have had no title to defend, which is absurd.

I agree with the Lord Ordinary. I think that there is not the slightest reason [697] to believe that the deed was given to Stephen, except as the will of the testator. I confess I have some difficulty in going into the evidence on that point at all, because, when a tested or holograph instrument is left by a testator, it is not necessary to prove delivery. The death of the testator is equivalent to delivery; it becomes an operative instrument by his death. No doubt an *ex facie* valid will may be challenged, and there have been cases where a probative will has been directed by the testator to be destroyed. But there is no appearance of such being the case here. In short, it is an unexceptionable will. With the effect or precise meaning of any particular clause in it we are not now concerned; and I only remark, in conclusion, that I doubt a little the propriety, or indeed competency, of the course followed by the Lord Ordinary, when he simply allowed parties a proof of their averments with such an instrument before him. I think that was not necessary, and that nothing should have been admitted to probation except the averment, on the one hand, that the writ was holograph, and on the other that it was not. But it is the less to be regretted that this proof was allowed as the conclusion at which the Lord Ordinary has arrived is quite sound, and I am therefore for adhering.

LORD DEAS.—The first question is, whether there is any title in the trustees to pursue this action. In my opinion they have a title. This will points out the various

---

"The result is that the Lord Ordinary thinks full effect must be given to the holograph will, No. 12 of process. It seems impossible to go into the questions, whether there was or was not a subsequent reconciliation between father and son. Such reconciliation, even if proved, could not *per se* operate as a revocation of the will.

"The defender, Thomas Robb, besides challenging the validity of the will, disputes its effects as a trust-conveyance to the trustees. The Lord Ordinary thinks that he has no interest in this question, and as the beneficiaries, John and Alexander Robb, Margaret Ruthven, and the chapel trustees, do not oppose the conclusions of the summons, Thomas Robb has neither right not interest to resist.

"There is little evidence as to the rents. The Lord Ordinary thinks that £25 may fairly be taken as the nett amount. The conclusions of interdict and removing are superseded by the appointment of a judicial factor. As the summons was necessary the Lord Ordinary has only given expenses from the date of lodging defences."

beneficiaries having an interest in the estate. The principal interest is given to two grandchildren, the property disposed of consisting of certain houses. Whether that interest is a liferent or not I do not require. Having disposed of these houses, the testator nominates two trustees, Peter Robb and Alexander Smith. It is clear that that nomination is equally effectual with a conveyance in a disposition of the heritable property for the purposes of the trust. That is not a technical question, but one of fair construction. When we look at the deed we see that it disposes of the whole property, and then appoints the trustees to carry the previously declared purposes into effect. Even in formal deeds prepared by men of business it is very usual, and contributes to brevity, not to name the trustees until after specifying all the purposes of the trust. That being so, I am clear that there is here no averment relevant to go to proof, except that as to whether the writing is holograph. I can only account for the interlocutor allowing a general proof on the supposition that the Lord Ordinary, seeing that some proof was necessary, and there being no discussion, did not advert to the propriety of limiting its extent. No doubt, if it had been averred that the granter had given the deed to some one with certain instructions, proof might have been allowed as to that, but there is no such averment. This deed does not contain a dispositive clause, and therefore it requires the aid of the recent Act, and affords an example of the beneficial operation of that Act, showing how an illiterate man may now write his own deed quite intelligibly and effectually.

LORD ARDMILLAN and LORD KINLOCH concurred.

The following interlocutor was pronounced:—"The Lords having advised the reclaiming note for the defender, Thomas Robb, against Lord Gifford's interlocutor, dated 28th November 1871, No. 23 of process, and heard counsel, adhere to the said interlocutor, and refuse the reclaiming note: Find the said Thomas Robb liable in additional expenses, allow an account," &c.

JAMES YOUNG, S.S.C.—D. F. BRIDGEFORD, S.S.C.—Agents.

No. 120. X. MACPHERSON, 698. 17 May 1872. 1st Div.—Lord Jerviswoode, B.

JAMES ALEXANDER ROGERSON, Pursuer.—*Lord-Adv. Young—Millar—Duncan.*
WILLIAM ROGERSON AND OTHERS, Defenders.—*Sol.-Gen. Clark—Marshall.*

Entail—Prohibition—Contraction of Debt.—A prohibition in a deed of entail "to burden the lands in whole or in part with debts or sums of money, infeftments of annualrent, or any other servitude or burden whatsoever, except as hereinafter mentioned" (the exception being liferent provisions to wives and children by way of locality), *held* to be a valid prohibition against the contraction of debt.

Entail—Provisions to Wives and Children—Locality—Entail Amendment Act (11 & 12 *Vict. c.* 36, *sec.* 43).—A deed of entail excepted from the conditions and limitations of the entail power to the institute and heirs of taillie to secure and infeft their wives and also their younger children to a certain extent in liferent provisions payable out of the rents of the estate by way of locality, the heir in possession having a power to redeem the liferent provisions to the younger children by paying to them ten years' purchase thereof. *Held* that this power was not such a limitation of the prohibition against alienation as to make the entail defective in regard to that prohibition.

This action, brought by James Alexander Rogerson, an heir of entail in possession of the estate of Wamphray, in Dumfriesshire, concluded for declarator that the deed of entail of the said estate, dated 7th January 1812, and recorded in the Register of Taillies 3d June 1824, made by the deceased Dr. John Rogerson, of Wamphray, first physician to the Emperor of all the Russias, and the deeds of entail, granted by the deceased William Rogerson, Esq., of Wamphray, in 1847 and 1855, containing by reference the same conditions, limitations, clauses irritant and resolutive, &c., were invalid and ineffectual as regards all the prohibitions against alteration of the order of succession, against sales and alienations, and against the contraction of debt therein

contained, in terms of the Act 11 & 12 Vict. c. 36, and that the pursuer was entitled to hold the said estate free from the fetters of the entail.

The said deed of entail contained, *inter alia*, the following prohibitory clause :— " That it shall not be lawful to, or in the power of, the said Dr. John Rogerson, my son, or of any of the said heirs of taillie, to sell, alienate, wadset, impignorate, or dispone the said lands and estate hereby disponed, or any part thereof, either irredeemably or under reversion, or to burden the same in whole or in part with debts or sums of money, infeftments of annualrent, or any other servitude or burden whatsoever, excepting as is hereinafter mentioned, or to do or commit any act, civil or criminal, or to grant any deed, directly or indirectly, whereby the said lands and estate, or any part thereof, may be affected, apprised, adjudged, forfeited, or become escheat, or confiscated, or in any other manner of way evicted from the said heirs of taillie, or this taillie prejudged, hurt, or changed : And it is hereby expressly provided and declared that the said lands and estate before disponed shall not be affected or burdened with, or subjected or liable to be adjudged, apprised, or any other way evicted, either in whole or in part, for or by the debts or deeds contracted or granted by the said Dr. John Rogerson, my son, or by any of the said heirs of taillie, whether before or after their succession to, or attaining possession thereof, nor for or by any act, civil or criminal, committed or done by them, or any of them, prior or posterior to their succession."

After the prohibitory, irritant, and resolutive clauses, the deed of entail contained the following exceptions and reservations :—" But excepting always and reserving from the restrictions, limitations, and irritancies before written full power and liberty to the said Dr. John Rogerson, my [699] son, and to the whole heirs of taillie succeeding to the said lands and estate, and being in the right and possession thereof for the time (except in the case of remoter heirs attaining possession, but who shall afterwards be excluded by the existence of a nearer heir as mentioned in a preceding clause), notwithstanding of the premises, to secure and infeft their lawful wives and husbands in such liferent provisions payable out of the rents of the said estate by way of locality (in lieu of terce and courtesy, which are hereby excluded), as shall not exceed one-fifth part of the rents of the said lands and estate at the time of the death of the granters of such liferent localities, after discounting the yearly interest of debts and the prior liferent provisions to wives, husbands, or younger children, if any such there then be, affecting or which may affect the rents of the said estate during the existence of such debts and prior liferent provisions to wives, husbands, and children, so that the liferent provision to a wife or husband may always extend to one-fifth part of the surplus rents during the existence of such debts or former liferent provisions, and may increase in proportion as the said debts and prior liferent provisions to wives, husbands, or younger children shall be paid off or cease, and may amount to one full fifth part of the whole rents of the said estate, so soon as the said debts and former liferent provisions shall all be paid off and cease, or become extinguished respectively : And excepting and reserving also full power and liberty to the said Dr. John Rogerson, my son, and to the whole heirs of taillie who shall succeed to the said lands and estate, and be in the right and possession thereof for the time (excepting as in the immediate preceding clause), to secure and infeft their younger children who do not succeed to the said lands and estate in liferent provisions payable out of the rents thereof by way of locality to the extent after-mentioned—viz., if there shall be only one such younger child, for a liferent provision to him or her not exceeding one-eighth part of the rents of the said estate ; if there shall be two such younger children, for a liferent provision to them, equally between them, not exceeding one-seventh part of the rents of the said estate ; and if there shall be three or more such younger children, for a liferent provision to them, equally among them, not exceeding one-sixth part of the rents of the said estate, all to be computed as at the time of the death of the granters, and after discounting in all these events of provisions to children the interests of debts and the prior liferent provisions to wives, husbands, or younger children, if any such there be, then affecting or which may affect the said rents during the existence of such debts and former liferent provisions : . . . And declaring also that it shall be in the power of the heir in possession of the said lands and estate for the time to redeem the said liferent provisions to younger children at their respective ages of twenty-one years, or at their marriages respectively, by paying to them ten years' purchase thereof, and upon payment of that price, they shall be obliged to discharge and renounce their respective liferent provisions."

It contained a further provision and declaration to the effect "that the wives, husbands, or younger children of the said Dr. John Rogerson, or any of the said heirs of taillie, shall not be infeft or secured in any yearly annuities or interests upliftable furth of the said lands and estate, or any part thereof, but only in the lands themselves, and by way of locality, for so much of the yearly rents thereof; and that the wives, husbands, and younger children shall themselves uplift and receive the rents of their locality lands; and the succeeding heirs of taillie shall not be bound or liable for payment thereof, or the fee or property of the said estate afterwards affected therewith."

The pursuer pleaded;—(1) As the said deeds of entail contain no dis-[700]-tinct prohibition laid upon the institute or heirs of entail entitled to succeed to the said estate of Wamphray and others against the contraction of debt, in terms of the Act 1685, cap. 22, the same are defective entails within the scope and meaning of the Act 11 & 12 Vict. cap. 36. (2) By the conception of the said entails, and consistently with their provisions, the pursuer and the other substitute heirs are at liberty and have power to contract debt to a large extent, for payment of which the said lands and estate and others, or part thereof, may be adjudged or sold, or otherwise evicted from the succeeding heirs of entail, contrary to the intendment and express provisions of the said Act 1685, cap. 22. (3) In consequence of the right and power thus possessed by the pursuer and the other heirs-substitute, consistently with the provisions of the entails, the same are invalid and ineffectual entails, in terms of the said last-mentioned statute, within the meaning of the said Act 11 & 12 Vict. cap. 36. (4) The said entails not being complete or perfect entails in terms of the Act 1685, cap. 22, in respect that they do not contain effectual prohibitions against, 1st, sales and alienations, and 2d, the contraction of debt, or one or other of them, the pursuer is, in virtue of the Act 11 & 12 Vict. cap. 36, entitled to decree as concluded for.*

The defenders pleaded that the entails were valid and effectual as deeds of strict entail in terms of the Act.

The Lord Ordinary, on 7th December 1871, pronounced an interlocutor sustaining the defences, and assoilzieing the defenders from the conclusions of the action.

The pursuer reclaimed.

Argued for pursuer;—On a sound construction of the prohibitive clause there is no valid prohibition against the contraction of personal debt, in respect that the subsequent clauses show that the entailer had only in view the prohibition of debts which were made real by the heirs of entail.† The entail is bad *in toto* under the Entail Amendment Act, sec. 43, because it permits a contraction of debt as already shown, and also because it does not prohibit alienations. The prohibition to alienate is recalled to the effect of enabling the heir in possession to burden the estate with localities in favour of his widow and younger children, and the heir in possession is therefore, to that extent, a fee-simple proprietor.‡ A locality [701] is a more complete

* By the Act 11 & 12 Vict. cap. 36, it is enacted (sec. 43)—"That where any tailzie shall not be valid and effectual, in terms of the said recited Act of the Scottish Parliament passed in the year 1685, in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, in consequence of defects either of the original deed of entail, or of the investiture following thereon, but shall be invalid and ineffectual as regards any one of such prohibitions, then and in that case such tailzie shall be deemed and taken, from and after the passing of this Act, to be invalid and ineffectual as regards all the prohibitions; and the estate shall be subject to the deeds and debts of the heir then in possession, and of his successors as they shall thereafter in order take under such tailzie; and no action of forfeiture shall be competent at the instance of any heir substituted in such tailzie against the heir in possession under the same by reason of any contravention of all or any of the prohibitions."

† Mackenzie *v.* Mackenzie, May 23, 1823, F. C., and 2 S. 331; Nisbet *v.* Moncreiff, June 10, 1823, F. C., and 2 S. 381; Lindsay *v.* E. Aboyne, March 2, 1842, 4 D. 843, aff. Sept. 5, 1844, 3 Bell's Ap. 254; Cathcart *v.* Cathcart, March 31, 1863, *ante*, vol. i. p. 759; Arbuthnott *v.* Arbuthnott, May 27, 1865, *ante*, vol. iii. p. 865.

‡ Hay Newton *v.* Hay Newton, July 18, 1867, *ante*, vol. v. p. 1056, aff. *ante*, vol. viii. H. L. 66.

alienation than a lease, and is clearly inconsistent with the prohibition of alienation.*

Argued for the defenders;—(1) Similar prohibitions against the contraction of debt had been sustained as valid in repeated decisions under the entail statute.† (2) A right of locality is merely an annuity out of the rents of a certain part of the estate, and is not more an alienation than the provision authorised to be made for a widow by the Aberdeen Act, which is an infeftment in an annuity out of the whole or part of the estate. Such an exception to the prohibitory clause may be conceived as to do away entirely with its effect. But that is not the case here, where there is only a limited power to make certain temporary provisions. These might be alienations in the sense of some entails, but are not necessarily so as regards all entails.

At advising,—

LORD PRESIDENT.—This action is brought by the heir of entail in possession of the estate of Wamphray against his brother, Captain W. Rogerson, and the other substitute heirs of entail, for the purpose of having it declared that the deeds of entail under which the pursuer holds the estate of Wamphray are invalid and ineffectual as regards all the prohibitions against alteration of the order of succession, against sales and alienations, and against the contraction of debt, in terms of the Act 11 & 12 Vict. c. 36, and that the pursuer is entitled to hold the estate free from the fetters of the entail. The first objection stated to the entail regards the prohibition to burden, which provides that it shall not be in the power of the institute or heirs of taillie "to sell, alienate, wadset, impignorate, or dispone the said lands and estate hereby disponed, or any part thereof, either irredeemably or under reversion, or to burden the same, in whole or in part, with debts or sums of money, infeftments of annualrent, or any other servitude or burden whatsoever, excepting as hereinafter mentioned," or to do any act whereby the lands might be affected, apprised, or in any way evicted from the heirs of taillie, or the taillie prejudged, hurt or changed. It is further provided that the estate "shall not be affected or burdened with or subjected, or liable to be adjudged, apprised, or in any other way evicted, either in whole or in part, for or by the debts or deeds contracted or granted by" the institute or any of the heirs of taillie. The question is whether the prohibition to burden the estate is in itself, and without further provision, a good prohibition, and I think it is impossible to resist giving an answer in the affirmative, looking to the state of the authorities. No doubt in the case of Aboyne the words were not exactly the same, for there there was a prohibition "to burden or affect the same in whole or in part with debts or sums of money, infeftments of annualrent, or any other servitude or burden whatever"; and it is contended that the addition of the words "or affect" makes a material difference. I cannot sustain that argument. I think that to burden or affect is the same as to burden. There are, however, other cases in which the word "burden" stands alone in the clause, such as Nisbet *v.* Moncreiff, and Adam *v.* Farquharson. Upon the authorities, therefore, there is no doubt as to the validity of the prohibition to burden.

A question of a more general kind is raised by the second objection. It is said that by reason of certain exceptions from the prohibition introduced in the deed of entail the entail was made invalid *in toto* under section 43 of the Entail Amendment Act. There is excepted, in the first place, from the restrictions, limitations, and irritancies before written, full power to the institute and heirs of entail in possession, "notwithstanding of the premises, to secure and infeft their lawful wives and husbands in such liferent provisions payable out of the [702] rents of the said estate by way of locality (in lieu of terce and courtesy, which are hereby excluded) as shall not exceed one-fifth part of the rents of the said lands and estate at the time of the death of the granters of such liferent localities" after discounting interest and previous provisions to wives and children; and, in the second place, there is excepted power "to secure and infeft younger children who do not succeed to the said lands and estate in liferent provisions, payable out of the rents thereof, by way of locality, to the extent" therein mentioned—that is, so as never to exceed one-sixth part of the rents of the estate.

---

* Sandford on Entails, p. 294; Malcolm *v.* Malcolm, Nov. 21, 1823, F. C., and 2 S. 514.

† Haggart *v.* Agnew, Dec. 21, 1820, F. C.; Lindsay *v.* E. Aboyne, *cit.*; Adam *v.* Farquharson, June 18, 1840, 2 D. 1162, aff. Sept. 5, 1844, 3 Bell's Ap. 295.

The only remarkable thing about these exceptions is that the provisions to the younger children are to be made by way of locality. It is not usual so to provide for children. This is the only peculiarity, and it is not a peculiarity of importance. If you make a settlement of a sum out of rents, or of a certain proportion of rents, then you make the heir in possession debtor annually to the person to whom the provision is to be given, and you do not make the person to whom the provision is given a liferenter. But in a locality you make that person a liferenter, and when you fix the locality you fix not the amount of the annuity, but the portion of the estate which is to belong to him in liferent. He follows the fortunes of the land, and his income may be increased or diminished by a variety of circumstances of which he takes the risk. It is said that this would be an alienation of part of the estate, and in a very limited sense it is so. It is, in the first place, not a permanent, but only a temporary alienation, for it is only a liferent. In the second place, the liferent in the case of children is terminable in another way, for it is liable to be redeemed in the option of the heir in possession by paying to the younger children a sum equal to ten years' purchase of their rents at their respective ages of twenty-one. Thus the estate itself is not ultimately impaired, and the fee remains throughout vested in the heir. He is as much fiar of the part of the estate allocated to the widow or children as he is of the rest, although his right to enjoy the rents is suspended. The question comes to be whether this exception is such a destruction of the prohibition against alienation that we can fairly say that the entail is defective in one of the prohibitions under sec. 43. The phraseology of the Act is important. It enacts that where any tailzie shall not be valid and effectual in terms of the Act 1685, "in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, in consequence of defects either of the original deed of entail or of the investiture following thereon, but shall be invalid and ineffectual as regards any one of such prohibitions, then and in that case such tailzie shall be deemed and taken, from and after the passing of this Act, to be invalid and ineffectual as regards all the prohibitions." The questions which arise upon the words of this section are (1) is this entail not valid and effectual in terms of the Act 1685 in regard to the prohibitions; and (2) is it invalid and ineffectual as regards any one of the cardinal prohibitions? Both of these questions must, I am of opinion, be answered negatively against the pursuer. This is one of the numerous class of entails in which the prohibitions are relaxed in order to enable the heir in possession to make family provisions. This occurred in many, indeed I think in most of the entails made prior to the statute, and I think this as good an entail under the statute as most deeds of entail. But further, I think this entail is not invalid and ineffectual as regards one of the cardinal prohibitions. There is a good prohibition against altering the order of succession, against alienation, against contracting debt, and it will not affect the soundness of these propositions that one or more of these prohibitions is restricted in its scope for the purpose of allowing the heir in possession to deal with the estate for the sake of making family provisions. It does not matter which of the prohibitions is relaxed for that purpose. If power is given to burden succeeding heirs for that purpose there would have been a relaxation of the prohibition against contracting debt. Here there is a relaxation of the prohibition to alienate, and the one is no more a destruction of the prohibition than the other. This construction of the statute, by which I am led to sustain the validity of the deed of entail, receives confirmation from a consideration of the mischief intended to be remedied by the Entail Amendment Act. Under the previous law, when an entail was invalid as regards one of the [703] prohibitions, the entail might be defeated by the heirs doing any act not validly prohibited. Thus, if there were no valid prohibition against contracting debt, the heir might hold the estate in fee-simple by incurring debt to a confidential person, who having attached it by adjudication reconveyed it to him free from any fetters. And so where the defect was in the prohibition against sale. But in all cases it was necessary to hit the blot, so to speak—that is to say, that the heir should avail himself of the particular defect which existed in the entail by doing the thing which was not effectually prohibited. That led to a great deal of uncertainty in titles, and it was thought, very justly, that this was an undesirable state of the law. Hence it was enacted by the statute of 1848 that, where the heir could in any way get free from the fetters of the entail, he should be liberated from them altogether, and without any circuitous proceedings. For these reasons I conclude that this is a good entail, and not liable to either of the objections stated.

LORD DEAS.—I am of the same opinion on both points. If there were any room for doubt it would be proper that we should make avizandum. But we have been occupied all yesterday and to-day in listening to an able argument on the case, which it was quite easy to follow, and I think it would be unfortunate if there should even seem to be any doubt as to what the decision ought to be.

On the first question, whether there is an effectual prohibition of debt, I cannot doubt that there is. I should be of that opinion, even if there were no authority on the point; but it has been over and over again decided, and is now quite beyond dispute. I do not say that if, within the four corners of the deed, there were grounds for concluding that the entailer did not, in that clause, use the words in the sense which at first sight they seemed to bear, we might not look to that in construing the clause. But I find nothing of that kind in this deed.

As regards the second point, I am equally of opinion that there is nothing substantial in the objection. If the argument were good for anything the same result which is contended for, as following from the relaxing clause in reference to children's provisions, would hold good with reference to the provision for widows, and that is not maintained. To those holding the opinion that an entail is a thing that should be got rid of as soon as possible the view urged may be a very expedient one, and if it were adopted it would go far to abolish most of existing entails. But it is rather a new and startling view, for which I can find no ground whatever either in the statute of 1685 or that of 1848. This is not the kind of defect contemplated by the Act of 1848 at all. The three cardinal prohibitions are the things there contemplated, and the meaning of the 43d section I hold to be, that wherever an entail is vulnerable in any of these three points, or was so before the passing of the Act, you may now get rid of it *in toto*; the limitation by which the heir in possession could take advantage of a defect in the entail in one particular way only being now removed. But, apart from that, I agree with your Lordship that there is no defect in this entail. An heir of entail may provide for widows by way of locality, and if so, he may also provide for younger children in the same way. That is not a defect in the entail. No part of the estate can be alienated in any reasonable sense of the term. There may be a suspension of possession of part of the estate, but it is temporary, equally as when a widow is in possession under her locality.

LORD ARDMILLAN.—On the first point I have no doubt. There is clearly a valid prohibition against contracting debt. I read the whole clause together in a connected form, including the words "or to do or commit any act," &c., and I have no doubt that the cases cited are conclusive for the validity of the prohibition.

The second point is new, and it was ingeniously urged. It is said that the exception of power to make provisions by way of locality is such an abatement or surrender of the prohibition to burden as to make that prohibition invalid. I think that this entail is valid under the Act 1685, notwithstanding the relaxation. Such provisions as those permitted by it are favourably viewed by the law, as is proved by the Aberdeen Act. In the manner in which the provisions [704] are permitted to be effected, although it is certainly unusual so to provide for children, I see nothing that can make a difference as to the validity of the entail. There is no ground for thinking that this reservation of power is anything more than what must happen when the Aberdeen Act is taken advantage of. Not even one who has the greatest repugnance to entails can maintain that wherever a provision can be made under the Aberdeen Act that brings the entail under the 43d section of the Rutherfurd Act, so as to be destructive of the validity of the entail.

LORD KINLOCH.—I am of the same opinion, and I should be sorry if there could be any doubt as to the decision of the Court. As regards the first point, it is foreclosed by authority. The case of Aboyne is conclusive, and this is a still stronger case. The same words are used in the leading clause in both, but here there are some explanatory words added, which, so far from taking away the effect of the previous words, confirm it. I hold, therefore, that there is here a valid prohibition against the contraction of debt.

I cannot find any ground for the other objection, considering this as an entail under the Act 1685; and I do not think it could be maintained that, apart from that Act, any objection could be urged against the entail. I think it is impossible to say that, under that Act, relaxation of the fetters to the effect of enabling the heir in possession to make a provision for widows and children takes away from the validity

of the general prohibition against alienation. It was justly remarked by your Lordship in the chair that if that were so most of the entails executed since 1685 are invalid.

But if this view be correct it is conclusive of the question regarding the Act of 1848. That statute introduced no new law as to the scope and effect of the fettering clauses. The whole intent of it was to ordain that, where any of the prohibitions were ineffectual under the Act 1685, the whole entail should be invalid. Before that Act was passed, an entail could only be got rid of circuitously, by doing a thing not effectually prohibited; and the Act was intended to put a stop to such proceedings, and bring about the true practical result, that, where any of the prohibitions are invalid, the entail is invalid as a whole. But here none of the prohibitions are invalid, and the Act of 1848 does not apply.

THE COURT adhered to the interlocutor of the Lord Ordinary.

J. C. & A. STEWART, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 121. X. MACPHERSON, 704. 17 May 1872. 2d Div.—Sheriff of Ross, Cromarty, and Sutherland, I.

SIR JAMES MATHESON, BART., Petitioner and Respondent.—*Sol.-Gen. Clark—Keir.*

CHARLES STEWART AND OTHERS, Respondents and Appellants.—*Watson—Mackintosh.*

Interdict—Possessory Judgment—Sheriff—Sale of Heritage—Boundary.—Held that a proprietor who had sold one of two contiguous estates was entitled to interdict in the Sheriff-court against the purchasers entering upon land alleged by the seller not to be included in the estate sold.

Observed, that the proper mode of clearing up the dispute was by the purchaser bringing an action of declarator.

This case arose out of a petition in the Sheriff-court of Sutherland and Caithness by Sir James Matheson, Bart., of Achany and Gruids, in the parish of Lairg and county of Sutherland, against Charles Stewart, solicitor in Inverness, George Grant Mackay, civil engineer there, and William Taylor Rule, solicitor there, joint proprietors of the lands and estate of Rosehall, situated in the parish of Creich and county of Sutherland. The petition stated "that the petitioner is heritable proprietor of the lands and barony of Gruids, and of the lands and estate of Achany adjoining thereto, being part of the said lands and barony of Gruids. That the respondents have recently acquired from the petitioner by purchase the estate of Rosehall, which is situated wholly in the parish [705] of Creich. That the said lands and estate of Rosehall, and the said lands and barony of Gruids, adjoin each other, and are, *inter alia*, bounded by a ridge or watershed of a range of hills from the west to the east and south-east. That within a bend of said ridge, from a point called Corr Rossal, to another point called Knock Corr, on the Lairg side of said ridge, there is a considerable extent of pasture land, and a loch called Loch-na-Fuarlich, all part of the said lands and barony of Gruids, and the property of the petitioner, and the same have been from time immemorial possessed by him and his predecessors and authors; and, in particular, the said pasture land and loch have been in the sole and uninterrupted possession of the petitioner for the last seven years and upwards, and the said pasture land has been occupied for the said period by the petitioner's tenant, Patrick Plenderleath Sellar, as part of the sheep farm of Gruids, let to him by the petitioner. That the respondents have wrongfully and unlawfully commenced to erect a house on the said pasture land close to said loch, and have placed a boat on the said loch for the purpose of fishing thereon for trout; and in the course of their operations have trespassed upon, cut up, and damaged the said pasture land, to the loss and injury of the petitioner and his said tenant."

The prayer of the petition was "for interdicting the respondents, their servants and others employed by them, from erecting said house, and from entering upon and

carrying on any operation on said pasture land; as also from fishing on said loch, and trespassing upon or interfering with the petitioner's sole and exclusive right to said pasture land and loch; as also to ordain the respondents to remove said boat from said loch, and to pull down the said house, so far as already built, and to remove the materials thereof; and to restore the said pasture land to the condition in which the same was before the commencement of said operations," &c.

The respondents averred that the lands in dispute had been possessed by the petitioner as part of his estate of Rosehall, which they had purchased.

The petitioner pleaded;—(1) The petitioner having sole and exclusive property in and right to the land and loch in question, as part of the lands and barony of Gruids, is entitled to interdict in terms of his petition. (2) The petitioner, by virtue of his titles to the lands and barony of Gruids and others condescended upon, and the continuous peaceable, uninterrupted, and exclusive possession of him and his predecessors in said lands and barony which has followed thereon for time immemorial, or, at all events, during the space of forty years and upwards, has the sole and exclusive property in and right to the lands condescended on, and is therefore entitled to interdict as craved. (3) The petitioner having been in possession for seven years and upwards, without interruption, in virtue of his titles, is entitled to a possessory judgment. (4) Generally, in the circumstances above set forth, and in respect the respondents have no right or title under which they can pretend right to the land and loch in question, the petitioner is entitled to perpetual interdict against them, with expenses. (5) The subjects in question having, both before and since the petitioner acquired possession thereof, or at least for the last seven years, been uniformly let as part of the estate of Gruids, in the parish of Lairg, to different tenants from those of Rosehall in the parish of Creich, the petitioner is entitled to interdict as craved.

The respondents pleaded;—(1) The present possessory action against the present proprietors and possessors of Rosehall, who acquired their title from the petitioner, is incompetent, in respect that the lands of all the three adjoining estates, including Rosehall, belonged to and were possessed during the last seven years and upwards by the same proprietor, who, [706] without a contradictor or party having an adverse interest, was entitled to apportion or use them, and did use them, indiscriminately without reference to the precise or actual boundaries of each. (2) The alleged possession by the petitioner being of a kind which cannot, in the circumstances, be legally founded on, the question of right and title cannot competently be adjudicated upon in this Court. The acts complained of having been for some time completed, and the respondents in open and undisturbed possession, interdict was too late, and an incompetent mode of redress. (5) If any possession of the subjects in dispute was had by the petitioner, which can be competently founded on as constituting a right to a possessory judgment, that possession having been in connection with and as part and pertinent of Rosehall, the respondents, and not the petitioner, are entitled to a possessory judgment.

The Sheriff-substitute (Mackenzie) pronounced this interlocutor:—"Finds that the said moor or hill pasture land in dispute forms part of the grazings let by the petitioner to his tenant, Patrick Plenderleath Sellar, conform to tack, No. 31 of process, and that the said Patrick Plenderleath Sellar has possessed the same under the petitioner as part of the sheep grazings so let to him from Whitsunday 1857 down to the date of the present action: Finds that by said tack the rights of shooting over the said sheep grazings so let, and of angling in the rivers and loch situated on said ground, were reserved to the petitioner, and that the petitioner has let the same to General Matheson, residing at Achany, who has possessed the same as shooting and fishing tenant from 1861 down to the date of the present action: Finds that the respondents in the month of June 1870 entered upon said grazing lands, placed a boat on said loch, erected a boat-house or other structure on the margin of said loch, and that they used the same, and angled on said loch: Finds that the respondents have not qualified any legal title for such proceedings, and that they have acted unlawfully: Finds that in virtue of his title, as proprietor of the lands and barony of Gruids, and of the possession by his tenants, the said Patrick Plenderleath Sellar and General Matheson, of the disputed subjects for a period of seven years prior to the proceedings by the respondents complained of, the petitioner is entitled to a possessory judgment as against the respondents: Therefore repels the defences, ordains the respondents instantly to remove both the said boat from Loch-na-Fuarlich and the said boat-house or structure from the margin of said loch, and to restore the pasture land whereon the same was erected to the

condition in which it was before the commencement of the operations complained of Interdicts, prohibits, and discharges the respondents from encroaching on said pasture land or angling in said loch in future, all as prayed for: Finds the respondents liable to the petitioner in the expenses of process; allows an account thereof," &c.

The Sheriff adhered.

The respondents appealed. At advising,—

LORD NEAVES.—In this case a sale was effected between the parties of a certain subject called Rosehall. By that sale the appellants acquired right to every bit of ground falling under that name. The bargain having been completed, it appears that the parties were not at one as to the precise subjects embraced under the name. Such differences often occur, and in order to settle them investigation is necessary. How otherwise is such a dispute to be settled? The buyer is surely not entitled to take possession of the portions of ground in question at his own hand, and in spite of the resistance of the seller? The seller is not to be coerced by the *ipse dixit* of the buyer to give what he considers has not been sold or disponed. The maxim *melior est conditio possidentis* must hold in such a case. The seller who has to give possession denies that he has ever conveyed [707] or parted with the subjects in dispute. The matter in doubt must, I think, be cleared up by a declarator, or by an action at the buyer's instance, to obtain full implement of the bargain by getting *de facto* possession of the estate he says he has acquired. I cannot think that, pending such proceedings, or so long as they are not instituted, the buyer can be permitted at his own hand to take possession of what he considers himself entitled to. The seller who was originally in possession is the party to be in the meantime preferred, and he cannot thus be ousted. I do not think this is a mere possessory question. Even if it were, the evidence led by the appellants is totally insufficient to support the case they set forth; but the question is not one that can be competently decided in a petition of this description. Sir James Matheson, in the circumstances of the case, is clearly entitled to say to the appellants, "I have a title to these disputed subjects, and I protest against and object to you taking possession of them until your title is found to be better than mine by a formal decision in a proper action."

LORD COWAN concurred.

LORD BENHOLME.—As I do not quite agree with my brother Lord Neaves in the grounds which he has assigned for his judgment, it is necessary that I should state my reasons for differing. I think that the proposed ground of judgment is too narrow, and not to me sufficiently satisfactory. I am of opinion that the question of possession is the true ground upon which to proceed. Though there is a certain conflict of evidence, I agree with the Sheriffs that Sir James Matheson's possession of the ground in question for the period of seven years prior to the sale as proprietor of the estate of Gruids, through his tenant Sellar—a tenant of part of Gruids, and of no part of Rosehall—has been fully made out. Being of that opinion on the evidence, I think that Sir James Matheson is entitled to have interdict pronounced against these appellants on the footing of a possessory judgment, and that he is fully entitled to all that he asks, considering the nature of the interference. It is unnecessary to refer to the argument advanced by the appellants that this was really only a question of right to fish in the loch. The record here is made up so as, as far as possible, to enable the parties to join issue upon the question of boundary, and not upon any such narrow ground.

As regards the result of the judgment, I concur with Lord Neaves, but I am by no means inclined to ignore the plea founded on the seven years' possession.

LORD JUSTICE-CLERK.—I concur in the proposed judgment, and I think it a reasonable solution of the dispute, but one which after all does not conclude the matter, and only determines by whom the action is to be brought to decide the ultimate right. I agree with Lord Benholme in thinking that the proof of possession which has been led before the Sheriff is of importance in this preliminary stage, but I cannot help thinking that the principle of a possessory judgment hardly arises. The benefit of a possessory judgment is only required where the title is challenged. But here both the title and the prior possession are undoubtedly with Sir James Matheson, and had been so since 1834. The real question is what was sold under the recent transaction. The prior possession may be of use in order to construe the general terms of the title, but Sir James Matheson does not require the benefit of a possessory judgment to protect him in possession until it can be shown that he has ceased to be proprietor.

I concur entirely in the views of Lord Neaves. The purchase was concluded in the

full knowledge of the disputed boundary, and the purchaser was not entitled to assume possession *via facti* until he had established his title.

THE COURT pronounced this interlocutor:—"Find in point of fact that prior to the sale of the estate of Rosehall to the appellants the respondent was and had been since 1844 in possession of the subjects in dispute: Find that in the year 1870 the appellants purchased from the respondent the estate of Rosehall: Find that prior to the purchase the appellants were informed by the respon-[708]-dent that they must satisfy themselves as to the extent of the estate, and that, before the disposition was executed, a question was raised between the seller and purchasers in regard to the subjects now in dispute: Find that the purchasers accepted the disposition without that dispute having been adjusted: Find that, in these circumstances, the appellants were not entitled at their own hand to assume possession of the disputed subjects: Therefore dismiss the appeal; affirm the judgment appealed against, and decern: Find the appellants liable in expenses, and remit," &c.

MACKENZIE, INNES, & LOGAN, W.S.—STUART & CHEYNE, W.S.—Agents.

No. 122. X. MACPHERSON, 708. 18 May 1872. Bill Chamber, 1st Div.—Lord Mackenzie, B.

THOMAS STEVEN LINDSAY (Trustee on the Sequestrated Estates of C. & A. Christie), Complainer.—*Sol.-Gen. Clark—Balfour.*

THE RIGHT HONOURABLE the EARL OF WEMYSS AND MARCH, Respondent.—*Shand—Asher.*

Landlord and Tenant—Sequestration for Rent—Interdict.—When a sequestration for rent has attached goods in the custody of a tenant which are not his property, the owner's remedy is to appear before the Sheriff and claim to have them withdrawn from the sequestration; and he is not entitled to interdict against the landlord proceeding to sell such goods in the sequestration.

Messrs. C. & A. Christie were tenants under the Earl of Wemyss of minerals at Wallyford and Inveresk. They had also a brickwork at Wallyford, and a shop or store for the sale of goods to the miners there.

On 10th February 1871 the Earl of Wemyss presented a petition to the Sheriff of Edinburgh for sequestration of their effects at Wallyford for payment of the rent or lordship due by them at Martinmas 1870, and in security of the current year's rent. The prayer of the petition was for "warrant of sequestration of the whole coal, clay, calcined blackband ironstone, &c., and other minerals, dug out from the said coal-field by the respondents, in security of a payment of the year's lordship payable in respect of the said coal or pits; and further, in security of the like sum of £1650, 1s. 2d., or such other sum as may ultimately be ascertained to be the amount of the lordships on the coals and other minerals dug out from the said coal-fields or pits, for the year subsequent to last 1870." The petition also contained a prayer for warrant to inventory in the following terms:—"*Item*, To grant warrant to the Clerk of Court, or any of his assistants, to proceed to the said colliery pits, and to take an inventory of the whole coal, clay, and other minerals dug and won from the said coal-fields or pits, either lying in the said pits, or carried to the coal-hill or pit mouth; *item*, the whole *invecta et illata* in the pits, or brought to the surface, or lying at the pit mouth or coal-hill, and report the same to your Lordship."

An inventory was taken in terms of a warrant granted on the same day; and on 3d March another inventory was taken of the goods in the shop or store in terms of a subsequent warrant.

On 22d February 1871 the Sheriff appointed a judicial manager of the colliery and effects, under the Act of Sederunt 10th July 1839, sec. 152.

On 5th April 1871 the estates of Messrs. Christie were sequestrated, and the complainer was on 17th April confirmed trustee in the sequestration. Neither Messrs. Christie nor the complainer appeared in the process of sequestration for rent.

After the lapse of some months the complainer presented this note of suspension and interdict praying that the Earl of Wemyss should be pro-[709]-hibited and interdicted from "selling, disposing of, using, or in any way interfering with" an immense number of articles included in the said inventories, which belonged to the bankrupts at the date of the sequestration, "and are now the property of the complainer, as trustee on their sequestrated estates." The articles enumerated were mainly machinery and implements used in mining operations, and the stock in trade of the Wallyford shop. The complainer stated—"There was no sequestration of the foresaid moveable property belonging to the sequestrated estate. No warrant of sequestration of the said moveable property was craved in the petition, or granted by said interlocutor." "Not only were the said moveable articles enumerated in the prayer of the note not sequestrated, but the same were not subject to hypothec for mineral rents or lordships, and in particular they were and are not subject to any hypothec for the mineral rents or lordships claimed by the noble respondent."

The complainer pleaded;—(1) The articles condescended on being the property of the complainer as trustee foresaid, and the noble respondent having intimated his intention to sell the same, the complainer is entitled to interdict as craved. (2) The foresaid articles, the property of the petitioner, not being subject to landlord's hypothec for the mineral rents claimed by the noble respondent, the complainer is entitled to the interdict sought. (3) The foresaid proceedings at the instance of the noble respondent, and the interference with the complainer's property under the same, being wrongful and illegal, and incompetent, the complainer is entitled to the interdict craved. (4) Even assuming the said articles to have been subject to hypothec for mineral rents or lordship, the complainer is entitled to interdict, in respect that the articles were not regularly or competently sequestrated within the time limited for the exercise of the landlord's right to sequestration after the term of payment or the termination of the lease.

The Lord Ordinary pronounced an interlocutor (11th March 1872) granting interim interdict "against the respondent using, for the purpose of carrying on the collieries and other works at Wallyford, the articles specified in the prayer of the note; and as regards the question, whether the respondent is entitled so to use the said articles," passing the note. *Quoad ultra* his Lordship refused the note, and reserved all questions of expenses.*

---

* "NOTE.—1. The Lord Ordinary is of opinion that the complainer, as trustee on the sequestrated estate of C. and A. Christie, has not taken the proper course to vindicate his right to the articles specified in the prayer of the petition. The grounds of his application are,—1st, that the articles were not sequestrated by the Sheriff on the petition for sequestration presented by the respondent as landlord; 2d, that these articles are not subject to the landlord's hypothec; 3d, that even if sequestrated by the Sheriff, such sequestration is illegal and invalid, in respect that it was not done within the time limited for the exercise of the landlord's right to sequestrate, and that these articles cannot be made available for payment of the year's rent falling due at Martinmas 1870; and, 4th, that the lease was terminated on 15th February 1871 by the respondent, under the powers conferred by the lease, so that no rent is due after that date.

"By the Bankruptcy Act of 1856 (sec. 119), it is enacted, that 'nothing in this Act contained shall affect the landlord's right of hypothec.' The respondent, as landlord, having, nearly two months before the mercantile sequestration, taken proceedings by a petition for sequestration to make the hypothec available for payment of the rents due to him by the Messrs. Christie, his right to carry on these proceedings, in so far as regular and proper, is not therefore affected by the complainer's act and warrant as trustee. That the sequestration is still a depending process. The Sheriff has sequestrated and granted warrant to inven-[710]-tory as craved, and has appointed a person to take charge of the sequestrated subjects, as authorised by the Act of Sederunt of 10th July 1839 (sec. 152), and two inventories have been taken and lodged in process. Nothing further can be done in that process without the warrant of the Sheriff; and by appearing in that process the complainer can state his whole objections thereto, and to the proceedings therein. He can also object to any application which may be made for a warrant to sell the effects which have been inventoried, and he can therein fully vindicate his right to these effects. As stated by Lord President M'Neill in the

[710] The complainer reclaimed, and argued;—The only articles included in the prayer for sequestration were the minerals, and therefore the other articles included in the prayer of this note were not sequestrated. Further, these articles were not subject to the landlord's hypothec for the lordship or rent payable for minerals.*

Counsel for the respondent were not called to reply.

LORD PRESIDENT.—If the complainer were well founded in the first plea that has been maintained to us by Mr. Balfour, that the goods to which this complaint has reference are not validly sequestrated, I think we should be bound to entertain this application, and to pass the note for the purpose of trying the whole question, because if the goods were not legally and effectually sequestrated they are not properly within the jurisdiction of the Sheriff at all in that process; but I do not think that can be well founded. I think the construction of the prayer of the petition for sequestration, on which it proceeds, is too critical, and [711] that the prayer fairly read applies for a sequestration of what are there called the *invecta et illata* as well as of the minerals wrought out. Being of that opinion as to the first plea, I have no further doubt about the case at all; because I think everything else that Mr. Balfour for the complainer wishes to raise may not only be competently raised before the Sheriff, but I think that is the proper tribunal in which to raise it, and that the complainer's proper remedy lies there. And while I do not doubt the jurisdiction of this Court in the matter, or the right of the Court to interfere, if they thought it necessary for the ends of justice, I still think that the Court will always be very slow to interfere with the jurisdiction properly vested in the Sheriff, where there is not only a competent but a convenient remedy open, and, as I apprehend, a much more convenient remedy than can be obtained under this application for interdict. I am therefore of opinion that the Lord Ordinary has done quite right here, and I am for adhering to his interlocutor.

The other Judges concurred.

The following interlocutor was pronounced:—"The Lords having heard counsel on the reclaiming note for the complainer against Lord Mackenzie's interlocutor of 11th

---

case of M'Kechnie *v.* the Duke of Montrose, 15 D. 626, 'the process of sequestration, though a process for securing the landlord's rights, is also to some extent a process of repetition, for in it a person may claim to have articles withdrawn from the sequestration.' The proper course for the complainer is to enter appearance in the depending sequestration process, and not unnecessarily to multiply proceedings. In so far as regards the grounds or objections above stated, the whole matter has been competently brought before the Sheriff. It is for that Judge to pronounce, in the first instance, a decision upon these objections when stated to him, and he cannot, it is thought, be prevented from proceeding in the exercise of his jurisdiction, by means of the interdict now craved by the complainer. The complainer can suffer no prejudice from following this course, because, if the Sheriff's judgment is adverse, he has his right of appeal.

"2. But although the respondent cannot be prevented from proceeding with his sequestration process, and obtaining the judgment of the Sheriff therein, he is not entitled, the Lord Ordinary is of opinion, to use any part of the articles averred to have been duly sequestrated by him in carrying on the coal-workings and other works at Wallyford. His right of hypothec confers upon him no such power. The factor, who was on his application appointed by the Sheriff in terms of the powers conferred by the Act of Sederunt of 10th July 1839, sec. 152, to take charge of the sequestrated subjects, is not entitled to use them. The Lord Ordinary has accordingly granted interim interdict, prohibiting the respondent from using the sequestrated effects for carrying on the collieries and other works which were leased by the Messrs. Christie. The respondent, in his answers, avers that the engines and other constructions erected upon the leasehold subjects by the Messrs. Christie (commonly called trade fixtures) are his property, and were improperly inventoried in the process of sequestration. The Lord Ordinary considers that the respondent will require to show very special grounds to support his claim to the property of these subjects. None such have been averred by him, and the lease appears in some respects adverse to such a claim, inasmuch as it is thereby provided, with respect to engines, apparatus, or utensils fitted up by the tenant, that he shall, at the termination of the lease, have right thereto, if he thinks proper, and shall be entitled to take the same at a valuation, but not a part merely."

* Hunter on Landlord and Tenant, ii. 359; 2 Ersk. 6, 61, 64; Tennent *v.* M'Brayne, Feb. 28, 1833, 11 S. 471.

March 1872, No. 17 of process, Adhere to the said interlocutor, and refuse the reclaiming note: Find the complainer liable in expenses since the date of the said interlocutor; allow an account to be given in, and, when lodged, remit the same to the Lord Ordinary in the Bill-Chamber, with power to his Lordship to decern for the taxed amount."

BOYD, MACDONALD, & LOWSON, S.S.C.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

No. 123. X. MACPHERSON, 711. 18 May 1872. 2d Div.—R.

LOUISA SPENCER OR FERRIER, First Party.—*Lee.*
JOHN FERRIER and JAMES FERRIER, Second Parties.—*M'Laren.*

Legacy—Vesting.—A testator by trust-disposition and settlement directed his trustees to pay to his sister A. the interest of a sum of money, and "after the death of my said sister A., or after my own death in the event of the said A. predeceasing me, that my trustees shall, as soon thereafter as my trustees shall find it convenient, pay the capital of the said sum to my nephew, B., whom failing, to the lawful issue of his body equally; and in the event of the said B. dying before the period of payment of the said sum without leaving lawful issue," the testator made a different bequest of the sum of money. A. predeceased the testator. B. survived the testator for a short time, and died before any of the testator's estate had been realised. *Held* that the legacy had vested in B. at the death of the testator, and was carried by his testament.

This special case was presented by (1) Mrs. Louisa Spencer or Ferrier, widow of William Ferrier, executrix and universal legatee of the said William Ferrier, and (2) John Ferrier and James Ferrier.

By trust-disposition and settlement the late Alexander Black disponed to Robert Duncan, residing in Brechin, brother of his deceased wife; Thomas Duncan, residing in Brechin, also brother of his deceased wife; the said William Ferrier, therein designed seaman, his nephew; William Johnston, bookseller in Brechin; and the Reverend Alexander Gardner, minister of the second charge of the parish of Brechin, his whole estate, heritable and moveable, for the purposes therein mentioned.

By the third purpose of the trust-disposition and settlement the truster directed his trustees "to retain from my estate the sum of £500 sterling, and pay over the free income or annual proceeds thereof half-yearly to or for behoof of my sister, Mrs. Ann Black or Ferrier" (mother of the said deceased William Ferrier, and of the said John Ferrier, and James Fer-[712]-rier), "during her lifetime; and after the death of my said sister, or after my own death, in the event of the said Ann Black or Ferrier predeceasing me, that my said trustees shall, as soon thereafter as my trustees shall find it convenient, pay the capital of said sum of £500 to my nephew, the said William Ferrier, whom failing, to the lawful issue of his body equally; and in the event of the said William Ferrier dying before the period of payment of said sum of £500, without leaving lawful issue," he directed his trustees to pay £200 thereof to the widow of the said William Ferrier, the first party, and the remaining £300 to the said John Ferrier and James Ferrier, the second parties to the special case, equally between them.

The second and fourth purposes contained the following clauses:—"Secondly, that my trustees shall, as soon as conveniently may be after my death, convey and make over absolutely to the said Robert Duncan, in the event of his surviving me, whom failing, in the event of his predeceasing me, to the said Thomas Duncan absolutely, in the event of his surviving me, whom failing in the event of the said Thomas Duncan also predeceasing me, to the treasurer of the Brechin Hospital Infirmary, for behoof of that institution, All and Whole the house," &c. "Fourthly, that my trustees shall make payment of whatever legacies I may bequeath by any writing under my hand, however informal, and at what time soever executed, and meantime I direct them, at the first term of Whitsunday or Martinmas happening six months after my death, to make payment of the following legacies, *videlicet.*"

Mr. Black, the truster, died on 12th December 1870. His sister, Mrs. Ann Black or Ferrier, predeceased him, having died on 14th August 1869. The truster was survived by William Ferrier, John Ferrier, and James Ferrier. The first party to the case was the widow of the said William Ferrier. William Ferrier at the time of Mr. Black's death was absent from Great Britain, being master of a vessel trading between Glasgow and the West Indies, and was in Jamaica in ill-health at the date of the truster's death. He died at sea on his voyage home on 18th May 1871.

Mr. Black's moveable estate at the time of his death amounted to £1758, 5s. 9d. These funds were sufficient for payment of the truster's debts, and of all the legacies and provisions left by his settlement. But the only funds realised by the trustees prior to 18th May, the date of William Ferrier's death, were the balance in the deceased's bank account, and the Government annuities on the deceased's life, amounting together to £199, 7s.

Mrs. Louisa Spencer or Ferrier, the second party to the case, was the sole executrix and universal legatee of the said William Ferrier, under and in virtue of his will or testament executed on 13th November 1867.

The questions of law submitted by the parties were—"(1) Whether the legacy of £500 vested in the said William Ferrier, and so is conveyed by his will to his widow, the first party? Or (2) Whether the said William Ferrier died before the period of payment of the said legacy of £500, and the direction took effect to pay £200 thereof to his widow, and the remaining £300 to the said John Ferrier and James Ferrier?"

Argued for the first party;—The legacy vested in William Ferrier at the death of the testator. The words "period of payment" referred to the contingency of the testator's being survived by his sister, and in that event the legacy would not have vested till her death.*

[713] The second parties argued that the vesting was postponed till the trustees should find it convenient to make payment of the legacy. The testator intended that the legacy should not vest at his death, but at some other time.†

At advising,—

LORD JUSTICE-CLERK.—This case, like others of the same class, must be determined by the intention of the testator, and depends upon the expressions he has used. I do not suppose that your Lordships are disposed to question what has been laid down in the authorities to which we have been referred. But this case stands entirely apart from the cases of Thorburn, Wilkie, and Howat (14 S. 485, 15 S. 430, and 8 Macph. 337), in all of which the words of the settlement excluded the construction which is maintained here. The facts are these. Black, the testator, died on 12th December 1870, his sister having predeceased him. He left sufficient moveable estate to pay all his debts, and also the legacy of £500 to his nephew, William Ferrier. William Ferrier died on 10th May thereafter. He had been appointed one of the trustees under Mr. Black's settlement, and had expressed his willingness to act. The question is whether the provision to William Ferrier under the third head of the settlement did or did not vest at the death of the testator; and that depends on the construction of the third purpose of the settlement and the meaning of the words "period of payment" used in the devolution over.

The case differs from the cases quoted in this, that the provision in that purpose does not relate to any general period of division, nor was any sale or other thing directed to be done by the trustees before the funds were to be applied to that purpose. The clause relates to the legacy of £500 alone. The distribution of the rest of the estate is to be regulated by the fourth purpose of the trust, and for which a specific term of payment is provided. The true meaning of the words used in the devolution over in the third purpose may be gathered by attending to the phraseology of the second purpose. In that clause the same words occur, "as soon as conveniently may be," and there is also a devolution over. But in that case the latter only takes effect if the primary legatee predecease the testator. The words in the third purpose are only different in as far as, instead of the condition being predecease of the testator, it is

* Howat's Trustees, Dec. 17, 1869, *ante*, vol. viii. 337; Thorburn *v.* Thorburn, Feb. 16, 1836, 14 S. 485.

† Earl of Stair *v.* Stair's Trustees, June 19, 1827, 2 W. and S. 614; Wilkie *v.* Wilkie, Jan. 27, 1837, 15 S. 430; Campbell *v.* Campbell, Feb. 17, 1743, 1 Paton, 343.

predecease of the "foresaid period of payment." The reason of the variation seems plain enough. It had no reference to the words "as soon as they conveniently can," for this third purpose begins by directing the trustees to apply the interest of a fund presumed to be in their hands, and realised for the benefit of the testator's sister during her life, and then the fee is provided to William Ferrier. What was mainly on the testator's mind was the provision to his sister. But as she might predecease, the period when payment could be made was alternative, at his death or at hers. This alone, I think, led to the different phraseology of the clause. What the testator contemplated by "the event of the said William Ferrier dying before the period of payment" was the survivance of the testator in the one case, or his sister, if she survived him, in the other. In the last event the period of payment might have been postponed till after the death of the testator. But as the sister predeceased the testator there was no reason for the trustees to delay payment. From the state of the funds in their power they had the means of payment available. Therefore, the period of payment being the death of the testator, the legacy vested in William Ferrier.

LORD COWAN.—The question of vesting raised in this case must be determined by the intention of parties, to be gathered from the terms of his deed of settlement. I take the same view as your Lordship has done. The provision must be held to have vested at the death of the testator, by whom the liferentrix was [714] predeceased. The words "as soon thereafter as my trustees shall find it convenient" were obviously intended to give a facility of acting to his trustees, so that they might not be embarrassed by being called upon to pay before the funds came into their hands. The words are used in the sense of giving to the trustees a sound discretion as to the time of payment. They cannot be held to have been intended to suspend the term of vesting. When you consider that there were two periods of payment, one the time of the testator's death, and the other the death of his sister, the liferentrix, but by whom he was predeceased, it clears the case of all difficulty. "As soon as convenient *thereafter*," *i.e.* after whichever of the terms of payment should first occur. And this construction is in accordance with the effect and meaning of the very same phraseology in the second purpose of the deed.

LORD BENHOLME.—It appears to me not to be the tendency of a Court of law to hold that the vesting of rights should depend upon mere accident. There were two periods of payment here, either at the testator's own death or at his sister's. The alternative which actually took place was his own death, and there was no reason why payment should not have been made at his own death.

The case of Lord Stair introduced a change into Scotch practice, viz., to hold that what a testator ordered to be done should be held to have been done within a reasonable time from the time of his death. Twelve months at first were allowed to elapse before the truster's will was held to be executed in arranging the interests of the beneficiaries. But, if I mistake not, the English Courts have departed from the rule laid down in that case, by holding that no such period should be supposed to elapse.

On the whole, I agree with the opinions of your Lordships.

LORD NEAVES.—I concur, and in doing so it is not necessary to discuss the cases which have been referred to, as the present is wholly different from those cases. If a fund is to be liferented by one person before it be finally taken by another, the fee may possibly be suspended, but here the bequest is made dependent upon two events, viz., the death of the testator, his sister predeceasing him, or his own death first, and then the subsequent decease of the sister. In the event of these happening in the order last mentioned, the trustees are instructed, as soon thereafter as they shall find it convenient, to pay the sum mentioned. I cannot think that any person's right to payment of a legacy, supposing him to have survived the testator, will be made dependent upon any phrase so vague and indefinite as this. The right, it is said, is not to vest till it is convenient for the trustees to pay the legatee. Such a construction, indeed, is wholly different from the direction in the fourth purpose of the deed, where the trustees are directed to pay at the first term occurring six months after the testator's death. It is not contended that that direction interferes with vesting *a morte testatoris*. How can it reasonably be maintained that this provision in the third purpose does so? This is the earlier provision of the two, and is it to be postponed to the later one? There is nothing here, in my opinion, so stringent as to support such a view as has been contended for.

THE COURT pronounced this interlocutor:—"Find that the legacy of £500 vested

in William Ferrier, and so is conveyed by his will to his widow, the first party, and find the second parties liable in expenses to the first party, and decern, and remit to the Auditor," &c.

MACKENZIE & KERMACK, W.S.—HENRY BUCHAN, S.S.C.—Agents.

[*Commented upon*, Scott *v.* Scott's Executrix, 1877, 4 R. 384.]

No. 124. X. MACPHERSON, 715. 21 May 1872. 1st Div.—Lord Mackenzie, B.

ACCOUNTANT OF COURT, Reporter.

JOHN GILRAY (*Curator Bonis* to William Robertson), Compearer and Reclaimer.—*Black.*

MRS. JANE HARDIE OR ROBERTSON AND OTHERS, Compearers.—*Lee.*

Judicial Factor—Curator Bonis—Trust—Remuneration—12 & 13 *Vict. c.* 51.—A person who carried on a small business as an ironfounder having become insane, his *curator bonis* carried on the business on his responsibility for the benefit of the ward and of his family. The Court, on a report by the Accountant of Court, authorised him to fix the commission due to the curator for his trouble in managing the business up to the termination of the last account, but refused to direct the Accountant to fix the rate of remuneration for the future, or to sanction in any way the continuance of the business.

John Gilray was appointed *curator bonis* to William Robertson, ironfounder, Edinburgh, a lunatic, on the 2d April 1867, on the petition of his wife and brother. The assets of the ward's estate at the beginning of the factory consisted chiefly of the stock and effects of a going foundry, and of such profits as could be made from the business. At the audit of the curator's first account, which closed at 30th June 1868, the Accountant allowed the curator £100 as commission for the period prior to that date, and warned him that it would be necessary to give up carrying on the foundry business. In the following year the Accountant again warned the curator (who had intimated his intention of carrying on the business, and had given various reasons for it) of his responsibility, and reserved the question of commission, allowing the sum of £10 for making out the factorial account. At the audit of the accounts for the year ending 30th June 1871 the Accountant proposed to reserve the question of commission as formerly, but the curator remonstrated in the following terms:—

"Commission, &c.—The factor again respectfully urges that the amount of commission due to him should now be fixed; and in explanation of his views, begs to refer to his report of 21st November 1870. Further, in compliance with the Accountant's verbal request, he has endeavoured to estimate the income which the ward's estate will yield if the foundry were given up, and the plant and effects realised, as follows:—

"The amount of the funds as in Appendix II. of the factor's account is	£1243 4 10½
"Deduct the factor's claims for commission, say	243 4 10½
"Free funds	£1000 0 0

"This sum, invested at say 4 per cent., will yield annually £40; but as the maintenance of the ward and family amounts to about £115 yearly, the result would be that, in less than ten years, the whole estate will be expended. It must be kept in mind also that the above sum of £1243, 4s. 10½d. includes the values of the household furniture, and of the life policies, which yield no return, as also the foundry plant, valued at market prices, but it cannot be expected that these prices will be realised if the effects are brought to a sale."

The results of the factor's management from 2d April 1867 to 30th June 1871 were reported by the Accountant to have been the following:—

"1. That the nett profits from the foundry have amounted to £685, 8s. 7d., subject to the factor's commission, or any allowance that may be made to him for management.

[716] "2. That the receipts and payments disconnected from the foundry have been—Receipts £267 6 7

"Payments, viz.:—

"Maintenance of ward and family	£588 0 5	
"Interest on heritable bond	216 18 5	
"Miscellaneous payments	138 0 4	
"Repairs and taxes	17 17 7	
		960 16 9
"Deficiency		£693 10 1

"Which has been met by the profits from the foundry.

"3. What the estimated amount of the estate at 2d April 1867 was £1317 0 0

"While the amount of the free assets at 30th June 1871 was . . 1243 0 0

"Loss. £74 0 0

"Exclusive of commission or allowance to the factor since 30th June 1868.

"This small loss has arisen from the allowance to the ward and family having exceeded the free income of his estate in the earlier years of the factory. In consequence of the improvement in the business, however, the clear profit for the past year was £432 18 3

"Whilst the maintenance of the ward and family cost only . . 114 18 9

"Leaving a surplus for year ending 30th June 1871 of . . . £317 19 6

"These results instruct that the past management has been beneficial to the ward; and that, if the foundry business be abandoned, and the whole plant and assets realised, there will be a very small surplus available for the future support of the ward,—quite inadequate to maintain him even in the very moderate style in which he has been kept for some years. And it is equally clear that the management of an extensive foundry by a factor, as in this case, personally acquainted with the business, and taking full charge of it (thus saving the employment of a manager), must occupy a great deal of time and thought on the part of the factor, and involves him in heavy pecuniary responsibilities.

"In the circumstances, the Accountant would have had no hesitation in allowing the factor credit for a moderate allowance for management, but as that would imply a direct sanction and approval of the factor continuing to carry on a trade involving considerable risk, which may possibly terminate in the loss of the ward's whole funds, the Accountant does not feel himself warranted in awarding any commission to the factor without authority from the Court.

"The circumstances are therefore reported to the Lord Ordinary for instructions."

The Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having heard the counsel for the *curator bonis* on the report by the Accountant of Court, No. 12 of process, refuses *in hoc statu* the motion of the *curator bonis*, that Accountant be ordained to fix the commission to be allowed to the *curator bonis*."

The *curator bonis* reclaimed, and argued;—It was not incompetent nor inconsistent with precedent for the Court to allow a factor to take credit for sums fairly expended in carrying on a going business for the evident benefit of his ward, although it was true that the Court might refuse *ab* [717] *ante* to authorise him to hazard the ward's funds in trade.* Here what was asked was not authority to carry on the business, which the *curator bonis* elected to do in the full knowledge of the personal liability he was incurring, but merely that the Accountant should be authorised to fix the remuneration due to the curator for his trouble in carrying on the business, which in time past had been done with results very clearly beneficial to the ward and his family.

* Philip, Nov. 22, 1827, 6 S. 103; Hamilton *v.* Stewart, July 11, 1834, 12 S. 924.

Lee, for the wife and children of the ward, stated that they concurred in the application. The children were of the ages of 17, 16, and 14 years respectively, the eldest, a son, being an apprentice in the foundry, and looking forward to taking up the business. There was no strict rule for immediate realisation.* The business here was a small foundry, not so speculative a concern as a farm, which a *curator bonis* is always allowed to carry on; or as bank shares, the subject in question in Baird's case.

LORD PRESIDENT.—It is impossible not to feel sympathy with this *curator bonis*, who has boldly and generously carried on the business on his own responsibility, and advantageously for the ward and his family. But we must take care not to be led away by such sympathy into doing what may become a very serious precedent in the administration of the law. We cannot sanction his carrying on the manufactory with the funds of the estate under his charge; and we must not do what would imply approval of his having done so. But we have information from the Accountant of Court that since 30th June 1868 the business has been carried on by the *curator bonis* with a profit, whereby the family has been enabled to live, and the lunatic has been supported in an asylum. I am of opinion that it is not inconsistent with our duty, in superintending his actings, to hold a *curator bonis* entitled to remuneration for what has been done in byegone years, in respect that the result has been so far satisfactory. But we cannot direct the Accountant to fix the rate of commission for the future. We shall do nothing inconsistent, either with principle or with the practice of this Court, in directing the rate of commission to be fixed for the period from 30th June 1868 to 30th June 1871.

The other Judges concurred.

This interlocutor was pronounced:—"Recall the interlocutor of 8th March 1872, and remit to the Lord Ordinary to direct the Accountant to fix the commission to be allowed to the curator for the year from 30th June 1868 to 30th June 1871."

D. CURROR, S.S.C.—H. W. CORNILLON, S.S.C.—Agents.

No. 125. X. MACPHERSON, 717. 21 May 1872. 2d Div.—Sheriff of Stirlingshire, I.

JAMES CALDWELL, Pursuer and Appellant.—*Sol.-Gen. Clark—Asher—Moncreiff.*

THOMAS MONRO, Defender and Respondent.—*Shand—Maclean.*

Reparation—Slander—Innuendo—Relevancy.—In an action of damages for slander the pursuer averred that the defender, the minister of the parish of C., had—in commenting from the pulpit upon an anonymous letter which had appeared in a newspaper, bearing the signature "a member of C. parish kirk-session"—falsely and calumniously stated that it "bears internal evidence that it is a forgery, and that the editor has been imposed upon by a so-called member of session," meaning thereby, and intending to convey, and by which he did convey to the minds of the congregation, or some of them, that the pursuer was the anonymous writer, and the so-called "member of session" to whom he was referring as having been guilty of forgery and of imposition, and [718] that the pursuer was a person guilty of imposition and who had practised deceit, or who had been guilty of moral misconduct. It appeared from the pursuer's statement that on the day after that of the alleged libel the defender, at the pursuer's request, had by letter disclaimed any reference to the pursuer in the statement complained of. *Held* that the pursuer had not set forth a relevant case.

James Caldwell, residing at Kincaidfield House, Milton of Campsie, raised this action in the Sheriff Court of Stirlingshire against the Rev. Dr. Thomas Monro, minister of the parish of Campsie, to recover damages for alleged slander by the defender.

The pursuer averred that in February 1871 the members of the kirk-session of

---

* Accountant of Court *v.* Baird, June 29, 1858, 20 D. 1176, 1184 (*per* Lord Deas).

Campsie having agreed that a petition against patronage should be presented to Parliament from the congregation, a difference of opinion arose as to which of two forms of petition should be adopted. Mr. William Stevenson, a member of the kirk-session, being desirous of sending a letter to the *Glasgow Herald* newspaper, requested the assistance of the pursuer in composing it. "The pursuer, in drafting the letter, made no attempt to conceal his composition. The facts contained in the letter were all furnished to the pursuer by Mr. Stevenson, and the letter faithfully expressed Mr. Stevenson's views and wishes. The letter so drafted was left by the pursuer with Mr. Stevenson, and Mr. Stevenson instructed his daughter to make a copy of the draft, and the copy she made, duly signed by her father 'A Member of Campsie Parish Kirk-session,' and, in addition, authenticated with his own signature, was, along with a note to the editor, also signed by Mr. Stevenson, duly forwarded to the editor of the *Glasgow Herald* for insertion in that newspaper."

"On Sabbath, 5th March 1871, and from the pulpit of Campsie parish church, during the hours of divine worship, and immediately before the blessing was pronounced, and after reading a statement to the congregation purporting to be from the members of the kirk-session present at the meeting of 27th February 1871, in the presence and hearing of the congregation, the defender did, rashly and recklessly, falsely, calumniously, and maliciously, and without probable cause, or at least falsely and calumniously, state, with reference to the foresaid letter, subscribed 'A Member of Campsie Parish Kirk-session,' *inter alia*, that 'one would have thought that this tempest in a teapot would have been allowed to drop, but I observed from the newspapers that some one purporting to be a member of session had written an anonymous letter to the editor, which I have no doubt is a forgery. I have not had time to look at it, but I do not think it will require any notice from me, as it bears internal evidence that it is a forgery, and that the editor has been imposed upon by a so-called member of session,' or did use and utter words to that or a similar effect, and did use and utter all or one or other of these expressions, or words of similar import, meaning, or effect, falsely, calumniously, maliciously, and without probable cause, or at least falsely and calumniously, and rashly and recklessly, meaning thereby and intending to convey, and by which he did convey, to the minds of the said congregation, or of the greater part, or one or more of them, that the pursuer was the 'anonymous' writer and the so-called 'member of session' to whom he was referring as having been guilty of forgery and of imposition, or one or other of them, or did use or utter expressions, in allusion and with application to the pursuer, to the above or the like effect, or at least in allusion and application to a person who was considered by the said congregation, or one or other of them, to be the pursuer, and that the pursuer was a person guilty of imposition, and who had practised deceit, or was aiding and abetting in such imposition and deceit, or who had been guilty of moral misconduct. Counter statement denied, and reference made to [719] pursuer's statement of facts." (Cond. 17) "It was known in the parish and to the congregation that the said letter of 4th March was pursuer's composition, and the pursuer was the only person to whom the said congregation considered that the foresaid false, calumnious, and malicious, or false and calumnious, expressions could or did apply."

(Cond. 22) "The defender, after having been duly informed, and well knowing that the pursuer was believed by a great many persons in the parish to be the 'anonymous' writer and 'so-called member of session' to whom he was referring in said false, calumnious, and malicious, or at least false and calumnious expressions, as being guilty of the said crimes of forgery and of imposition, and without adopting any means of verification of the accuracy of his said accusations, did, on or about 8th March 1871, write and deliver, or cause to be written and delivered, to the editor of the said *Glasgow Daily Herald* newspaper, a letter which was published in the publication of the *Glasgow Daily Herald* newspaper of the following date:—'Campsie Parish Church—The Anti-Patronage Movement—Manse of Campsie, 8th March 1871.—Sir,—Although our small parochial doings in Campsie in the anti-patronage movement have already received enough, and perhaps more than enough, of notice in your columns, I must yet ask you to insert a few sentences in reference to the anonymous letter which appeared in your print of Saturday. From its internal evidence I infer that it cannot be what it pretends to be—the production of 'A Member of the Campsie Parish Kirk-session':—1*st*, Because, on the preceding Monday, at a meeting of our session, I was unanimously requested by the elders then present to intimate to the congregation on the following

Sabbath that we had considered the question of anti-patronage, and had found that we were all virtually of the same mind in this matter, and that any apparent collisions which had taken place had arisen from mistake and misapprehension. All our elders except two were present at that meeting; and I am quite sure that neither of these two gentlemen is capable of writing a letter in any such spirit as that of the letter now in question. I cannot believe that any of the other elders could violate at once good taste and good feeling by ignoring the honourable understanding obviously implied in their request made to me. 2*d*, Because I particularly explained to the elders that I did not receive their letter until after the messenger by whom I sent a communication to my assistant in Campsie by the last train had left my house in Glasgow; and yet this pretended elder asserts that I could have sent a countermand about the petition by the last train. In common fairness, could an elder write thus about his minister? I think not. 3*d*, Because I specially mentioned to the elders that when the colporteur wrote me about the unseemly scene in church, told me that he had been asked to take both petitions about the parish for signature, and requested instructions from me, I immediately wrote to him to do as he had been asked to do, telling him that I would be equally well pleased by the signing either of the one petition or the other. Could an elder, knowing all this, fairly say that I had 'pushed my petition through the parish'? Surely not." . . . (Cond. 23) "The defender intended, by the publication of said letter of 8th March, to convey, and the said letter itself *de facto* meant and conveyed, falsely, calumniously, and maliciously, or at least falsely and calumniously, to the minds of the readers, that the foresaid letter, subscribed 'A Member of Campsie Parish Kirk-session,' was not genuine, and that the crime of forgery and deceit, or other moral misconduct, had been committed; and the said defender intended to convey, falsely, calumniously, and maliciously, and without probable cause, or falsely and calumniously, and rashly and recklessly, and by the [720] publication of said letter there was so conveyed, to the minds of the public, or at least to the minds of a considerable number of them, and to the minds of the before-named persons, or one or more of them, that the pursuer was the person who had committed the said crime, and who had been guilty of imposition and of practising deceit, or aiding and abetting in such imposition and deceit, or other moral misconduct, in connection with said letter by a member of the kirk-session." The pursuer referred to certain letters which passed between him and the defender, which are quoted in the opinions of the Judges.

The pursuer pleaded, *inter alia*;—(2) The defender having used and uttered and published the foresaid false and slanderous expressions rashly and recklessly, and without adopting any means of ascertaining the veracity thereof, and the general impression and belief having been thereby created in the minds of the congregation and of the public that the pursuer was the party who had committed, or who publicly and from the pulpit had been accused of having committed, the said crimes or crime, or practised deceit or other moral misconduct, or aided and abetted in imposition, deceit, or other moral misconduct, the pursuer is entitled to redress, and to have his character cleared of the imputation cast upon it by the defender's wrongful act, though the defender may not have intended the said expressions to apply to the pursuer. (4) The defender having caused to be published his said letter of 8th March, after being informed that the pursuer was considered as the party to whom said false and slanderous accusations were being applied and did apply, and the defender having, rashly and recklessly, publicly repeated the before-mentioned charges, the defender is responsible for the consequences of the congregation and the public having applied to the pursuer the charges and accusations made from the pulpit and in the said letter, even though the defender may not have intended said charges to apply to him.

The defender pleaded, *inter alia*;—(1) The summons and condescendence, both in respect to the statement from the pulpit and the defender's letter to the *Glasgow Herald*, both libelled, and generally, are irrelevant to infer the conclusions against the defender. (2) The defender's statement from the pulpit was, in the circumstances, privileged; and not having been made maliciously or without probable cause, the defender is entitled to absolvitor. (3) The defender's statements afford no ground of action, the defender not having meant thereby, and the statements themselves not implying, any of the imputations upon the pursuer now complained of. (4) The defender's statements not having contained nor implied any personal reference to the pursuer, and the defender not being responsible for any belief entertained by third parties as to the pursuer being the author of the anonymous letter published on 4th

March 1871, the pursuer is entitled to absolvitor. (5) The defender having been called on by the pursuer to disavow, and having sufficiently disavowed, any imputation upon the pursuer, is entitled to absolvitor. This plea was founded on the letters of 6th March quoted at p. 722.

The Sheriff-substitute (Sconce) pronounced this interlocutor:—"Having considered the summons, closed record, productions, and whole cause, and having heard the pursuer and the defender's procurator thereon, and advised the same, referring to the annexed note, Finds that the pursuer has not relevantly alleged; and therefore sustains the defences, and assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses," &c.

The Sheriff (Blackburn) adhered. The pursuer appealed.

Argued for the pursuer;—Knowing that the pursuer had taken an interest in, and had written upon the patronage question, the congrega-[721]-tion of Campsie parish church at once applied the expressions used by the defender in the pulpit to the pursuer. It was implied that the person who wrote the letter must have imposed upon the editor of the *Herald*. The words used on 5th March were in themselves actionable if spoken of an individual, and although the defender did not mention the pursuer's name, the pursuer was entitled to a proof of his averment that the defender alluded to him. Moreover, even although the defender might not have intended to refer to the pursuer, still, as he had used actionable words, and the public held them to apply to the pursuer, he was liable in damages. With regard to the letter to the *Herald* of 8th March, when the defender wrote it he knew that the public would think that he was alluding to the pursuer, and so he could not plead innocence of intention.*

Argued for the defender;—The words used on 5th March were not in themselves libellous, in respect that they not only did not name any one in particular, but did not even point to any one by necessary implication. The defender's remarks were perfectly general, and could be stretched no further than that he thought, from internal evidence, that the letter was not genuine; and the defender could not be held responsible because some of the public chose to think that he was alluding to the pursuer, when in point of fact he was not.†

LORD BENHOLME.—This is an action of damages on account of alleged slander, brought by a parishioner against his parish minister,—the pursuer being Mr. James Caldwell, Kincaidfield House, Milton of Campsie, and the defender, the Rev. Dr. Monro, the minister of the parish of Campsie. The slander is said to have been committed first by something said from the pulpit,—an oral slander,—and this was followed in the course of a few days by a letter to the newspapers. The circumstances of the case are these:—There had been some excitement in this parish on the subject of patronage, or rather anti-patronage views, but the parties concerned were not quite agreed as to what they would substitute in the place of patronage. Especially they were not agreed as to the persons to whom the privilege of electing the clergyman should be committed, and, as generally happens when there is but a small difference between the parties, the zeal on each side was very considerable, and it had found its way into the kirk-session. Now, without stating some previous disagreements which had taken place, I may mention that on Monday, 27th February, there was a meeting of the kirk-session, at which they seem all to have come to one. They seemed to have authorised, indeed, they did authorise, the minister, who had brought up a statement of a conciliatory kind, something that would suit the views of both parties, to make a statement from the pulpit; and I think it right that your Lordships should observe what is said on that subject by the pursuer himself. In Cond. 13 he says,—"On Monday, 27th February 1871, the whole matter was brought up at a meeting of Campsie parish kirk-session, over which the defender presided. At that meeting it was arranged that a statement which the defender then drew out should be read to the congregation the following Sabbath." Here, then, was a concord between them; and the parish minister was authorised to read a written statement

* Smith *v.* Gentle, Jan. 31, 1844, 6 D. 565; Reid *v.* Outram, Feb. 28, 1852, 14 D. 577; Kennedy *v.* Baillie, Dec. 5, 1855, 18 D. 138; Le Fance *v.* Malcomson, June 27, 1848, 1 Clark and Finnelly (H. of L.), p. 637, and cases there cited; Starkie on Libel, pp. 49 and 80.

† Craig *v.* Hunter, June 29, 1809, F. C.; Torrance *v.* Weddel, Dec. 12, 1868, *ante*, vol. vii. p. 243; Wotherspoon *v.* Gray, Nov. 10, 1863, *ante*, vol. ii. p. 38.

which he had drawn up as suiting the views of all parties. On the Saturday following,—that is to say, the day before the minister was to make the statement,—there appeared a letter addressed to the editor of the *Glasgow Herald*, [722] in which there was a pretty long detail of the differences between the parties; but the most remarkable part of it was this, that whilst it set out, in somewhat severe terms, the dealings of the clergyman and the actings of the kirk-session, it took no notice whatever of the agreement that they had come to on the previous Monday, in terms of which the minister was authorised to make the statement I have mentioned. On the Sunday the minister made the statement that had been agreed upon, but he also thought it right and proper to express his surprise that such a letter had been written, and apparently signed by a member of the kirk-session,—a letter which entirely ignored the agreement to which the kirk-session had come, and which seemed to fly in the very face of the statement which he had been authorised to make with reference to the agreement of parties on the subject. Accordingly, after he had read his statement, he on this occasion made the statement which is the first article of the libel. The letter was subscribed "A Member of Campsie Kirk-session," and what the clergyman said was that "one would have thought that this tempest in a teapot would have been allowed to drop, but I observe from the newspapers that some one purporting to be a member of session had written an anonymous letter to the editor, which I have no doubt is a forgery. I have not had time to look at it, but I do not think it will require any notice from me, as it bears internal evidence that it is a forgery, and that the editor has been imposed upon by a so-called member of session." These are the words, and they are acknowledged to be substantially correct. I think it is not very much to be wondered at that the clergyman should conclude that, although this letter purported to be signed by a member of kirk-session, some other party had taken upon him to assume that character, inasmuch as it seemed to betray a most complete ignorance of what had been done in the session on the Monday previous,—of the agreement that had then been come to, and of the authority granted to the parish clergyman to make this conciliatory statement. Accordingly, he says he thinks it is a forgery. Then on the following day, Monday, 6th March, the pursuer writes the following letter:—"Kincaidfield House, Milton of Campsie, 6th March 1871. Revd. and dear Doctor,—With reference to the extraordinary charges of the crimes of forgery and of imposition made by you in church yesterday, against some person whose name you did not mention, I learn that some of the congregation understood that in making these charges you were alluding to me. Why any of the congregation should have thought that such a wicked allusion applied to me I know not. So far as I am concerned I never dreamt of applying your observations to myself. I make it a point never to send a letter to the editor of a newspaper without publishing my name in full or my initials; and when I send, as you yourself have done, any notice to appear as a paragraph under the news column, I always admit to any one inquiring of me that I am the author, a course which, if your memory serves you, you will recollect you have not always done. I believe that the charges of the crimes of forgery and of imposition made by you in church were made rashly and recklessly, and without the least inquiry at the members of session. As, therefore, you have made such serious charges when you had no right to make them, and as many of the congregation consider that I am the party you refer to, I think that, as a member of the church I am entitled to ask of you as a Christian minister to write me saying that you had no intention whatever of applying the charges to me, nor of leading others to suppose that I was the party referred to as having committed the crimes of forgery and of imposition. The bearer will wait for an answer. I must, in any event, have an answer within the next twenty-four hours.—Yours," &c. That was a straightforward letter, and it received a very straightforward answer. The bearer was to wait for an answer, and accordingly the answer was given on the same day:—"Manse of Campsie, 6th March 1871. Dear Sir,—In reply to your long note of this morning I have only time to say that neither you nor any one else was in my thoughts when I made the observations to which you allude, because I knew nothing about the anonymous letter in the *Herald* except what its internal evidence implies.—Yours," &c. Perhaps I ought to have mentioned, as a matter of fact with regard to the letter in the *Glasgow Herald*, that it was composed by the pursuer, as he says, and as probably was the case, by the facts [723] being supplied to him by a member of the kirk-session; but the composition of the letter was his own, and hence it would appear there was a likeness in the style of the letter

with that of certain other letters that had appeared in the same newspaper, and which were the writing of the pursuer, although to them he did not append his name. Now, one would think that after this very distinct statement on the part of the minister, that he had no intention whatever of alluding either to the pursuer or to any other individual, the pursuer might have rested satisfied; but that statement from the pulpit, which was merely of a negative kind, stating that that letter surely could not have been written by a member of the kirk-session, is the utterance which forms the first libel.

The second libel is a letter which was written to the newspapers by the minister, in which he gives his reasons, and I think they were exceedingly sensible reasons, for thinking that this letter could never have been written by a member of the kirk-session, in respect that it entirely ignored the agreement that had been come to, which the minister was authorised to announce from the pulpit, and also that it gave an account of some previous circumstances which showed an utter ignorance of the real facts, and which consequently led him to think that no member of the kirk-session could have written the letter. Now, that is the second libel complained of; and out of this trumpery case—for such I must call it—two questions appear to me to arise. In the first place, are these alleged libels really libellous? It is said that there is a charge of forgery here; and a charge of forgery, if seriously made, is certainly a very important and a very grave and blameable charge to make against any individual. But it is very plain that the substance of the charge here is merely this, that the letter was not written by any member of the kirk-session. There is not the slightest hint as to the person who might have written it, for of that the doctor was profoundly ignorant. When he went into the pulpit that morning he had not the most distant idea who the individual was; and far less had he any intention of marking any individual person, in the general notice he took of the letter, when he said that it could not have been written by a member of kirk-session, from its internal evidence,—that is, from the contents of the letter itself. Now, a charge of forgery this certainly is not; and I think the most that can be made of it is a charge of a certain deception,—that the writer of that letter, whoever he was, had assumed to himself a designation to which he was not entitled. It was not a mere *nom de plume*; it was not a mere fictitious name, which certainly would have been very innocent. It was not the name of any individual, which might have been grave enough; but it was the name of an office-bearer, and it appeared that the man who wrote that letter either was an office-bearer or wished it to appear that he was an office-bearer in the church. The doctor thought the last of these was the case,—that the man who had written the letter had wished to assume the authority and to take the credit of being a member of the kirk-session; and that is the charge here. Whether that is a libel or not is hardly a question that arises in the case in connection with the pursuer. If the doctor had made that charge with reference to any individual I think it might have been held to have represented him as having imposed upon the public, or imposed upon the editor, by assuming a false designation; but that would be the outside of it. Upon that point of the case, therefore, I do not think it necessary to say much, because I think the real strength of the defender's case consists in this, that in all he said from the pulpit, and still more in what he said in his letter, there is not the slightest indication that he pointed at, or had in his mind, any individual whatever. Nor do any of the surrounding circumstances, as they appear to us, carry along with them the presumption that the doctor had such a knowledge or such an intention on the subject. It does not appear that the doctor had the least idea who had composed the letter. If he had had any idea of that kind it might then have been suggested that he had attributed the responsibility of the letter, written as it was by the pursuer, to the pursuer as a whole; but he had no such idea whatever. He was entirely in the dark; and he never was enlightened by the pursuer, who chose to keep himself, and his share in the affair, entirely secret. Now, the main circumstance, if it be a circumstance at all, to aid the pursuer's libel in this [724] case, is stated to be this, that he had written several letters in the *Glasgow Herald* on the subject of patronage; that in these letters there was a very considerable similarity of style with that of the letter upon which the doctor had commented; and hence the pursuer says that the doctor, being well aware of these letters in the *Herald*, and also knowing that the pursuer was the author of them, must, in his own mind, have formed the conclusion that the pursuer had written this letter also. Now, it is a very remarkable thing that the

pursuer, in his record, does not say that the doctor knew anything of his authorship of those letters, and, what is still more remarkable, the letters or copies of them are in process, and they are not signed by anybody. They are signed by mere initials, and they are dated, not from the pursuer's place of residence, which is stated in the first article of the condescendence to be at Kincaidfield House, Milton of Campsie, but they are dated from Campsie. Thus, it is very plain that nobody could know, from reading these letters, who was the author of them; and what is still more remarkable in the case is that the pursuer does not allege on the record that the doctor knew who was the author. This seems to me to be almost the only circumstance alleged on the record to make it the least probable that the doctor had the pursuer in his view when he made these observations in the pulpit; but I think the second libel is perhaps still more free from any taint of slander. It consists in merely setting out the several grounds upon which the doctor thought that that letter upon which he commented could not have been written by a member of the kirk-session; and they are very sensible grounds. The doctor never could have imagined that any man who had been present on the Monday, when he was authorised to make the statement regarding a certain agreement between the parties, could have set his face to have made such a statement as this; and there are various other circumstances which seem to betray a total ignorance of what the kirk-session must all have known. In this letter, which is said to be the second libellous matter, he merely sets out the circumstances which had induced him to think that the original letter was not written by any member of the kirk-session; but there is no one expression in that letter which points at the pursuer as being the author of it. In such a case, where the alleged slander itself contains no hint as to the person intended, is it for the pursuer to say, "I shall put into my libel an innuendo that you intended me," after having received from the doctor, upon his own requisition, a distinct statement that he had neither him nor any individual in his eye,—a statement which he was at perfect liberty to make public to the whole parish? But the fact appears to me to be this, that the rest of the parishioners, who seem to have been a good deal interested in the matter of patronage or anti-patronage, had discovered the resemblance between the pursuer's former letters and this letter, a similarity in style, which he himself admitted; and finding this extreme similarity in style, they had one and all arrived at the conclusion that he had written it. It was his own composition; and after all, the imposition which was alleged against him, and all that could be deduced from this libel,—if it was a libel at all,—and the intention of making that accusation against him, is not only very clearly renounced by the minister, but there is no ground whatever, in my opinion, for the innuendo which he attempts to attach to the letter. In these circumstances, both Sheriffs arrived at the conclusion that this libel was not relevant,—at least they refused to consider that an innuendo of that sort was admissible; and I agree very much with the grounds on which Sheriff Sconce particularly has proceeded in disposing of this case. I therefore propose to your Lordships that we should adhere to the interlocutors of the Sheriffs.

LORD NEAVES.—I concur in the opinion which has been given. I think this an unreasonable and unjustifiable action, and brought in circumstances the most untenable. The parties connected with this church fell into some dispute which we have not much to do with; but we see that it existed, and that some proposal was made that the minister should make a statement on the subject from the pulpit. In the meantime, however, a letter appeared in the *Glasgow Herald* commenting upon the matter, and signed by "A Member of Campsie Parish Kirk-session." This letter being upon the subject about which the minister [725] had been requested to make the statement to the church, it was natural and almost necessary that the minister, the presiding member of the kirk-session, should say something to his congregation upon the subject. What he did say was this, and it is the first libel here founded on—"One would have thought that this tempest in a teapot would have been allowed to drop, but I observe from the newspapers that some one, purporting to be a member of session, had written an anonymous letter to the editor, which I have no doubt is a forgery. I have not had time to look at it, but I do not think it will require any notice from me, as it bears internal evidence that it is a forgery, and that the editor has been imposed upon by a so-called member of session." It is quite plain that what the minister there means is that the letter was not written by a party having the character which the anonymous signature bore him to have. His statement meant nothing more than that; about that there can be no doubt. Now, that gives rise to this important question,—can anything

be innuendoed into any or every other thing whatsoever? Is there unlimited latitude in this matter? I cannot think that there is unlimited inlet for innuendo in that way. Suppose the minister had made this statement without reference to any personality at all, and had said, "A letter has appeared in the newspapers which appears to me not to be written by any one such as it purports to be signed by," was the minister not entitled to make such a statement, that he believed it was not written by a member of the kirk-session? Might he not say that with regard to the letter itself? He cannot be accused of libelling a letter—that is not the subject of a libel at all. He must libel a man. Or suppose that no person had been referred to at all as the author of the letter, but that the statement had otherwise been made precisely as was made here, would the pursuer be entitled to consider that as a libel against him, and to say, "Oh, you had in your own mind that it was written by me, and I was the person you were referring to. Although you did not refer to anybody as the writer of the letter, still you must have meant me, and it was so understood by those who heard you." I greatly doubt whether it is possible for us to view that as an innuendo. There is nothing in the shape of an innuendo in it at all. It is quite possible to form an innuendo from words spoken in exactly the opposite way in which they are meant. You may speak ironically of a man as an honourable man, and that may be construed by innuendo to mean that he is a dishonourable man, but you cannot innuendo those things which are mere statements of fact. Now, all that is innuendoed here is the letter by the minister saying that some one did it. If a letter appears in a newspaper, it is plain that some one did it, but you cannot indicate who the writer was unless you mean some person that the speaker had in his eye, or unless there is something in the letter that can be brought forward as applying to a particular person. Unless that exists I think it exceeds the competent latitude of innuendo to hold that the libel refers to any particular person. If the party says, "Somebody that I know of, but that I will not mention, although he is known quite well, did such and such a thing," it would be perfectly competent and open for an innuendo to be assumed there; but here there is nothing of the kind except a statement that somebody has written a letter, and the party speaking of that letter says that the writer of it is not a member of the kirk-session. But, however that may be, the case does not rest here. This had taken place on 5th March, and on the morning of the 6th the pursuer takes the field in a particular form, and writes a letter to Dr. Monro, which Lord Benholme characterised as a straightforward letter, and so it appears to be. I do not think it is very straightforward when we come to know what was within the party's knowledge at the time. I do not think it was a very straightforward letter in point of fact, but it appears on the face of it to be a straightforward letter, and it would be so considered by the party who received it, and it certainly met a straightforward answer. This is the demand which the party then makes upon the first libel:—"Revd. and dear Doctor,—With reference to the extraordinary charges of the crimes of forgery and of imposition made by you in church yesterday against some person whose name you did not mention, I learn that some of the congregation understood that, in making these charges, you were alluding to me. Why any of the congregation should have thought that such [726] a wicked allusion applied to me I know not. So far as I am concerned, I never dreamt of applying your observations to myself." Then he goes on to remark that he never sent anonymous letters to newspapers, and, although it is not very logical, he continues, "I believe that the charges of forgery and of imposition made by you in church were made rashly and recklessly, and without the least inquiry at the members of session." That rather seems not to have been his business at all from the position which he occupies. "As, therefore, you have made such serious charges when you had no right to make them, and as many of the congregation consider that I am the party you refer to, I think that, as a member of the church, I am entitled to ask of you, as a Christian minister, to write me, saying that you had no intention whatever of applying the charges to me, nor of leading others to suppose that I was the party referred to as having committed the crimes of forgery and of imposition. The bearer will wait for an answer. I must, in any event, have an answer within the next twenty-four hours." This is the sort of stand-and-deliver style in which this gentleman approaches the minister, and the minister stands and delivers a very plain deliverance:—"Dear Sir,—In reply to your long note of this morning I have only time to say that neither you nor any one else was in my thoughts when I made the observations to which you allude, because I knew nothing about the anonymous letter in the *Herald* except what its

internal evidence implies." That is as plain a compliance on the part of the minister with the appeal made to him as it was possible to make. It is a disclaimer, a positive statement that he had neither the pursuer nor anybody else in his mind when he adverted to that article, and unless it was illegal for him to advert to the letter at all he was surely under no responsibility after he had made that statement. The doctor's reply was given and received, and there the matter rested for several days. That I think ought to have settled the matter, but there is a part of it which that letter of the pursuer did not bring up. If the people were connecting him with the letter in the *Herald* which was written by a supposed member of the kirk-session, it may be that they did so from knowing things which the minister did not know, and which it is not alleged that the minister did know; because at this time, from what he wrote to the minister, it would appear as if the pursuer held himself out as a man who knew nothing about the letter to the *Herald* at all, who had no hand in it, and had nothing to do with it, and that it was a most extraordinary thing that his name should ever have been connected with it. How they could ever have supposed that he had anything to do with that letter is incomprehensible to him; he never dreamt that the charges could be connected with his name. If the pursuer had written on 6th March what, after all was over, he wrote on 22d March, the matter would have assumed a very different shape. I need not go on to read the things which took place before that date. There was a letter, which the minister sent to the newspapers on 8th March, in which he gave his reasons for thinking that the original letter had not been written by a member of the kirk-session because it contained statements which were inaccurate, which he was quite entitled to say, being still in ignorance, so far as appears, of the history of the letter previously. That letter, which appeared in the *Herald* on 9th March, is the second ground of charge. On 11th March the pursuer makes a fresh demand upon him. Having accepted his apology of the 6th, or rather his explanation, for it was no apology, completely disclaiming the thing he wanted him to disclaim, and which being in writing it was in his power to show to all those kind friends who were putting him under the belief that he was the party who was meant, he gets uneasy again, and, on 11th March, the pursuer writes,—"Revd. and dear Doctor,—Since I wrote to you on Monday last I have had under my careful and serious consideration the extraordinary charges of the crimes of forgery and of imposition made by you in church last Sabbath." Well, he had nothing to do with this, except so far as he meant to be connected with it. "I find that the almost universal belief in the parish is that I am the person you aimed at as being guilty of these crimes. In fact, so very convinced on that point are some even of your warmest supporters, to whom I have shown your note, that they won't give credence to your statement that I was not in your thoughts at the time. It is perfectly evident, therefore, that whatever was your intention or motive, I stand as the party whom you [727] are supposed to have had in view, and to have branded as a forger." And then he goes on to say that he considers the charges to be slanderous and calumnious. "In these circumstances, I now call upon you, unqualifiedly, publicly, and from the pulpit to-morrow, (1) to withdraw the charges of forgery and of imposition which you made last Sabbath." He had nothing whatever to do with that, except as relates to himself. "And (2) to state that, in making these charges, you had no member of the church in your thoughts at the time, and that you should regret if any of the congregation thought that, in making these charges, you were in any way alluding to or desirous of injuring a member of the congregation." Then he says, "Some one must be aimed at." I do not think that at all. It does not follow that because a letter appears, and I say that some one has put that letter into the newspapers, I must mean any particular individual. "If the effect of these statements has been to malign the character of an innocent party, although unwittingly on your part, there can be no possible doubt that, as responsible for the consequences of your illegal and wrongful acts, you are bound to clear the character of that party." The minister, I think, very properly answered that letter, having altogether disclaimed that he had anybody in his eye when he made his remarks from the pulpit, and I quite agree with him that if he had got up in the pulpit and made such a statement there as the pursuer wished him to make, the result would have been to make him perfectly ridiculous. On 22d March the pursuer wrote another letter, in which he says—"Revd. Sir,—In the hope of your still rendering it unnecessary, I am advised again to address you before taking steps to vindicate my character from the slander complained of in my letters to you of 6th, 11th, and 13th instant; and to state that the letter

signed 'A Member of Campsie Parish Kirk-session,' which appeared in the *Glasgow Herald* newspaper of 4th instant, was written by Mr. William Stevenson, farmer, Alton, Milton of Campsie. As his education rendered it unsuitable for him to put his own composition before the public, he supplied me with the facts which the letter narrates, and I drafted the letter for him. I left the draft with him, and, with some little alteration, it was written out by his daughter, and, along with a note to the editor of the newspaper, also written out by his daughter, and signed by him, was forwarded for insertion in the *Herald*. Having made you aware of these facts, you will see that the charges of forgery and imposition made by you from the pulpit on 5th instant are without foundation; and as you have already been made aware that these charges are applied to me, to the injury of my character, and they have not been withdrawn, nor any apology made, I have now to request that you apologise and withdraw the charges in as public a manner as they were made; failing which, within eight days from this date, I shall be compelled to take means for vindicating my character, and for damages." If that letter had been written on 6th March, see how differently the case would have stood. There would have been an avowal that the letter had been authorised by a member of the kirk-session, Mr. Stevenson, and that he (the pursuer) knew it to be so, and, in the next place, there would have been an explanation of how it was that the members of the congregation, who might know the facts, were likely to connect the pursuer with the statements which were there made, because it was not a secret thing. Mr. Stevenson knew it, and Mr. Stevenson's daughter knew it, because she had written out the letter from the draft which the pursuer made. He had composed the letter in his own style, and that being known to two or three people, would very soon spread through the parish so far as they were concerned, but it does not seem to have reached the minister in any way. It is here disclosed to him for the first time, and now the pursuer comes and charges the minister with libel without saying that he knew all the time how the letter had been produced. In these circumstances, the pursuer comes forward and says alternatively—"You either meant it to apply to me, or some of the congregation have regarded it as alluding to myself, and therefore you are to be answerable in damages to me for what you have done." I think a more untenable proceeding cannot be conceived. The man who had disclaimed in his first letter the possibility of being supposed to be connected with this letter is yet the man whom those behind the scenes would know to be connected with that very letter, for he was the man who [728] had framed it. It was apparently signed by Stevenson after being copied out, but it is no wonder that the authorship of the letter should be attributed to the pursuer by those who knew the facts; and although he disclaims the authorship in his first letter to the minister, still he does not explain anything of the kind which he stated subsequently. On these grounds I think it manifest that this action is untenable. I doubt whether there ever was a ground on which an innuendo could be fastened upon the first statement, but the correspondence which took place on 6th March removed the possibility of that innuendo completely; and the new statement, which forms the second ground of libel, might have been prevented by this man stating the facts as he knew them to be,—that it was a member of the kirk-session by whom the letter had been prompted, and that he (the pursuer) had been the composer of it. I think for any party in these circumstances to drag this clergyman into Court is altogether out of the question. In my opinion, therefore, the action, as it stood here, putting it in the way in which it has been put by the Sheriffs in their interlocutors, was altogether irrelevant and untenable.

Lord Cowan.—I consider that this action has been properly disposed of by the Sheriffs in the Court below. In stating the grounds upon which we arrive at that opinion we must guard against any mixing of facts which properly are for consideration on the merits or before a jury, if the case came to that result, with these facts which enter properly into the question of relevancy. Confining myself entirely to the question of relevancy, I concur with the views which have been stated by both your Lordships, that there is not a case here which ought to be permitted to go to trial as in a case of slander. There may be a little mixing up of the facts which should enter into the evidence in the cause with what are truly questions of relevancy in the very elaborate note of the Sheriff-substitute. That part of the case, however, is left out of view, and properly left out, in the note of the learned Sheriff, who concurred in the result at which the Sheriff-substitute arrived.

As regards the words which are here alleged to have been used by this reverend

doctor from the pulpit, I concur in thinking that some explanation was required on his part to his congregation with reference to a letter purporting to be from a member of his own kirk-session, of which he is the moderator, and of whose proceedings he was perfectly cognisant; and therefore it does not seem to have been at all untimeous or improper for him to take up the matter of the letter and to give his views upon it. No doubt the words "forgery" and "imposing" or "impostor" were incautious, and too strong; but when you look at them from a rational point of view, and construe them fairly, they just come to what Lord Benholme has explained, that this was a letter which, from all that we know of what passed in the session, could not have come from any member of the session. I think it was in that sense that the word "forgery" was applied to the letter. It was not a deliberate charge of forgery against any one,—charging him with that serious crime; but the statement of the minister simply came to this—"Having reference to all that I know of what passed in session, that letter cannot have been the composition of any of the elders who constitute my session." Therefore I think it very doubtful whether the words, in the circumstances, could be held to be really slanderous, unless they had been directly pointed at some particular individual, and unless it had been alleged that the minister had maliciously intended to point out to the congregation that the man who wrote that letter had actually committed what was a deliberate forgery. I do not think that that is alleged in this record at all. Then, as regards the innuendo, a party is not entitled to innuendo anything that may serve the purposes of a particular action of damages. There must be some solid ground stated with reference to the innuendo upon which the action is to hang or can be put. The observations made on that point by Lord Neaves are deserving of great consideration. I think there is nothing here that can be innuendoed so as to constitute a good ground for bringing an action of damages of this particular kind; and I may just add this, that I do not mean to go over the special grounds of judgment which both your Lordships have taken—that I [729] never saw an action insisted in in such remarkable circumstances as the present: indeed, having regard to the correspondence that passed between these parties, I think the action is untenable, for this reason: The very morning after the general words were used from the pulpit which are alleged to have been slanderous this gentleman writes the letter which has been already read. The utterance from the pulpit was on 5th March, and on the morning of the 6th he writes—"Some people tell me that these words were calculated to touch me, or to impinge upon my credit and character. What do you say, my dear doctor? My own opinion is that such a wicked deed never could have been intended by you to be attributed to me, and I never took the thing upon myself. What do you say, dear doctor?" And the dear doctor immediately answers, "I never intended to refer to you at all; and you are perfectly at liberty to circulate this letter amongst the whole parishioners, and so get rid of this supposed injury to your character, which several of the parishioners may have considered it to have suffered." Now, what happened after that? The doctor, next day, or the day after, wrote the letter to the *Herald* which appeared on the morning of the 9th, and which is said to form the second ground for an action for slander. And what is that letter? When you read it over, it is a vindication of his statement that from internal evidence he had grounds for holding that the letter was not the production of a member of kirk-session, and he details these grounds in support of his own position, and explains, I think logically, that he had sufficient grounds for drawing the inference that the original letter could not have been the production of a member of his kirk-session. That is published in the *Herald* of 9th March, and it approves itself entirely to my mind. I approve of the doctor's logic, and I think it shows his reasoning was right. It is just the kind of reasoning I would have adopted if I had been in his unfortunate position. Perhaps I would not have used the word which he used in his original statement; but that is capable of being explained in the way I have mentioned. That was on 9th March, and it was after that second letter appeared that the letter of 11th March was written by the pursuer. He was contented to take the explanation upon 6th March, and he remained perfectly quiet until the letter of the 9th was published, in which there is not a word of slander that I can gather; and then comes the letter of 11th March, threatening the defender with this action of damages. Now, what does it all come to? It is just this: Notwithstanding your having repudiated the idea of me being in your mind, and writing so to me on 6th March, you are telling a downright falsehood (that is the substance of the letter), and I will bring an action to have it found by a jury

that, notwithstanding of your distinct disclaimer to the contrary, and in writing, you had me in your mind, and you did actually make these charges against me as an individual. I think that, looking at the record, and having regard to the grounds which the pursuer has been at pains to embody in it, and which we are entitled to look at in the question of relevancy, the Sheriffs have well disposed of this action. I should make one observation further, that I concur in the statement made by the Sheriff that this defender is entitled not merely to have the action dismissed, but is entitled, having regard to the nature of this record, to have himself absolved of the action, and that the interlocutor of the Sheriff is well founded both in expression and in its substance.

The LORD JUSTICE-CLERK, not having heard the argument, gave no opinion.

The following interlocutor was pronounced:—"Dismiss the appeal: Affirm the judgment appealed against: Find the appellant liable in expenses, and remit," &c.

MACONOCHIE & HARE, W.S.—MITCHELL & BAXTER, W.S.—Agents.

No. 126. X. MACPHERSON, 730. 22 May 1872. 2d Div.—Lord Gifford, I.

WILLIAM PAUL AND OTHERS (Barnet's Trustees), Pursuers and Real Raisers. —*Sol.-Gen. Clark—Birnie.*

ALEXANDER BARNET AND OTHERS, Defenders.—*Watson—Johnston.*

Trustees—Exoneration.—In an action of multiplepoinding and exoneration raised by testamentary trustees the Court found one of the claimants entitled to certain lands. After this decree the trustees granted a lease of part of the lands, and refused to convey the estate to the claimant until they received exoneration. *Held* that the trustees were entitled to exoneration up to the date of the raising of the action, but that they were bound to denude in favour of the heir without receiving exoneration for subsequent actings.

This was an action of multiplepoinding and exoneration by the trustees of the deceased Mr. Barnet of Hillhead in Aberdeenshire. The truster left considerable property, heritable and moveable, and after a proof as to propinquity, the Lord Ordinary preferred Alexander Barnet to the heritage, and his brothers and sisters to the moveables. Competing claimants, both to the heritage and the moveables, reclaimed against this judgment to the Inner-House, who affirmed it. Certain competing claimants to the moveables appealed against this judgment to the House of Lords. The unsuccessful claimant to the heritage did not appeal. Between the judgment of the Lord Ordinary and that of the Inner-House the trustees let a portion of the lands on lease. Alexander Barnet having called on the trustees to denude, they offered to comply on receiving exoneration. This, however, he refused to grant, on the ground that they had acted *ultra vires* in granting a lease of the heritage after the date of the multiplepoinding, and that this lease was to be reduced.

The Lord Ordinary pronounced an interlocutor authorising the clerk to deliver up the disposition and assignation, which had been lodged in process by the trustees, to the agent of Alexander Barnet, and granted leave to reclaim.

Against this interlocutor Barnet's trustees reclaimed.

The reclaimers argued;—The trustees were not bound to denude till offered exoneration for their whole actings with reference to the trust-estate. They had not sufficient funds in their hands, or deposited in Court, to secure them against the result of the threatened reduction; and they were not safe to denude in favour of the heir in heritage until the issue of the appeal as to the moveables should be ascertained. If the heirs preferred in moveables were held not to have been the nearest relations of the deceased, and therefore to have been wrongously preferred to the moveables, their brother, the heir in heritage, must have been wrongously preferred to the heritage.*

---

* Elliot's Trustees *v.* Elliot, July 3, 1828, 6 S. 1058; Edmond *v.* Blaikie and Anderson, Nov. 16, 1860, 23 D. 21.

The respondents replied;—After the heir had obtained decree in his favour the trustees could no longer lawfully withhold from him the disposition to the heritage. They had acted *ultra vires* in granting a lease of the heritage after the case was in the hands of the Court, and they could not claim exoneration for actings subsequent to the date when the action was brought into Court.

LORD JUSTICE-CLERK.—If this act of administration had taken place before the multiplepoinding was brought there might have been a great deal in the argument that the trustees were entitled to retain the deed until they obtained their exoneration and discharge. But that is not the position of the case, because the action had been brought, and the estate was in the hands of the Court. The trustees might have come to the Court to obtain authority to grant [731] the lease. It may turn out that it was beyond the power of the trustees to grant the lease, or it may turn out that the heir has obtained a larger rent in consequence of the lease; but these are questions which do not arise here. I do not think that the trustees are entitled to withhold the disposition.

LORD COWAN.—I agree with the general principle stated, that trustees cannot be called upon to denude until the period of their management has come to an end, and their right to exoneration been determined judicially. But the present is an exceptional case. The estate had been brought into Court, and must be held to have been under control of the Court, and yet, without judicial sanction, the lease in question was granted by the trustees. Still, either of the parties interested as claimants might have applied to the Court, and have had a judicial factor appointed. No such thing was done, and the trustees were left to manage the estate; but what they did was, in my opinion, an act of extraordinary administration. Whether it was justifiable in the circumstances, or was a wrong act, to the effect and in the sense of subjecting the trustees to personal liability, is not for inquiry *hujus loci*. The only question we have here to decide is whether this disposition is to be given up to the heir or not. I am of opinion it ought to be given up. It cannot be held to be a sufficient reason for keeping an heir out of his rights to say that another party has entered into possession under a different title, emanating from the interim administrators in trust of the property. Moreover, from the statements of counsel it would appear that, in any view, the trustees are sufficiently protected against responsibility from the consequence of their fiduciary acts, if done *in bona fide*.

LORD BENHOLME and LORD NEAVES concurred.

THE COURT pronounced this interlocutor:—"Find that the reclaimers are entitled to be exonered and discharged of their whole actings and intromissions up to the date of bringing the action into Court, and exoner and discharge them accordingly, and decern: *Quoad ultra* adhere to the Lord Ordinary's interlocutor: Find the reclaimers liable in expenses since the date of that interlocutor, and remit," &c.

TODS, MURRAY, & JAMIESON, W.S.—T. J. GORDON, W.S.—Agents.

No. 127. X. MACPHERSON, 731. 23 May 1872. 2d Div.—R.

JOHN MILNE, Inspector of Lumphanan.—*Harry Smith.*
SAMUEL RAMSAY, Inspector of Kincardine O'Neil.—*Keir.*

Poor—Settlement—Residence—Absence—Statute 8 *&* 9 *Vict. c.* 83 (*Poor-Law Act*), *sec.* 76.—In 1863 a man went to reside in the parish of A. with his wife and family. In 1864 he worked for six months in another parish, frequently returning at night to his wife and family in the parish of A. In 1866 he was absent for ten weeks on an engagement in a parish eighteen miles distant, and only returned twice during that time. In 1868 he worked in a parish eight miles distant for six months, and only returned for the night once a week or once a fortnight. In 1869 he became a proper object of parochial relief. *Held* that he had acquired a residential settlement in the parish of A.

This special case was presented by John Milne, inspector of poor of the parish of Lumphanan, and Samuel Ramsay, inspector of poor of the parish of Kincardine O'Neil, in the following circumstances:—

Robert Galashan was born in the parish of Kincardine O'Neil about the year 1835.

On 1st August 1863 he went with his wife and family to the adjoining parish of Lumphanan, working chiefly as a journeyman shoemaker, and sometimes engaging himself as a farm-servant. During about six months of the year 1864 he worked as a journeyman shoemaker in the parish of [732] Kincardine O'Neil, frequently remaining there all night, and frequently returning for the night to his wife and family, who continued to reside in Lumphanan.

On 12th Sept. 1866 he went to Dorsinsilly in the parish of Glenmuick, a distance of eighteen or twenty miles from his residence in Lumphanan. He had entered into an engagement to go there and to remain until Martinmas (22d November 1866) as a farm-servant in room of one who had left. During the currency of his engagement he was employed as cattle-man (having been engaged chiefly for that purpose), but worked occasionally at the harvest. His wife and family continued to reside in Lumphanan, in a house containing furniture and other property belonging to him, and he visited them only twice,—once when sent for by his wife, and once on his way to a feeing market.

From Martinmas 1866 till 6th August 1869 he resided with his family in Lumphanan. He lived in a house for which he would not pay any rent, and from which he would not remove though often desired to do so; and during this period he frequently applied for parochial relief, which was refused. From Martinmas 1866 till 6th August 1869 he worked in Lumphanan as a journeyman shoemaker, except for about six months in 1868, when he worked in the parish of Cluny, about eight miles distant, returning home for a night weekly or fortnightly as suited his convenience, and for some weeks in 1868, when he worked as a "harvest hand" in Midmar parish, also about eight miles from his house, returning home to his wife sometimes weekly and sometimes once a fortnight.

On 6th August 1869 he made an application for parochial relief to the parish of Lumphanan, which was granted; and on 31st August of that year he was lodged in the lunatic asylum in Aberdeen, where he remained at the date of the special case. He had a wife 35 years of age, and six children who were aged respectively, at the date last above mentioned, 11, 9, 7, 5, and 3 years, and 3 weeks.

The question for the opinion and judgment of the Court was,—"Whether the parish of Kincardine O'Neil, as the parish of birth, is liable for the relief of the pauper? or whether the pauper acquired a residential settlement in the parish of Lumphanan, and that parish is therefore liable for his relief?"

The inspector of Lumphanan argued;—The absence of a pauper on a contract of service will interrupt his acquisition of a residential settlement. The 76th section of the Poor-Law Act refers to the residence of the husband, and it does not matter where his wife and family reside. Besides the absence on contract of service in 1866 there were long interruptions in 1864 and in 1868 which prevented his acquiring a residential settlement in Lumphanan.*

The inspector of Kincardine O'Neil argued that occasional absence will not interrupt the acquisition of a settlement.

At advising,—

LORD JUSTICE-CLERK.—The difficulty which so often arises in cases like the present in determining the locality of industrial residence, with a view to ques-[733]-tions of settlement, is mainly caused by the area of chargeability being confined to the limits of parishes. When a man works in one parish, but has his house and home in the next, he of course resides in the latter. But many occupations require periods of absence from home. But still, as long as the absence is temporary in its nature, and the intention to return coincides with the maintenance of the house and family in the other parish, the continuity of industrial residence is not interrupted. The principle of the law of settlement is that the parish which has had the benefit of the pauper's

* Hewat *v.* Hunter, July 6, 1866, *ante*, vol. iv. p. 1033; Beattie *v.* Leighton and Mitchell, Feb. 20, 1836, *ante*, vol. i. p. 434; Hutchison *v.* Fraser, Feb. 11, 1858, 20 D. 545; Hamilton *v.* Kirkwood and Smith, Nov. 13, 1863, *ante*, vol. ii. p. 107; Crawford and Petrie *v.* Beattie, Jan. 25, 1862, 24 D. 357; M'Gregor *v.* Watson, March 7, 1860, 22 D. 965; Greig *v.* Myles and Simpson, July 19, 1869, *ante*, vol. v. p. 1132; Moncrieff *v.* Ross, Jan. 5, 1869, *ante*, vol. vii. p. 331; Beattie *v.* Kirkwood and Adamson, May 30, 1861, 23 D. 915.

industry and of the fruits of it, while he was able to support himself, should be charged with his aliment when he becomes unable to do so.

Difficult questions, of course, must arise in the application of a rule so arbitrary as that of the five years' continuous residence required for the acquisition of a settlement by the Poor-Law Act, and much ingenuity has been expended in cases of this nature. But the present case does not present any element of difficulty. I think the pauper's residence in the parish of Lumphanan was continuous for more than the statutory period, in any rational sense of the term. He had his wife and family there during the whole period, and his personal presence was only twice interrupted, once by his occasionally spending a night in the next parish where he worked for about six months, and once for a period of two months and a-half when he had a temporary engagement in a parish about twenty miles distant. Mere absence will not interrupt the continuity of industrial residence, if the cause be temporary, the intention to return clear, and the primary establishment of home be throughout maintained.

LORD COWAN.—The question here is, whether there has been an interruption of this pauper's residence in the parish of Lumphanan for the five years prior to his obtaining parochial relief in August 1869. I take the case on the footing of the commencement of the residence in the parish of Lumphanan being in 1863, because, although the pauper apparently wavered a little, he eventually came back to his wife and family, who had resided continuously in that parish. Thereafter, on 12th September 1866, the pauper entered into an engagement as a farm-servant until Martinmas 1866, a space of ten weeks or thereby. It does not appear that the work which he then undertook to perform was not such as he had often been in the habit of performing. The character of this service is shown by this, that most probably shoemaking, which was his regular trade (as must have occasionally occurred in the trade), happened at that time to be slack, and having heard of employment elsewhere, owing to the illness of a servant, he went to farm-work for that temporary purpose, and then returned to his wife and family. Now, is that to be looked upon as a separation from the parish of Lumphanan, where he and his family had resided for so many years previously?

This is not similar to the cases where we have held absence to interrupt settlements. For instance, with regard to the case of Beattie *v.* Kirkwood, which has been quoted to us, I recollect the circumstances of that case perfectly. The father, with whom the pauper had formerly resided, had left the parish and broken up his household, and when the pauper returned to the parish his return was held to be the commencement of a new settlement, because he now lived by himself. All the other cases were much of the same nature. The man's position while absent is of great importance in cases of interruption by absence. Where absence upon a special contract has been sustained as causing interruption, it was with regard to a servant going to a neighbouring parish for a year on an engagement. In such a case the continuity of his residence is certainly destroyed. But this is not an absence of that character. The fact here is simply that he took advantage of a temporary engagement for ten weeks or so, and then returned to his family and resided with them where he had lived before.

With regard to the two cases of Greig *v.* Myles and Moncrieff *v.* Ross, in which the questions as to a sailor and a fisherman were decided, the ground of judgment rested on the peculiar circumstances of the cases, and they were dealt with as special. But in the case before us I am of opinion that there was no absence of such a character or such a nature as to affect the acquiring of a residential settlement by this pauper.

[734] LORD BENHOLME.—Had this case come before us without our having had the benefit of previous decisions my opinion would have been that there had been an interruption of the pauper's residence in the parish of Lumphanan. But the judgments which have been pronounced compel me to come to a different conclusion. In the case of the sailor (Greig *v.* Myles) it was held that a man in his position need hardly reside in the parish at all, provided he have a wife and family residing in it. It is true, however, that he could not acquire a settlement elsewhere, because he was at sea when absent. But in the case of the fisherman (Moncrieff *v.* Ross) even that element was wanting, because he had been residing in a different parish in Scotland, and might have acquired a settlement there had he remained long enough. With these cases before us I cannot help giving effect to the principle established by them. It is not contended in the present case that any other settlement was acquired, and I can hardly think that when the pauper was at Dorsinsilly he was in a position to acquire a settlement in the parish of Glenmuick. He had no house there, and his wife and family continued to

reside at Lumphanan. The element of intention is important, and is clearly brought out by the case of Govan (Beattie *v.* Kirkwood), where the Court came to an opposite decision. In that case the young man, who lived with his father, had neither house nor wife nor family in the parish. The father, with whom he resided, broke up his establishment, and the son's connection with the parish was thus entirely severed. That case shows the desire of the Court to find grounds for holding—or as it has been quaintly expressed, to be "astute" in discovering means for holding—that the continuity of the residence is not interrupted. On the whole, there is enough in the decisions to enable us to hold that the settlement in the present case was not interrupted.

LORD NEAVES.—I come to the same conclusion.

The basis of the argument for Lumphanan parish is that it is of no importance that the pauper's wife and children resided continuously in that parish. But that fact is clearly of vital importance. If the cases of the sailor and the fisherman, referred to in the argument, had been without that element, it would have been very difficult to sustain the plea that their families had acquired a residential settlement. The true question is, where was this man's home—not, where was his domicile. In coming to a conclusion on that point we must necessarily be influenced by the inquiry, where his wife and family resided, and where his earnings were remitted to and spent. Where men must, in consequence of the nature of their occupations, such as railway guards or commercial travellers, lead a migratory life, their true residence must be decided by the question of their *animus residendi*, and that parish must in general be liable in a pauper's relief in which the proceeds of his industry have been spent.

The pauper here was a journeyman shoemaker, but it is clear that he did all sorts of odd jobs when shoemaking was slack, and little odd jobs like that will not count as deductions from a period of residence. The temporary engagement for service into which he entered raises the chief difficulty in the case, but I think that engagement was made for a special purpose, without any *animus* of severing his connection with Lumphanan. I think we should be going against the previous cases if we departed from the broad general rule there laid down.

THE COURT pronounced this interlocutor:—"Find that the pauper, Robert Galashan, acquired a residential settlement in the parish of Lumphanan, and that this parish is liable for his relief, and decern."

JOHN WHITEHEAD, S.S.C.—SKENE & PEACOCK, W.S.—Agents.

No. 128. X. MACPHERSON, 735. 24 May 1872. 1st Div.—Dean of Guild of Edinburgh, M.

JAMES COWAN, Appellant.—*Sol.-Gen. Clark—Asher.*
ROBERT STEWART (Hart's Factor), Respondent.—*Shand—Strachan.*

Servitude, Negative—Constitution.—Although a negative servitude may be constituted by a writing which does not enter the records, the writing must be in terms which clearly indicate an intention to create a permanent right.

Servitude, Negative—Missives of Sale.—Held (*diss.* Lord Deas), in the construction of missives of sale of a heritable subject, that a permanent servitude *non altius tollendi* was not constituted by an agreement therein contained, to the effect that, in consideration of the seller, as proprietor of adjoining subjects, concurring in an application to be made by the buyer to the Dean of Guild for authority to erect certain buildings, the buyer should restrict the height thereof, that having been a mere personal obligation with regard to the particular application.

Stamp—Process—Minute.—Consent of parties in a cause to hold a copy of an agreement in process as a true copy, and equivalent to the original, the original not being said to have been either lost or destroyed, does not save the necessity of having the copy stamped under the Court of Session Act, 1868.

In 1788 Laing, a builder, acquired an area of ground at the corner of North Hanover Street and Thistle Street, Edinburgh, bounded on the east by Hanover Street, and

on the south by Thistle Street, on which he built two tenements fronting to Hanover Street. Each tenement had a piece of open back ground, with coach-house and stable thereon, and these back grounds were separated by a mutual boundary wall.

After some time the proprietor of the southmost of these tenements built on his back ground a large tenement facing Thistle Street, covering the whole of his back ground, and having windows in its north wall, which was built close up to the mutual boundary wall, but did not occupy any part of that wall.

This tenement, which forms No. 50 Hanover Street, was acquired in 1853 by Thomas Lindsay, who was also proprietor of the uppermost or third and fourth storeys of the southmost of the said two tenements which formed No. 54 Hanover Street.

The three lower floors and back ground of No. 54 Hanover Street, after various transmissions, were disponed to James Martin, who was infeft 7th August 1857, and by the trustee and commissioners in his sequestration were conveyed to the appellant, who was infeft 10th June 1859. His titles contained no prohibition or restriction against building on his back ground.

In 1857 Martin was desirous of acquiring from Lindsay the two upper storeys, cellars, and pertinents of his tenement, and with that view his agent, Mr. Andrew Fyfe, S.S.C., addressed the following missive letter to Mr. Lindsay:—

"Edinburgh, 4th March 1857.

"Thomas Lindsay, Esq.,
"Lindsay Place, Edinburgh.

"Dear Sir,—On the part of Mr. James Martin, stationer, Edinburgh, I hereby offer to purchase from you the two upper flats belonging to you in No. 52 Hanover Street, Edinburgh (north side of the common stair), with the cellars and pertinents thereto belonging, and also the cellars and sunk area in the front of No. 54 Hanover Street, lying to the north of the outside stair leading into the said common stair, and the right and privilege to Mr. Martin, as proprietor of the house No. 54 Hanover Street, to make a communication from the upper flat of that house into said common stair, and with free ish and entry thereto by said common stair, at the price of £950 stg., payable on delivery by you of a valid disposition and progress [736] of writs, Mr. Martin's entry to be as at Candlemas last. It is a part of this arrangement that as Mr. Martin contemplates making alterations on the tenement No. 54 Hanover Street, by converting the same into one or more shops, with a saloon or saloons at the back thereof, you, as proprietor of the property lying to the south thereof, shall sign your concurrence to such plans, immediately on their being made out, they being made to the satisfaction of Mr. William Beattie, builder, and on the understanding that Mr. Martin does not intend to erect on the southmost 9 or 10 feet of his back ground, at present unbuilt upon, lying next your tenement, any saloon or other building higher than 13 feet above the floor of the present dining-room flat of No. 54 Hanover Street. Mr. Martin is to pay the expense of the disposition in his favour. Your acceptance will conclude the bargain.—I am, &c. "ANDW. FYFE."

"Edinburgh, March 7th, 1857.—I hereby accept of the above offer.

"THOMAS LINDSAY."

Neither the proposed saloon nor any other building was erected on the back ground by Mr. Martin. The disposition granted by Lindsay to Martin on 26th March 1867, and that in favour of the appellant, do not refer to the missive letter, nor to any agreement or restriction.

The appellant presented a petition to the Dean of Guild in 1865 for a warrant to make alterations on and additions to the said subjects, No. 54 Hanover Street, conform to plans produced.

The trustees of Mr. Lindsay, who had died in 1858, appeared, and objected to the prayer of this petition being granted, on the ground that the proposed alterations were inconsistent with their rights as contained in the titles of the properties and the foresaid missives. The objection applied both to the appellant's using any part of the mutual wall and to his raising his proposed buildings beyond the limit fixed by the missive. A minute was lodged in the process before the Dean of Guild whereby the petitioner (the appellant) stated that "in consequence of the answers lodged by the respondents, Lindsay's trustees, and to save litigation," he had resolved to modify his proposed alterations to the effect of using only one-half of the mutual wall, and of

substituting a pavilion roof for the proposed gable-formed roof. Of consent, warrant was granted, and the alterations were afterwards made, conform to the plan as modified by the said minute.

The appellant being desirous of further improving his property petitioned the Dean of Guild for authority to remove the present back building, and to erect another building of an additional storey on its site with a flat roof, and a saloon with flat roof between the back building and front tenement. He did not propose to make any use of the mutual wall.

Answers were lodged for Stewart as factor *loco absentis* for Mrs. Elizabeth Hart or Heggie, to whom the first and second flat above the street of the foresaid tenement in Thistle Street had been conveyed by Lindsay's trustees.

He pleaded;—(1) By the foresaid missive letters of sale a permanent negative servitude was created in favour of the said Thomas Lindsay, and Mrs. Hart, as his successor in the foresaid subjects, whereby she is entitled to prevent any erection on the back ground to the north belonging to the petitioner, within ten feet of the south boundary wall of said back ground, which shall exceed thirteen feet in height, and the erection now proposed being of that description, the warrant craved should be refused. (2) The petitioner is barred by the agreement and compromise made in the previous application at his instance from raising the building then sanctioned, [737] or erecting in place thereof another building of a higher elevation, and is thereby excluded from applying for the warrants now craved. (3) Mrs. Hart's predecessor having in the former application conceded to the petitioner right to build on the said mutual wall to the extent of one-half, as part of an arrangement, one of the conditions of which was that the buildings to be erected on the back ground were to be constructed and maintained in the manner in which they now exist, so as to admit of light to the property now belonging to Mrs. Hart, the petitioner is bound to implement that condition, and is not entitled, as he now proposes, while availing himself of the concession, to increase the height of the buildings on his ground. (4) At all events, the petitioner having availed himself of said concession, and agreed in consequence to restrict his buildings so as to preserve the lights of the said property, he is now precluded from altering the said buildings or erecting any other so as to interfere injuriously with the said lights.

The Dean of Guild pronounced an interlocutor, finding—"(1) That upon the sale of the property now pertaining to the petitioner by Mr. Thomas Lindsay to Mr. James Martin, there was constituted by the missives of sale, dated 4th and 7th March 1857, a servitude over the petitioner's property, No. 54 Hanover Street, in favour of the respondent's property, to the effect that the proprietor should not erect on the southmost nine or ten feet (virtually nine feet) of his back ground, lying next the respondents' tenement in Thistle Street, any saloon or other building higher than thirteen feet above the floor of the dining-room flat of No. 54 Hanover Street; (2) That the joint minute of 22d March 1865, upon which the former warrant proceeds, does not import a discharge of the said servitude, but only a consent to the particular building specified in said minute; (3) That the building plan annexed to the petition provides for the occupation of the space of nine feet subject to the foresaid servitude *non ædificandi* by a building of two storeys much exceeding the limit of thirteen feet in height, allowed by the said missives; (4) That the said intended building would have the effect of darkening certain of the respondents' windows; (5) That in point of law the respondents, in virtue of the said missives, have a good title to prevent the erection of a building in terms of the present application: Therefore refuses the prayer of the petition, and decerns, reserving to the petitioner to build upon any part of said back ground distant not less than nine feet from the respondent's said wall, and subject to the approval of the Court under any future application: Finds the petitioner liable," &c.

The petitioner appealed.

On 31st January the Court, on the motion of the respondent, granted diligence to recover the missive letter, of which only a copy had been produced. The case being called on 19th March, parties proposed to lodge a joint minute admitting that the copy in process was a true copy, and equivalent to the original.

LORD PRESIDENT.—It is not said that the original has been lost or destroyed. Parties cannot be allowed to evade the stamp-laws in this manner. This is a direct attempt to defraud the stamp-laws by a joint minute.

Thereafter the copy was admitted in terms of the joint minute on payment to the

clerk of Court of the amount of duty and penalty as provided by the Court of Session Act, 1868.

The appellant argued;—The missive letter founded on is not the writ of Mr. Lindsay, the respondent's author, having been found in the repositories of Mr. Fyfe, agent for the granter. Even if it were, it is not couched [738] in such terms as to create the servitude claimed; but only constitutes a limited personal obligation not binding on singular successors.

The respondent argued;—A negative servitude may be competently constituted by a missive writing,* though neither holograph nor tested. The fair construction of the missive of 4th March 1857 was that it constituted a permanent servitude.

At advising,—

LORD PRESIDENT.—This petition at the instance of Mr. James Cowan, proprietor of the tenement No. 54 Hanover Street, craves warrant from the Dean of Guild to build on the back ground belonging to that tenement, so as to cover the whole of it. The Dean of Guild has found that "upon the sale of the property now pertaining to the petitioner by Mr. Thomas Lindsay to Mr. James Martin there was constituted by the missives of sale, dated 4th and 7th March 1857, a servitude over the petitioner's property, No. 54 Hanover Street, in favour of the respondent's property,"—the respondent being the immediately adjoining proprietor to the south,—"to the effect that the proprietor should not erect on the southmost nine or ten feet (virtually nine feet) of his back ground, lying next the respondent's tenement in Thistle Street, any saloon or other building higher than thirteen feet above the floor of the dining-room flat of 54 Hanover Street." If the Dean of Guild is right there is an end of the case, for the proposed building would be a violation of the respondent's rights under that servitude. The case turns on the construction of the missives of sale; but in order to deal with that question it is necessary to attend to the condition of the two properties at the time the arrangement was made. The two tenements, 50 and 54 Hanover Street, were originally built by the same person, but they soon came into the hands of separate proprietors. They were contiguous properties, and as there was no restriction, it was open to the proprietor of No. 50 to build on every available inch as high as he pleased; and in like manner the owner of No. 54 might build on the whole of his area. The back ground of No. 50 was built on at a very early date; for there was a temptation to the proprietor to do so, arising from his having frontage to Thistle Street,—a very great advantage, which No. 54 did not possess. In 1857, when the transaction between Lindsay and Martin took place, Martin was proprietor only of three storeys of No. 54, the two upper storeys belonging to Lindsay, the owner of No. 50. It was the object of Martin to acquire these two upper storeys, for as soon as he did so, with the cellarage belonging to them, he would become the proprietor of the whole of No. 54 as it originally stood. Martin's agent, accordingly, on 4th March 1857, wrote a letter to Mr. Lindsay, offering to purchase "the two upper flats belonging to you in No. 52 Hanover Street, Edinburgh (north side of the common stair), with the cellars and pertinents thereto belonging, and also the cellars and sunk area in the front of No. 54 Hanover Street, lying to the north of the outside stair leading into the said common stair, and the right and privilege to Mr. Martin, as proprietor of the house No. 54 Hanover Street, to make a communication from the upper flat of that house into said common stair, and with free ish and entry thereto by said common stair." So far the meaning of this document admits of no doubt at all. The subject of the proposed sale, and the privileges which are to accompany the conveyance of the subject, are very distinctly specified. The price is also clearly stated at £950, payable on delivery "of a valid disposition and progress of writs, Mr. Martin's entry to be as at Candlemas last." What follows is a different matter, and does not appear to stipulate for anything to be given to Martin as a part of the subject, or a pertinent and privilege. The subject and its privileges are all stated in the first part of the letter. What follows is this:—It is a part of this arrangement that as Mr. Martin contemplates making alterations on the tenement No. 54 Hanover Street, by converting the same into one or more shops, with a saloon or saloons at the back thereof, you, as proprietor of the property lying to the south thereof, [739] shall sign your concurrence to such plans, immediately on their being made out, they being made to the satisfaction of Mr. William Beattie, builder, and on the understanding that Mr. Martin does not intend to erect on the southmost 9 or 10

* Mutrie, June 26, 1810, F. C.; Gray v. Ferguson, 1792, M. 14,513.

feet of his back ground, at present unbuilt upon, lying next your tenement, any saloon or other building higher than 13 feet above the floor of the present dining-room flat of No. 54 Hanover Street." This is the passage which is said to constitute a servitude *non altius tollendi* or *non ædificandi* over the subject No. 54 in favour of No. 50. Before this the proprietor of No. 54 was absolutely unrestricted, and it must be contended that this was the constitution of a servitude over a subject previously free from such a servitude. If there was such a constitution of servitude it was a most valuable right for No. 50 to acquire, because it enabled the proprietor to have lights to the back of the houses on his back ground as well as to Thistle Street. He knew quite well that his windows there were liable to be blocked up. Since, therefore, it was so valuable a right, it occurs to us to inquire what was the consideration given for it. It is very difficult to discover any consideration. All that Lindsay is taken bound to do is to consent to plans which are not to have the effect of interfering with the lights. That is, to say the least, so very inadequate a consideration, that one cannot help doubting whether it was in the contemplation of the parties to constitute a permanent servitude. It rather appears that the true construction of this passage is that, as Martin was then going to the Dean of Guild to get a warrant, it was made matter of arrangement that Lindsay should not oppose his application, but consent to his plans, and under this application, and in building in terms of the warrant to be then obtained, Martin should not build higher than thirteen feet. In short, the undertaking was confined to the then contemplated application to the Dean of Guild.

This is borne out by what followed. It is quite true that, according to our law, a document of this kind is sufficient to constitute a servitude *non ædificandi* without the servitude entering the titles. But when a servitude of a valuable kind is inserted in missives, and these are followed by a disposition, it is extremely probable that the party acquiring it will take care that it is inserted in his titles. An obligation of this kind in a loose document, which is immediately followed by a regular deed, in which it is not mentioned, is not in so favourable a condition as if the deed took notice of the right intended to be given. In the deed everything for which the £950 was paid is very particularly set out. The cellars intended to be conveyed are specially mentioned and described, "together also with the sunk area in front of the northmost half of the said tenement," and so on; and then follows the right and privilege to Martin of making a communication from the flat below the subjects disponed into the common stair, as well as a declaration that Martin should be bound to uphold the roof. All this shows how careful the parties were to insert all that was necessary to make their rights clear. It is very important, looking to the nature and value of the servitude right in question, that it is not inserted in the disposition.

But further, the consideration, such as it was, was never given. The consideration was that Lindsay should sign the building plan. But Martin abandoned his application, so that until now nothing has been done, either in the way of Lindsay consenting or of Martin building on the back ground. In these circumstances the conclusion I have come to is that the respondent's construction of this missive is untenable.

LORD DEAS.—In the spring of 1857 Mr. Martin was proprietor of the house No. 54 Hanover Street, consisting of the sunk or kitchen flat, the dining-room flat, and the drawing-room flat, with the back green and pertinents. Mr. Lindsay was at that time proprietor of the corner tenement of Hanover Street running north, and of Thistle Street running west, together with the immediately adjoining tenement in Thistle Street, the back lights of which, looking into Mr. Martin's said back green, are now in question. Mr. Lindsay was also then proprietor of the two flats situated immediately above Mr. Martin's drawing-room, and entering by the common stair No. 52 Hanover Street.

In that state of the property Mr. Martin became desirous to convert the street floor [740] of his house, No. 54 Hanover Street, into shops, and consequently to obtain an entrance to his drawing-room floor from the common stair No. 52 in place of retaining his inside stair, which fell to be removed to make way for the shop. To induce Mr. Lindsay to concede the entrance by the common stair, and to make no objection to the alterations in the lower portion of the tenement, Mr. Martin appears to have proposed to him to do two things, viz., first, to purchase from him the two floors immediately above Mr. Martin's drawing-room at the price of £950; and, second, to erect no saloon or other building on his (Mr. Martin's) back green within 9 or 10 feet of Mr. Lindsay's Thistle Street tenement of a greater height than 13 feet above the floor of the dining-room of No. 54 Hanover Street.

These proposals were embodied in a missive letter, holograph of and signed by Mr. Martin's authorised agent, Mr. Andrew Fyfe, of date 4th March 1857, and were agreed to by an acceptance, holograph of and signed by Mr. Lindsay on the 7th.

The question is whether, by that letter, so accepted, Mr. Martin constituted a negative servitude, effectual against singular successors, so as to prevent buildings from being erected above the stipulated height upon his back green within 9 or 10 feet of the back wall of Mr. Lindsay's tenement?

The Dean of Guild, who always inspects the premises, and has at his command the aid of a council of practical men like himself, has, with the advice of his legal assessor, decided that such a servitude has been effectually constituted, and in that decision I entirely concur.

There can be no doubt at all that, according to our law and practice, it was perfectly competent for Mr. Martin, by means of a missive or document of this kind, delivered to Mr. Lindsay, to lay the property belonging to him—Martin—under a servitude of lights to Mr. Lindsay, which should be effectual as against singular successors.

I do not quote authorities for this proposition, because there is really no doubt upon the point. Such a state of the law may be inexpedient. I rather think it is so, and for this reason:—Our system of records in Scotland so nearly enables an intending purchaser to ascertain every burden or condition applicable to any heritable property he wishes to acquire that we are naturally averse to recognise an exception in the case of a negative servitude like this, of which, as the law stands, it is not necessary that there should be any trace in the records. But the law is undoubted that such a servitude may be so constituted; and if the law is thought objectionable it must be changed by legislation and not by decision. We must administer it fairly while it exists.

It is equally undoubted that no technical words or forms are necessary to constitute such a servitude. The language used is unimportant if the meaning be plain. A singular successor knows that he must take the chance of the existence of such a document, but he may if he chooses insist upon special warrandice against it.

I entirely admit that, before this agreement was entered into, Mr. Martin was under no obligation to preserve the lights of Mr. Lindsay's tenement in Thistle Street. Mr. Lindsay's predecessor, when he erected that tenement, had taken the risk of his lights being obstructed, and, but for that agreement, Mr. Martin might have built up to the edge of his back ground.

That very fact, however, made it a great temptation to Lindsay to enter into the transaction with Martin as to the Hanover Street property. It was very natural that Lindsay should take the opportunity of Martin's anxiety for that transaction to obtain a stipulation against the grievous injury to his property which Martin could inflict; and, on the other hand, I am not surprised that Martin should have made the concession, for the advantage to him in building up Lindsay's lights, would have borne no comparison to the injury to Lindsay. I have looked at the premises, which I think is always an advantage when it can be done in a Dean of Guild case. It was obvious upon inspection that a high wall on the south verge of Martin's back ground would be almost ruinous to the value of Lindsay's property. The back wall of Lindsay's tenement is filled with windows, which afford the only light and air admissible into the back rooms which form one-half of the tenement, the whole of which would be rendered unhealthy to the numerous families who inhabit it, and generate evils in the heart of the [741] city of a kind which so much exertion is being made to prevent, as well as entail serious private loss. On the other hand, any building to be erected on Martin's back ground would be improved rather than the reverse, by its higher portions being kept nine feet back from Lindsay's wall, as there might then be windows in the side in place of light and air having to be got almost entirely from the roof. Where a privilege was of such value to the one party and of comparatively little value to the other, I am not surprised that, as part of the transaction in March 1857, the clause as to the back ground, bearing the sense in which I am disposed to read it, should have been introduced into the agreement.

It is said the constitution of such a servitude was foreign to the subject-matter of the missives, which was the purchase and sale of the two upper flats entering by No. 52 Hanover Street. But the observation is fallacious; for if the servitude was stipulated for, it was not merely the purchase and sale of the flats, but the purchase of the servitude also, which formed the subject-matter of the missives. There was nothing to prevent the purchaser from making the one thing a condition of the other, and this,

I think, is what was done, according to a fair construction of the missives. Martin offers to purchase the two upper flats and the right of entry to his own house by the common stair at the price of £950; and then the missive goes on—"It is part of this arrangement that as Mr. Martin contemplates making alterations on the tenement No. 54 Hanover Street, by converting the same into one or more shops, with a saloon or saloons at the back thereof" (that is, on the ground in dispute), Lindsay, as proprietor of the Thistle Street tenement, should sign the plans, "and on the understanding that Mr. Martin does not intend to erect on the southmost 9 or 10 feet of his back ground at present unbuilt upon, lying next your tenement, any saloon or other building higher than 13 feet above the floor of the present dining-room flat of No. 54 Hanover Street."

This is the understanding on which all that goes before proceeds. It is an inducement held out by Martin to Lindsay to enter into the transaction. It is indeed the only inducement, besides the £950, which Martin offers, all the other stipulations being for things to be done by Lindsay.

I cannot listen to the argument that this was a mere understanding as to what Martin intended at the time to do, and that he might change his intention immediately afterwards, and build on his back ground to any height he chose, without violating the agreement. To say, in such an agreement, that a certain condition is understood is just to say that that condition is part of the contract, and where the contract relates to heritable estate,—more especially where it relates, as here, to the heritable estate of both parties,—the condition is naturally to be presumed to be permanent. All the things that Lindsay undertook to do were to be available to Martin in all future time, and if the things which Martin undertook to do were not to be available to Lindsay in all future time they were of no value at all.

It is contended, however, that the stipulation limiting the height to which Martin was to build on his back ground is to be held to have been abandoned; and this contention is rested on two grounds, the first of which is that in the disposition which followed, by Lindsay to Martin, of the two flats, no mention is made of the servitude over Martin's back ground, while, on the other hand, express mention is made of the servitude of ish and entry to Martin's house by the common stair.

But here it must be kept in mind that the disposition was by Lindsay to Martin, who was getting the servitude of ish and entry, not by Martin to Lindsay, who was getting the servitude over Martin's back ground.

Lindsay, while he disponed to Martin the two flats immediately above Martin's house, retained the property of the flats on the other side of the common stair; and the clause constituting a *positive* servitude in favour of Martin of ish and entry to his house by that stair was a clause appropriate to the deed, and necessary to render such a servitude effectual against singular successors by its entering the record of sasines.

But the mention in a disposition granted by Lindsay to Martin of a *negative* [742] servitude conceded to Lindsay by Martin would have been mere narrative not appropriate to the deed, neither necessary nor effectual for the purpose, if that purpose had not been already accomplished by the missives, which it will be admitted on all hands to have been, if it be assumed as in this branch of the argument it must be, that the terms of these missives were sufficiently explicit. It is said to be an inexpedient law which permits a negative servitude to be effectually constituted by such a missive. But nobody doubts that it is the law.

The second and only other ground on which the plea of abandonment is rested is that Martin did not fully carry out his plans, having converted the lower portion of his house into shops, and availed himself of the right of ish and entry by the common stair, but not having erected the contemplated saloon or other buildings on his back ground.

But how Martin could get quit of the negative servitude he had granted to Lindsay by stopping short in the execution of his own plans is what I confess myself unable to understand. Even if he had given up these plans entirely, that could not have recalled the right he had conferred on Lindsay. But it is plain enough how it came about that Martin did not complete his plans. After he had executed all of them except the erection of the proposed saloon he became bankrupt (most probably from the expense of these operations), and was sequestrated, and the trustee for his creditors took possession of and sold the property. The plea of abandonment, therefore, seems to me to have neither law nor fact to support it.

An objection was stated at the bar to the validity of the missives, on the ground that

Martin's offer was not written and signed by himself, but by his agent, Mr. Fyfe. I do not understand, however, that any of your Lordships attach any weight to that objection, and it is clearly entitled to none. If Fyfe's authority were disputed the question would be a mere question of evidence. But the fact of authority is not disputed, and could not well have been so, seeing that Martin took advantage of the bargain which Fyfe had made for him by the missives, by obtaining and accepting a disposition in accordance with them from Lindsay. Consequently the offer being holograph of Fyfe is just as binding as if it had been holograph of Martin. That is a point which we have habitually dealt with as settled.

On the whole, my opinion coincides with that of the Dean of Guild and his assessor, and I am therefore for refusing this appeal.

LORD ARMILLAN.—I have felt this question to be attended with difficulty; and that difficulty has been increased by an inspection of the premises, which has satisfied me that the position of the respondent is entitled to favourable consideration, because substantial injury to his property appears to be the result which will follow the petitioner's proposed alterations.

Still, I have, on mature reflection, though after much hesitation, arrived at the conclusion that the petitioner has presented and instructed a claim which cannot be refused.

I think that we may now assume it to be settled and recognised as law that a negative servitude, if clearly expressed in writing, may be effectually constituted without possession, which indeed is scarcely appropriate, and without entering the records. I am not disposed, in deciding this cause, to disturb the received law on the matter, though its expediency may be doubted. But assuming this state of the law, I still think that it is essential to the constitution of such a servitude in such a manner, that the expression of intention in the constitution of the servitude shall be clear and unequivocal. I therefore view the question before us as a question of intention, to be gathered from the construction of these missives. The condition in the missives, of which I need not again repeat the terms, which your Lordship has explained, is certainly not clearly expressed. I do not doubt that Mr. Martin was sufficiently represented by his agent, Mr. Fyfe, who signed the missive. But there are no words of obligation definite and precise; and the expression of intention, which is said to be equivalent to obligation, is not necessarily the expression of permanent intention, and is not repeated **[743]** in the disposition, and never, at any time, assumed a more formal shape. The omission of that expression of intention from the investiture is not conclusive against it, for it might be constituted notwithstanding. But, in considering the question of intention as gathered from a fair construction of the missive, it is surely a fact of importance that there was no previous servitude or obligation, and that the words founded on are omitted in the disposition by which the contract of sale was effected.

When missives are followed and superseded by a formal disposition in which the price or consideration is accepted and discharged, the conditions of sale must be sought in the formal disposition, which is the embodiment of the completed contract, and the record of the deliberate intention of the parties. But in this disposition—in the deliberate record of what the parties meant—this obligation, which is said to express and to constitute the servitude, does not appear. It is not repeated, nor mentioned, nor in any way referred to; and in the question of intention that is important. Nothing but a clear expression of obligation in the missive can atone for its entire omission in the disposition. That clear expression is here wanting. Even on the petitioner's argument, in construing the missives, the expression of a binding obligation is only reached by inference from the expression of present intention. That inference is not necessary, and it can scarcely be permitted where the parties have embodied their deliberate intention in a formal writing of later date, in which the expression of present intention is omitted.

Apart from this, I am not satisfied that a permanent obligation, with a relative right of enforcement of the nature of a servitude, was really intended by the parties in execution of the missive and acceptance. I do not perceive any proper counterpart to such a permanent obligation, and it is very possible that, as explained by your Lordship, all that was meant was a temporary statement of intention to meet a temporary proposal or arrangement, which was not carried into effect; but the matter was put on a different footing by the disposition.

Accordingly I am, on the whole, though certainly with hesitation, disposed to concur in recalling the interlocutor of the Dean of Guild, and remitting to him to consider and dispose of the merits of the petition.

LORD KINLOCH.—The point raised by this appeal is whether a servitude *altius non tollendi* lies in favour of a tenement in Thistle Street, Edinburgh, over the back ground of an adjoining tenement to the north in Hanover Street. This servitude is said to be constituted by a missive letter, dated 4th and 7th March 1857, granted by Mr. Andrew Fyfe, as representing the proprietor of the tenement in Hanover Street, in favour of Mr. Thomas Lindsay, the then owner of the Thistle Street subject.

I do not doubt that it is competent to constitute a negative servitude, such as that *altius non tollendi*, by a mere missive letter passing between the proprietors of the two tenements. It may be thought an error in our law to admit the imposition of so serious a burden on singular successors by a document which may remain entirely latent, there being no register of such servitudes, and from the nature of the servitude, which is one of abstention merely, no published possession. But so I think the law to ordain. It is not the less true, in my apprehension, and holds all the more on account of the innate obscurity of the servitude, that the missive constituting the servitude should be expressed in clear and unambiguous terms. It must, beyond all doubt, import a permanent real right in favour of the one tenement over the other, not a mere personal or temporary arrangement between the individuals concerned.

I am of opinion that the letter relied on in the present case is not so expressed as to constitute a predial servitude. I assume the authority of Mr. Fyfe, the writer, to represent Mr. James Martin, on whose behalf it was written. Mr. Martin thereby proposed to purchase from Mr. Lindsay two upper floors in No. 52 Hanover Street, and the cellars and sunk areas in front of No. 54, as also "the right and privilege to Mr. Martin, as proprietor of the house No. 54 Hanover Street, to make a communication from the upper flat of that house into the common stair, and with free ish and entry thereto by said common stair," for [744] the sum of £950. This sum I consider, on the terms of the missive, to be the full consideration for the rights so purchased. The missive proceeds,—"It is a part of this arrangement that, as Mr. Martin contemplates making alterations on the tenement No. 54 Hanover Street, by converting the same into one or more shops, with a saloon or saloons at the back thereof, you, as proprietor of the property lying to the south thereof, shall sign your concurrence to such plans immediately on their being made out, they being made to the satisfaction of Mr. William Beattie, builder, and on the understanding that Mr. Martin does not intend to erect on the southmost 9 or 10 feet of his back ground, at present unbuilt upon, lying next your tenement, any saloon or other building higher than 13 feet above the floor of the present dining-room flat of No. 54 Hanover Street."

It is mutually admitted on the record that Mr. Martin never carried out the proposal here mentioned of building on the back ground. Nevertheless, the respondent contends that the effect of this letter was, whether such building proceeded or not, to constitute in favour of Mr. Lindsay's tenement, now held by his constituents as singular successors a permanent predial servitude *altius non tollendi* over Mr. Martin's, now Mr. Cowan's, back ground, to the extent of 9 or 10 feet from Mr. Lindsay's march.

I cannot give such effect to the letter in question. I think it destitute of those expressions necessary to constitute a real right in favour of the one tenement over the other. I do not hold that there are any *voces signatæ* essential to the constitution of such a right. But I hold that words must be used importing a real right as between the two tenements, not a mere personal arrangement between individuals. I think the missive contains nothing but such a personal arrangement. It simply goes to this, that Mr. Lindsay is to sign his concurrence to Mr. Martin's then proposed plans, on the understanding that these plans do not involve any building higher than a certain point within 9 or 10 feet of the march. What his signature to the plans was to obtain was a limitation of the plans to this effect. In substance it was simply that the plans (which the missive implies had not then been drawn out) should be drawn out on this footing. The plans, if proceeded with, were to be proceeded with on this design, and no other. Nothing more, and nothing less than this, is involved in the proposal. It might well be that, as between Martin and Lindsay, if the former proceeded with his plans, he was barred from so executing these plans as to encroach on the 9 or 10 feet. How far he might afterwards change his mode of occupying the back ground, and effectually, as against Lindsay, apply for leave to deal more largely with the 9 or 10 feet, needs not to be here inquired into. If the proposed plans were proceeded with, Mr. Martin personally was, I think, bound in their execution to maintain the proposed limitation. But Mr. Lindsay could ask no more than that, if these plans were proceeded with, it should be

under this limitation. Admittedly, the plans were not proceeded with; and the proposed limitation fell, as I think, to the ground. Mr. Lindsay of course retained any right which he had, independently of this letter, of objecting to Mr. Martin building on the back ground. But he could found no claim of servitude on the letter, which contained nothing but a personal arrangement, in its own nature contingent, and the condition of which was never purified. The question, at the same time, is not now between Martin and Lindsay, but between singular successors in both tenements; and as between these I hold *a fortiori* that no right exists.

By the judgment of the Dean of Guild appealed from this letter has been found to constitute a permanent predial servitude, holding good in favour of Lindsay's tenement against Martin's, whether Mr. Martin's then projected plans were carried out or not. And this is so held where very clearly, independently of this letter, there was no servitude *altius non tollendi* in favour of the one tenement over the other; but Mr. Martin was entitled to build to any height he pleased up to the march between the properties. It is held that by this letter there was, *eo ipso*, constituted a real right, effectual in all time coming, in favour of the one tenement over the other, and holding good for and against the singular successors in both tenements. I cannot arrive at this conclusion. I [745] consider all that passed to have been at best nothing more than a personal arrangement between the individuals, and the whole arrangement to have fallen to the ground when the proposed plan was not proceeded with. I therefore think that the interlocutor of the Dean of Guild should be recalled, and a judgment pronounced repelling the claim of servitude at the respondent's instance.

This interlocutor was pronounced:—"Having heard counsel on the appeal, recall the Dean of Guild's interlocutor of 31st August 1871: Find that according to the sound construction of the missives of sale, dated 4th and 7th March 1857, there was not constituted over the petitioner's property, No. 54 Hanover Street, in favour of the respondent's property, any permanent right of servitude *non ædificandi* or *altius non tollendi*, but only an obligation on the purchaser, in consideration of the seller consenting to an application to the Dean of Guild, to restrict his proposed buildings under that particular application in the manner and to the extent stated in the said missives: Remit the cause to the Dean of Guild to proceed farther as shall be just and consistent with the above finding," &c.

MENZIES & COVENTRY, W.S.—THOMSON, DICKSON, & SHAW, W.S.—Agents.

No. 129. X. MACPHERSON, 745. 24 May 1872. 1st Div. — B.

EDWARD SNELL, First Party.—*Marshall.*

GEORGE WHITE AND OTHERS (Trustees of Andrew Low), Second Parties. —*Guthrie Smith.*

ISOBEL GREIG OR STIVEN AND OTHERS, Third Parties.—*G. Webster.*

ROBERT KERR, Fourth Party.—*Shand—Balfour.*

DAVID MITCHELL (Trustee of Mrs. Low), Fifth Party.—*Marshall.*

Succession — Testament — Vesting — Liferent and Fee — Destination—Conditional Institute.—A testator disponed his heritable estate to his only daughter for her liferent use allenarly, and to his daughter's children *nominatim*, and any future children she might have, and the survivors or survivor of them, and failing the said children to certain nephews and the survivors or survivor of them in fee.

The daughter survived the testator, and was survived by two children, who died without issue. *Held* that the daughter took a fiduciary fee for her children, and that at her death they acquired an absolute right to equal shares which devolved on their respective heirs.

By disposition and settlement, dated 2d September 1818, Alexander Black disponed his whole heritable estate, generally and particularly described, to his spouse, Eliza

Crease or Black, "in liferent, for her liferent use allenarly, in case she shall survive me, whom failing by decease, whether before or after me, to and in favour of Elizabeth or Betsy Black, my daughter, wife of Lieutenant Robert Snell, of His Majesty's Navy, also in liferent, for her liferent use allenarly, and under the burden after-written; and to and in favour of Elizabeth Mary Snell, daughter of the said Elizabeth or Betsy Black and Robert Snell, the son lately procreated by them not yet named, and any other child or children that may be procreated by the said Elizabeth or Betsy Black of her present and any future marriage into which she may enter, and the survivors or survivor of them, equally between or among them, if more than one; and, failing the said child or children, to and in favour of William Greig, George Greig, Robert Greig, and Barbara Greig, children of the marriage between George Greig, tenant [746] at Easter Denside, and Isobel Black, my sister-german, and the survivors or survivor of them, equally among or between them in fee."

The executors were directed to allow a successive liferent of the moveable estate to Mrs. Black and her daughter, and it was then declared that "the said Elizabeth or Betsy Black shall be bound, from the liferent of my property, and effects hereby provided to her, to maintain, board, and educate her whole children of the present as well as any future marriage during their minorities, or till they be married, and in case of the decease of the longest liver of me and the said Eliza Crease, and Elizabeth or Betsy Black before the said children shall have attained majority or be married, then the interest and annual produce of the shares of my property and effects falling to such children shall be applied for their maintenance, board, and education, till they shall arrive at twenty-one years complete or be married, when their said shares are payable as aforesaid."

By codicils the testator, in the event of the death of his wife and daughter before the said Andrew Low, bequeathed to him the liferent of his whole estate, under the burden of maintaining the children of his daughter, or any of them who might be unprovided for.

The testator died on 1st April 1828. He was survived by his widow, who died on 23d February 1837, and by an only child, Betsy Black, who died on 20th March 1865.

Betsy Black was married, 1st, to Lieutenant Robert Snell, who died in July 1824; and 2d to Andrew Low, surgeon at Ferry-port-on-Craig, who survived her and died in April 1870.

Elizabeth Black had three children by her first marriage, and four children by her second marriage.

The following are the dates of the deaths of the whole children:—Helen Low died 5th January 1827, predeceasing the testator; Margaret Low died 27th May 1833; William Black Snell died in 1834; Alexander Low died on 22d May 1859; Elizabeth Mary Snell died on 27th September 1860. Sophia Low or Kerr died 11th January 1866; and Edward Keatts Nelson Snell died 5th July 1866.

None of these children left issue, or any deed affecting their succession.

A special case was presented to the Court by various parties claiming to have interest in the succession.

Edward Snell, the first party, was cousin-german and served as heir-at-law to Edward Keatts Nelson Snell. He maintained that the right to the fee of the whole heritable estate vested in Edward Keatts Nelson Snell as the last surviving child of the testator's daughter, and now belonged to him as his heir duly served; or otherwise, that the right to the fee of said subjects vested, at the death of the testator's widow, in his grandchildren procreated of the body of his daughter, Betsy Black, for behoof of themselves, and of any children to be afterwards borne by her; and that a right to one-fourth share *pro indiviso* of said heritable property vested in each of Elizabeth Mary Snell and Edward Keatts Nelson Snell, and now belonged to the said Edward Snell, as their heir-at-law; or otherwise, that the right to the fee of the said subjects vested at the death of the testator in his six grandchildren surviving him, and that three-sixths now belonged to Edward Snell, as heir-at-law of the three grandchildren of Betsy Black's first marriage.

The second parties to the case were the trustees of Dr. Andrew Low, who had expede a service as heir in general to his daughter, Sophia Low. They maintained that whether vesting took place at the testator's death or at that of his daughter, Mrs. Low, the fee of the whole heritage came to [747] belong to Edward Keatts Nelson

Snell and Sophia Low in equal shares, and that one-half *pro indiviso* fell to Dr. Low as heir of his daughter.*

The third parties to the case were the daughters of William Greig, the eldest son of Isobel, the testator's only sister.

The fourth party was Robert Kerr, the only son of Barbara Greig.

George and Robert Greig had died unmarried.

The third parties maintained, 1st, The heirs of the body of Betsy Black, the testator's daughter, having all failed, the third parties were entitled under the ultimate branch of the destination to the whole of the heritable property, or to three-fourths thereof, or one-half thereof, according to the effect to be given (if any) to the claim for Robert Kerr.†

The fourth party, Kerr, maintained that Betsy Black's children having all died without issue, and without making up any title to the said subjects, and, *separatim*, without executing any deed whereby the destination was evacuated, the issue of the bodies of William Greig and Barbara Greig became the parties having right to the heritable subjects under the destination, and that the succession consequently descended to them *per stirpes*, one-half to William Greig's daughters, as heirs-portioners, *quoad* the one-half that would have accrued to him had he been alive, and the other half to Robert Kerr, only son of Barbara Greig, as heir to her, *quoad* the half that would have accrued to her had she been herself alive; that therefore Robert Kerr, the fourth party, was entitled to succeed to one-half of the fee of the property on the termination of the liferent of Alexander Low.‡

The question submitted for the opinion and judgment of the Court was—Which of the parties "has or have right under the disposition and settlement by the late Alexander Black, or otherwise, to the said heritable subjects, and if more than one of the said parties have right thereto, in what proportions have they respectively right to the same?"

At advising,—

LORD PRESIDENT.—This case had at first sight an aspect of complication, which, however, has now disappeared; and I confess the view which I take of it is quite simple, and may be very shortly stated. Mr. Black, the testator, left his heritable property (after providing a liferent to his widow), to his only daughter, Elizabeth or Betsy Black, in liferent, for her liferent use allenarly, under the burden of maintaining and educating all her children, whether of the present or of any future marriage, till their majority or marriage; and in regard to the fee he provided as follows:—"And to and in favour of Elizabeth Mary Snell, daughter of the said Elizabeth or Betsy Black and Robert Snell, the son lately procreated by them not yet named, and any other child or children that may be procreated by the said Elizabeth or Betsy Black of her present and any future marriage into which she may enter, and the survivors or survivor of them, equally between or among them, if more than one; and failing the said child or children, to and [748] in favour of William Greig, George Greig, Robert Greig, and Barbara Greig, children of the marriage between George Greig, tenant at Easter Denside, and Isobel Black, my sister-german, and the survivors or survivor of them, equally among or between them in fee."

Now, Betsy Black, the testator's daughter, being married at the date of this settlement, and having two children already born, but the destination of the fee being not to these two only, but to all the children she might have, I apprehend it to be beyond all question that a fiduciary fee was vested in Betsy Black herself for behoof of all her children. It is equally certain that these children, as they successively came

---

* Martin's Trustees *v.* Milliken, Dec. 24, 1864, *ante*, vol. iii. 326; Hunter's Trustees *v.* Carleton, Feb. 11, 1865, *ante*, vol. iii. 514, aff. July 30, 1867, *ante*, vol. v. H. L. 151—L. R. 1 Sc. Ap. 232; Douglas *v.* Thomson, Jan. 7, 1870, *ante*, vol. viii. 374; Maxwell *v.* Logan, Dec. 20, 1836, 15 S. 291; Bell's Prin. 1746; Baxter *v.* Baxter, 3 My. & Cr. 368; Breadalbane's Trustees *v.* Pringle, Jan. 15, 1841, 3 D. 357.

† M'Intosh *v.* M'Intosh, Jan. 28, 1812, F. C.

‡ M'Laren on Wills and Succ. 493, 671; Thomson *v.* Scougall, July 9, 1834, 12 S. 910—2 S. & M'L. 304; Thomson's Trustees *v.* Robb, July 10, 1857, 13 D. 1326; Beattie's Trustee *v.* Cooper's Trustees, Feb. 14, 1862, 24 D. 519; Scheniman *v.* Wilson, June 25, 1828, 6 S. 1019; Shaw *v.* Shaw, *ib.* 1149; Bell's Prin. 1776; 1 M'Laren on Wills and Succ. 648.

1867," before Lord Ormidale, who reported it to the First Division, in respect of the doubt which had arisen whether the Act of 1867, under which the application was made, applied to trusts of this description.

Argued for the petitioners;—The previous statutes for amending the law relative to the administration of trusts were expressly confined to trusts in which the trustees acted gratuitously.* This Act was apparently intended to have a wider application, because by the definition clause (sec. 1) the words "trust" and "trust-deeds" are to "mean and include all trusts constituted by virtue of *any* deed, or by private or local Act of Parliament."

At advising,—

LORD PRESIDENT.—This is an application for the appointment of a new trustee, presented under the Trusts Act of 1867. The trust was created for behoof of the creditors of a mercantile firm, and thirty-two out of fifty-five of these join in the application. The trustee originally named accepted office, and entered on the management of the trust-estate, but he died in 1869, without accomplishing the purpose for which the trust was established. The object of this petition is to have the trust carried on, by the appointment of a new trustee under the powers of the statute. But the question has been raised by the Lord Ordinary, whether these powers apply to trusts of this description, and are not confined to gratuitous and family trusts. It appears to me that the question is attended with considerable difficulty. There is no doubt that the Act of 1861 (24 & 25 Vict. c. 84) is confined entirely to gratuitous trusts, as its title bears, and it provides that all trusts of that kind are to be held to include certain powers, whether these are included in the trust-deeds or not. There are various provisions in favour of such trustees, enabling them to resign, to assume new trustees, &c. There is also a definition of a gratuitous trustee, and it is this—(Sec. 3)—"A gratuitous trustee shall, for the purposes of this Act, be held to be [751] any trustee who receives no pecuniary or valuable consideration for performing the duties of a trustee, and is under no obligation, without special acceptance of such office, to discharge the duty of trustee." That statute was amended in 1863 by a short Act, which provides (sec. 1) that "the recited Act (of 1861) is and shall be applicable to all trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated, at whatever time such trusts may have been or may be constituted." That enactment was intended to remove any doubt as to whether the Act of 1861 applied to trusts constituted previous to its date.

As regards these two Acts, therefore, there is no doubt that they are confined to trusts in which the trustees act gratuitously. But the Act of 1867 is capable of a different construction. It does not bear on its title to be confined to gratuitous trusts, but is more general and comprehensive in its terms. It recites the previous statutes, leading one to expect that it is going to deal with the same matter, viz., the case of gratuitous trustees, but the preamble goes on to say merely that "it is expedient that greater facilities should be given for the administration of trust-estates in Scotland." It is difficult to say from that what is the precise scope and subject-matter of the statute. The first section is that on which most difficulty arises. It may be called the interpretation clause, its object being to define the use of the terms "trusts and trust-deeds," and "gratuitous trustees," which is done somewhat differently from the definition, of the previous Acts. Trusts are defined as "all trusts constituted by virtue of any deed or by private or local Act of Parliament," and "the words 'gratuitous trustees' in the sense of this Act, and of the said recited Acts, shall mean and include all trustees who are not entitled as such to remuneration for their services, in addition to any benefit they may be entitled to under the trust, or who hold the office *ex officio*, and shall extend to and include all trustees, whether original or assumed, who are entitled to receive any legacy, or annuity, or bequest under the trust." Now, the first of these definitions is very comprehensive, and may be held to include all trusts whatever. But the use and explanation of the term "gratuitous trustees" anew suggest difficulty in presuming that the meaning is so comprehensive. If the statute were intended to be supplementary to the others, and to be read as a code of legislation on the subject, it does not appear why the term "gratuitous trustee" should be defined at all, as that was done before. Now, if it is to be read as comprehending every species of trust, I cannot understand why it should include a definition of that term, unless to regulate its use as regards the

* 24 & 25 Vict. c. 84; 26 & 27 Vict. c. 115.

LORD KINLOCH concurred, but observed that as Betsy Black's children were undoubtedly the beneficial fiars, it was of no consequence who was the fiduciary fiar.

On 23d May this interlocutor was pronounced:—"Find and declare that on the death of Betsy Black, the only child of the testator, on the 20th March 1865, her only surviving children were Edward Keatts Nelson Snell and Sophia Low: Find that these two persons, as her only surviving children, did, according to the true construction of the testator's settlement, take an absolute right of fee in the whole heritable estate of the testator equally between them, which became fully vested in them, and on their deaths transmitted to their heirs respectively: Therefore find and declare the first party to the case entitled to one-half of the said heritable estate as heir-at-law of the said Edward Keatts Nelson Snell, and that the parties of the second part, as trust-disponees of the deceased Dr. Andrew Low, who was heir-at-law of his daughter, Sophia Low aforesaid, are entitled to the other half of the said heritable estate, and decern."

MITCHELL & BAXTER, W.S.—WM. ARCHIBALD, S.S.C.—WEBSTER & WILL, S.S.C.—HENRY & SHIRESS, S.S.C.—Agents.

[*Distinguished*, Marshall *v.* King, 1888, 16 R. 40.]

No. 130. X. MACPHERSON, 749. 28 May 1872. 1st Div.—Lord Ormidale.

WILLIAM MACKENZIE AND OTHERS, Petitioners.—*R. V. Campbell.*

Trust—Appointment of New Trustee—Trusts (Scotland) Act, 1867.—The provisions of the Trusts (Scotland) Act apply only to trusts in which the trustees act gratuitously.

This petition was presented by William Mackenzie and others, a majority of the creditors of the firm of Mackenzie and Duncan, engineers, with concurrence of the surviving partner and the representatives of the deceased partner. The petition prayed the Court to appoint a trustee under sec. 12 of the Trusts Act, 1867 (30 & 31 Vict. c. 97).

Section 12 enacts that "when trustees cannot be assumed under any trust-deed, or when any person who is the sole trustee acting under any such trust-deed has become insane or incapable of acting by reason of physical or mental disability, the Court may, upon the application of any person having interest in such trust-estate," "appoint a trustee or [750] trustees under such trust-deed, with all the powers incident to that office," &c.

The preamble of the statute bears—"Whereas by the Acts 24 and 25 Vict. c. 84, and 26 & 27 Vict. c. 115, certain powers are conferred on gratuitous trustees in Scotland, and it is expedient that greater facilities should be given for the administration of trust-estates in Scotland: Be it," &c. . . . Sec. 1.—"In the construction of this Act, and of the said recited Acts, the words 'trusts' and 'trust-deeds' shall be held to mean and include all trusts constituted by virtue of any deed, or by private or local Act of Parliament; and the words 'gratuitous trustees' in the sense of this Act and of the said recited Acts shall mean and include all trustees who are not entitled as such to remuneration for their services, in addition to any benefit they may be entitled to under the trust, or who hold the office *ex officio*, and shall extend to and include all trustees, whether original or assumed, who are entitled to receive any legacy, annuity, or bequest under the trust: Provided always," &c.

The trust-deed in question was granted by Mackenzie and Duncan for the benefit of their creditors, and in order that their works might be disposed of as "going works," in favour of James Knox, accountant, in Edinburgh, as trustee, and to his onerous disponees or assignees. It provided for a reasonable gratification to the trustee for his trouble, and an allowance to the partners or partner for their assistance. Mr. Knox died on June 6, 1869, without having completed the winding up of the estate or the partners being discharged.

This petition was brought under sections 12 and 16 of "The Trusts (Scotland) Act,

1867," before Lord Ormidale, who reported it to the First Division, in respect of the doubt which had arisen whether the Act of 1867, under which the application was made, applied to trusts of this description.

Argued for the petitioners;—The previous statutes for amending the law relative to the administration of trusts were expressly confined to trusts in which the trustees acted gratuitously.* This Act was apparently intended to have a wider application, because by the definition clause (sec. 1) the words "trust" and "trust-deeds" are to "mean and include all trusts constituted by virtue of *any* deed, or by private or local Act of Parliament."

At advising,—

LORD PRESIDENT.—This is an application for the appointment of a new trustee, presented under the Trusts Act of 1867. The trust was created for behoof of the creditors of a mercantile firm, and thirty-two out of fifty-five of these join in the application. The trustee originally named accepted office, and entered on the management of the trust-estate, but he died in 1869, without accomplishing the purpose for which the trust was established. The object of this petition is to have the trust carried on, by the appointment of a new trustee under the powers of the statute. But the question has been raised by the Lord Ordinary, whether these powers apply to trusts of this description, and are not confined to gratuitous and family trusts. It appears to me that the question is attended with considerable difficulty. There is no doubt that the Act of 1861 (24 & 25 Vict. c. 84) is confined entirely to gratuitous trusts, as its title bears, and it provides that all trusts of that kind are to be held to include certain powers, whether these are included in the trust-deeds or not. There are various provisions in favour of such trustees, enabling them to resign, to assume new trustees, &c. There is also a definition of a gratuitous trustee, and it is this—(Sec. 3)—"A gratuitous trustee shall, for the purposes of this Act, be held to be [751] any trustee who receives no pecuniary or valuable consideration for performing the duties of a trustee, and is under no obligation, without special acceptance of such office, to discharge the duty of trustee." That statute was amended in 1863 by a short Act, which provides (sec. 1) that "the recited Act (of 1861) is and shall be applicable to all trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated, at whatever time such trusts may have been or may be constituted." That enactment was intended to remove any doubt as to whether the Act of 1861 applied to trusts constituted previous to its date.

As regards these two Acts, therefore, there is no doubt that they are confined to trusts in which the trustees act gratuitously. But the Act of 1867 is capable of a different construction. It does not bear on its title to be confined to gratuitous trusts, but is more general and comprehensive in its terms. It recites the previous statutes, leading one to expect that it is going to deal with the same matter, viz., the case of gratuitous trustees, but the preamble goes on to say merely that "it is expedient that greater facilities should be given for the administration of trust-estates in Scotland." It is difficult to say from that what is the precise scope and subject-matter of the statute. The first section is that on which most difficulty arises. It may be called the interpretation clause, its object being to define the use of the terms "trusts and trust-deeds," and "gratuitous trustees," which is done somewhat differently from the definition, of the previous Acts. Trusts are defined as "all trusts constituted by virtue of any deed or by private or local Act of Parliament," and "the words 'gratuitous trustees' in the sense of this Act, and of the said recited Acts, shall mean and include all trustees who are not entitled as such to remuneration for their services, in addition to any benefit they may be entitled to under the trust, or who hold the office *ex officio*, and shall extend to and include all trustees, whether original or assumed, who are entitled to receive any legacy, or annuity, or bequest under the trust." Now, the first of these definitions is very comprehensive, and may be held to include all trusts whatever. But the use and explanation of the term "gratuitous trustees" anew suggest difficulty in presuming that the meaning is so comprehensive. If the statute were intended to be supplementary to the others, and to be read as a code of legislation on the subject, it does not appear why the term "gratuitous trustee" should be defined at all, as that was done before. Now, if it is to be read as comprehending every species of trust, I cannot understand why it should include a definition of that term, unless to regulate its use as regards the

* 24 & 25 Vict. c. 84; 26 & 27 Vict. c. 115.

Act itself, and the object must be, therefore, to determine the kind of trusts that are to be affected by the operation of the Act. However loosely expressed, therefore, this statute must be meant to apply to the same class of trusts as the two previous statutes.

There is no direct instruction to be got from the other clauses, but the inference I have drawn from the first is fortified by a consideration of them, for while there are many provisions applicable to any kind of trust, there are others applicable only to family or gratuitous trusts. But I do not find any provision either solely or directly applicable to trusts for creditors. I do not say that there are not very comprehensive clauses. But it is singular that if trusts for creditors were intended to be embraced there should be no provision in the Act specially applicable to them.

The result is that the Act must be held as intended not to extend beyond the purpose of the previous Acts, but to form part of the same legislation; at least there is no sufficient authority, on the face of the statute, for extending it to trusts of a different description. I have had great difficulty in resolving this question, which I can ascribe to one cause only, the extremely imperfect language of the statute.

LORD DEAS.—I agree with your Lordship that the only difficulty arises from the generality and vagueness of the language used in the last of the statutes commented on. But, of course, we are bound to read the whole of the Act attentively, and then to consider what is the meaning which it conveys to the mind. On reading it consecutively it is difficult to doubt that it was intended [752] to apply only to gratuitous trusts. I agree in the remarks made upon it by your Lordship, but the conclusive consideration to my mind is, that the whole powers and privileges conferred on gratuitous trustees by the previous statutes are obviously conferred on all the trustees mentioned in the last statute, and that it is impossible to suppose that all these powers and privileges were intended to be conferred on paid trustees of every description. But the petitioner's argument must necessarily go that length. The statutes 24 & 25 Vict. c. 84, and 26 & 27 Vict. c. 115, applied in express terms to gratuitous trusts only. The statute 30 & 31 Vict. c. 97, sec. 1, bears that "in the construction of this Act, and of the said recited Acts, the words 'trusts and trust-deeds' shall be held to mean and include all trusts constituted by virtue of any deed, or by private or local Act of Parliament." The effect of this enactment in the new Act is, that the words "trusts and trust-deeds" in the recited Acts include all trusts and trust-deeds comprehended under the new Act, in which this interpretation clause occurs. The words are to be held co-extensive in their meaning in all these Acts, the result of which is, that if the new Act includes paid trustees, so do the recited Acts, and all the powers and privileges conferred by the recited Acts upon gratuitous trustees are to be held as conferred upon paid trustees, such as non-liability for omissions, the power to appoint a factor at the expense of the estate, &c. I cannot think that this could be the intention of the Legislature, and on this ground, as well as on the grounds stated by your Lordship, I concur in holding the petition incompetent.

LORD ARDMILLAN concurred.

LORD KINLOCH.—The trust-deed under which this petition asks the Court to appoint a new trustee is a trust-deed granted in connection with the affairs of a copartnery, and granted in favour of a trustee for creditors, who is to receive a remuneration for his trouble. I am of opinion that this trust-deed does not fall within the purview of "The Trusts (Scotland) Act, 1867," and that therefore the petition should be refused.

The Acts 24 & 25 Vict. c. 84, and 26 & 27 Vict. c. 115, by which various powers and privileges were conferred on trustees, are clearly confined to the case of gratuitous trusts, for so they are declared, in so many words, to be. The Acts do not limit their provisions to *mortis causa* deeds; but it is plain that these were mainly in the view of the Legislature. It is in these that gratuitous trustees are chiefly found. And the whole powers and privileges conferred are such as are peculiarly appropriate to the case of *mortis causa* deeds.

The after Act of 1867, which is that now relied on, begins with an additional definition, *inter alia*, of the words "gratuitous trustees." Such a definition would be altogether idle and out of place if the intention of the statute was to bring all trusts whatever within its operation, whether gratuitous or not. In the second section it is provided—"In all *such* trusts the trustees shall have power to do the following acts, when such acts are not at variance with the terms or purposes of the trust." A power is then given to appoint paid factors and law-agents, to discharge trustees who have

resigned, and to do certain other things. In section 3 the statute uses an apparently more general phrase, and says—"It shall be competent to the Court of Session, on the petition of the trustees under *any* trust-deed, to grant authority to the trustees to do any of the following acts." Power is then given to sell, feu and let, borrow money on, or excamb the trust-estate. A variety of clauses follow, all prefaced with the same general introduction; amongst which is the 12th, now founded on, giving power to the Court to appoint new trustees.

The question now arises, whether these clauses are to be taken in their rigid literality—be held applicable to all trusts whatever—or whether they are to be restrained to the case of gratuitous trusts, such as were provided for by the two previous statutes, and, I clearly think, are exclusively provided for by the 2d section of the Act 1867. I am of opinion that the latter is the sound conclusion. I think the general phrase "any trust" is to be construed as referring to any trust of the same general description with those previously referred to. Fairly [753] interpreting the statute, I think that no other construction can be put on it. The whole of the provisions are such as are fairly applicable to the case of gratuitous trusts, and these alone. I have particularly noticed those referring to the "beneficiaries" under the trust—expressly so called. I cannot fancy the Legislature having in view the case of trusts for creditors, such as is here involved. Still less can I suppose it intending to apply its provisions, without any discrimination, to that large body of varying trust-deeds which would be comprehended under the term "any trust-deed," taken absolutely. I think the whole arrangements of the statute are different from what they would have been had it been contemplated to apply its provisions to all trusts whatever of any kind. The petitioners have not satisfied me that this unlimited construction is to be given to the Act. I hold, on the contrary, that it was exclusively intended to follow out into further ramifications the provisions of the two prior statutes as to gratuitous trust-deeds. I therefore cannot apply its provisions to the trust-deed now in question.

THE COURT directed the Lord Ordinary to refuse the petition as incompetent.

A. K. MACKIE, S.S.C.—Agent.

[*Distinguished*, Royal Bank of Scotland, 1893, 20 R. 741.]

No. 131. X. MACPHERSON, 753. 30 May 1872. 1st Div.—Lord Mure, B.

THE TRUSTEES OF THE DECEASED JOHN M'NEILL, Complainers.—*Pattison—Watson.*

THE REV. COLIN CAMPBELL, Respondent.—*Millar—Duncan.*

Teinds—Interim decree of Locality—Suspension—A. S. 5th July 1809, *sec.* 5— *A. S. 20th June* 1838.—A heritor charged for payment of his proportion of stipend modified by an interim decree of locality presented a note of suspension on the ground that the amount greatly exceeded the teind of his lands as ascertained by an old decree of valuation, of which he had raised an action of approbation. He did not, however, allege that there was not in the hands of the other heritors surplus teind sufficient to meet any claim which he might have for over payments of stipend. *Note refused.*

In an action of augmentation, modification, and locality at the instance of the minister of the united parishes of Kilninver and Kilmelford, in the county of Argyll, the Lord Ordinary on teinds, upon the 26th January 1866, pronounced an interim decree of locality, which was acted on and received effect until March 1872, when the trustees of the deceased John M'Neill of Ardnacross and Glenmore, one of the heritors in the united parishes, presented a note of suspension as of a threatened charge at the instance of the minister for payment of £44, 12s. 1d., being, along with the sum of £25 paid by the complainers to account in October 1871, the proportion of stipend allocated upon them for crop and year 1871, conform to the interim decree of locality.

The reasons of suspension were that the proportion of stipend allocated upon the

complainers greatly exceeded the amount of the teind of their lands, as valued by a report or decree of the sub-commissioners in 1629, of which the complainers had brought an action of approbation in 1866. During the dependence of this action the Rev. Colin A. M'Vean, who was at the time minister of the united parishes, was transported to another parochial charge, and the cure remained vacant until the induction of the Rev. Mr. Campbell in 1869. The action was not, however, intimated to Mr. Campbell, and in July 1870 decree in absence was pronounced.

Thereafter, in consequence of an omission in the summons, causing a corresponding error in the decree of approbation, Mr. M'Neill's trustees raised another action concluding for reduction of the erroneous decree, and for ratification and approbation *de novo* of the report of the sub-commissioners in 1629. The summons in this action had been executed but had not been called in Court at the date when the note of suspension was presented.

[754] The complainers offered to consign the amount of the modified stipend which they declined to pay, and they also proposed to surrender the teinds of their lands conform to the alleged valuation of the sub-commissioners in 1629.

The respondent pleaded that the note of suspension was merely an attempt to obtain in a summary form relief from an existing legal obligation, which could not be competently discharged or modified until the interim scheme of locality had been rectified, or a final scheme adjusted and approved of.

The Lord Ordinary refused the note, with expenses.*

---

* "NOTE.—This is a suspension of a threatened charge upon a decree of interim locality, and proceeds upon the assumption that the complainers are possessed of a valuation of their teinds, which has been disregarded in the preparation of the interim scheme; that they have in consequence been called upon to pay more than the true value of their teind; and that the decree is therefore to that extent invalid and inept, as involving an encroachment upon stock.

"The application is mainly rested upon the cases of M'Cartney, March 4, 1817, F. C., and Oswald, Nov. 21, 1835, 14 S. 32, in both of which suspensions of charges proceeding upon decrees of interim locality were sustained, notwithstanding the provision of the 5th section of the Act of Sederunt 1809. But these cases differed, in the opinion of the Lord Ordinary, in several material respects from the present. For in both of them there were decrees of approbation of the sub-valuation which showed distinctly that the stipend which had been allocated exceeded the valued teind; while in the present case there is as yet no available approbation of the sub-valuation, for the complainers are only in the course of endeavouring to obtain one. In the case of M'Cartney, the decree, although produced with the heritors' rights, in terms of the Act of Sederunt 1809, but disregarded in preparing the interim scheme, had been given effect to in a final locality, in which the error made in the interim scheme had been corrected,—notwithstanding which, the minister, though aware of the correction, insisted upon charging upon the interim decree; and it was upon this ground mainly that the judgment in that case proceeded. In the case of Oswald, again, the minister was admittedly insolvent; and it was also taken as an admitted fact, in disposing of the case, that all the other teinds in the parish were exhausted; so that, in the event of the sum charged for being erroneously paid, no relief of over-payments could be got either from the heritors or minister. But here, on the other hand, there is no imputation against the solvency of the respondent; and parties are directly at issue as to whether the teinds of the other heritors are exhausted.

"In neither of these cases, moreover, does it appear that any payment of stipend had been made under the alleged erroneous interim scheme, while here payment has been made under the interim scheme for four years without objection, and without any attempt having been made to have the scheme rectified under the provisions of the Act of Sederunt of 20th June 1838; which provisions appear to the Lord Ordinary to be almost of themselves sufficient to take this case out of the rule applied in the cases of Oswald and of M'Cartney, because, at the time those cases were decided, it was not competent to obtain a rectification of an interim scheme in the manner provided by sec. 2 of the Act of Sederunt 1838.

"The 4th section of this Act of Sederunt, no doubt, contemplates that a suspension may be brought after interim decree, with a view to a surrender of teinds. But this must, as the Lord Ordinary conceives, be intended to meet cases where the party bringing

[755] The complainers reclaimed, but the Court, without calling upon the respondent's counsel, unanimously adhered to the Lord Ordinary's judgment.

T. & R. B. RANKEN, W.S.—M'NEILL & SIME, W.S.—Agents.

No. 132. X. MACPHERSON, 755. 30 May 1872. 1st Div.—Lord Mackenzie, B.

GEORGE AULDJO JAMIESON (Allardice's Judicial Factor), Petitioner.—*Sol.-Gen. Clark—Watson.*

MRS. BARCLAY ALLARDICE, Respondent.—*Balfour.*

Judicial Factor—Special Powers—Sale of Heritage.—Trustees were directed to make over the residue of the estate to the truster's son, on his attaining thirty years of age. The trust affairs were in an embarrassed state, and a judicial factor was appointed. When the son had attained twenty-nine years of age the judicial factor found that the income of the estate was not sufficient to meet the annual payments, and applied to the Court for power to sell the heritable property. Power to sell granted.

Trust-settlement—Vesting.—The residue of a trust-estate was bequeathed to the son of the truster, who directed that the bequest should not take effect till the son attained thirty years of age, "unless my trustees shall be of opinion that it should take effect sooner." The truster further stated his wish that the trustees should make over his landed property to his son on his attaining thirty years of age, "or earlier if expedient"; and he gave them power to sell the whole or part of his lands.

Opinion that the bequest vested in the son *a morte testatoris.*

This petition was presented to the Junior Lord Ordinary by George Auldjo Jamieson, judicial factor on the trust-estate of the late Robert Barclay Allardice of Ury and Allardice, with concurrence of Lieutenant Robert Barclay Allardice, for special powers to sell the estate of Allardice, and certain subjects in Stonehaven belonging to the trust.

The late Mr. Barclay Allardice died in 1854 leaving a trust-disposition and settlement in favour of trustees. He was survived by a married daughter, Mrs. Ritchie, subsequently known as Mrs. Barclay Allardice, and by two illegitimate sons, Robert and David, who concurred in this petition.

Mr. Barclay Allardice's affairs were at the time of his death in a very embarrassed condition, and in 1871 Mr. Jamieson was appointed judicial factor on the trust-estate. In February 1872 he presented this petition.

The petition set forth that the purposes of the trust were—(1) payment of the truster's debts; (2) payment of £3000 to David Stewart Barclay, who is the younger of the two illegitimate sons of the truster; (3) payment to Ann Angus, the mother of the said son, of an annuity of £100, and to the truster's lawful daughter, Margaret (Mrs. Ritchie), of an annuity of £200; (4) payment of £1000 to each of Mrs. Ritchie's

---

the suspension may have only very recently acquired materials to enable him to apply for a rectification of the interim scheme, or may not have had an opportunity of surrendering in the locality; and not such a case as the present, where the complainers have for some time been in possession of the materials on which the surrender is proposed to be made, and have been endeavouring to effect a surrender in the process of locality, but have [755] hitherto failed in succeeding to satisfy the Lord Ordinary in that cause that they are in a position to do so.

"In these circumstances, it appears to the Lord Ordinary that, were he to pass the note with a view to a surrender, he would in effect be reviewing the judgment of Lord Gifford, refusing to allow the complainers to surrender on their alleged valuation; while he would at the same time be sustaining the competency of stopping payment of a charge upon an interim decree of locality in a case where the party is not in possession of a valid operative decree of valuation, but is merely in the course of endeavouring to obtain one, and which, having regard to the terms of the Acts of Sederunt of 1809 and 1838, he does not consider he would be warranted in doing."

three sons, Robert, Samuel, and David, on their attaining majority; (5) and lastly, the residue is bequeathed to the said Robert Barclay Allardice, his elder illegitimate son by the said Ann Angus.

By the said trust-deed the trustees are empowered to "apply the annual rents or interests of the foregoing bequests to my said two sons, in ali-[756]-menting and educating them during their minority, and, if found advisable, to apply the principal sums, in whole or in part, in purchasing commissions for them in the army or navy, or otherwise settling them in life, and declaring that, subject to the exercise of these powers, the bequest in favour of my said son Robert shall not take effect until he shall attain the age of thirty years complete, unless my said trustees shall be of opinion that it should take effect sooner."

The said deed also contains the following clause:—"With full power to the said trustees,—although it is my earnest wish and desire that they shall, if possible, and if considered by them to be expedient in the circumstances of the trust, make over my landed property, in whole or in part, after making provision for the payment of my debts, bequests, and others before mentioned to my eldest son, Robert, by the said Ann Angus, on his arriving at the age of thirty years, or earlier if deemed expedient,—to sell or dispose of all or any part or parts of my said estate and effects hereby conveyed."

At the time of the truster's death his estates were heavily burdened with debt, and his affairs where in great confusion and embarrassment.

It was the truster's desire, as stated in his deed of settlement, that his said son Robert should be educated for the military profession, and he is now a lieutenant in the 93d Regiment. The residue of the trust-estate vested in him at the death of the truster, but until May 22, 1873, he will not attain the age of thirty specified in the trust-deed as the period when the residue of the trust-estate should be made over to him.

The legacies bequeathed by the trust-deed have been paid, but the annuitants, Mrs. Ritchie and Ann Angus, still survive, and are in receipt of the annuities provided to them by the truster.

The petitioner stated that the sale of the estate of Allardice, and of the subjects at Stonehaven, had become not only highly expedient, but absolutely necessary.

The present position of matters is as follows:—

1. The rental of Allardice amounts to				£1475	0 0
2. The rental of the Stonehaven subjects, including market customs, is				93	6 4
				£1568	6 4
Deduct—					
Public burdens affecting Allardice . . .	£100	14	4		
Do. Market Place subjects . . .	7	4	1		
				107	18 5
Remains free rental				£1460	7 11
Which is the whole available revenue of the estate under the charge of the judicial factor. But the annual burdens, including interest on debts and the two annuities, amounted to				1468	9 7
Showing a deficiency of . . .				£8	1 8
without making any allowance whatever to the residuary legatee, Lieutenant Barclay Allardice. It is absolutely necessary, however, that he should have something for his maintenance, and he has accordingly borrowed on the security of his revisionary interest a sum of £1500, the interest on which at 5 per cent. amounts to . . .				75	0 0
Which would make the annual deficiency				£83	1 8

[757] On the other hand, the position of matters, if the trust-estate were sold, would

be as follows:—The petitioner is advised that he may expect for the estate of Allardice £41,500 0 0
And for the Stonehaven subjects may be added, say . . . 1,300 0 0

Total . . £42,800 0 0

After deducting debts and expenses there would remain a balance of £15,600, which would yield, at 4 per cent. . . £624 0 0
But this would be subject to the following annuities, viz.
1. To Mrs. Ritchie, now Mrs. Barclay Allardice, 56 years of age £200 0 0
2. To Mrs. Macdonald, 55 years of age . . 100 0 0

300 0 0

Leaving a surplus income of £324 0 0

in place of a deficiency of £83, 1s. 8d.

The petitioner craved the Court to authorise him to expose the subjects for sale by public roup at the upset prices of £41,500 and £1300 respectively.

The Lord Ordinary remitted to Mr. Alexander Hamilton, W.S., to inquire into the circumstances and report.

Mr. Hamilton reported that the facts were correctly set forth in the petition, and that it was expedient that the special powers should be granted.

The Lord Ordinary pronounced the following interlocutor:—Refuses *in hoc statu* to grant authority to the judicial factor to sell the lands and barony of Allardice, and the market buildings and others in Stonehaven, and decerns; but allows the expenses of the present petition and proceedings to be charged against the estate." *

[758] The petitioner reclaimed, and a minute was put in for Mrs. Barclay Allardice,

---

* "NOTE.—The Lord Ordinary is of opinion that the judicial factor has not shown sufficient grounds to entitle him to receive *in hoc statu* the authority of the Court to sell the lands and estate which form the residue of the trust-estate.

"From the statement of the judicial factor there appears to have been a deficiency of income to meet the expenditure of the past year to the amount of only £8, 1s. 8d. This arises after payment of the two annuities chargeable on the proceeds of the residue remaining after payment of the whole bequests other than the bequest of the residue. The deficiency is small, and would at once be met by a reduction to that extent in the expenses of management, or in the rate of interest on the heritable debt of £23,850,—on £7000 of which interest above the market rate appears to be at present payable, although the estate, to the management of which the judicial factor was lately appointed, has been valued as worth upwards of £40,000. This small deficiency is not *per se* a sufficient ground to warrant the application.

"The petition is presented by the judicial factor with the concurrence of Robert Barclay Allardice, the testator's son. It was maintained that the testator's said son had a vested right in the residue, which consists of the lands and barony of Allardice and certain heritable subjects in Stonehaven of small value, and that as the residue, if sold, would yield a considerable surplus income for his behoof, the prayer of the petition should be granted.

"The construction of the fifth trust-purpose of the testator's trust-disposition and settlement, which contains the bequest of the residue, is attended with difficulty, and no decision has been pronounced by the Court upon it. In the report of the case of Allardice's Trustees *v.* Allardice and others in the Jurist (vol. xxxviii. p. 315), which had reference to the construction of the fourth trust-purpose of the testator's settlement, directing payment of £1000 to be made to [758] each of the testator's three grandsons by his lawful daughter, Mrs. Ritchie, the reporter states that the Court considered that light was thrown on the construction of the fourth trust-purpose 'by the provision as to residue, the right to which undoubtedly vested in the testator's son Robert *a morte testatoris*, but payment of which was postponed until he was thirty years of age, unless the trustees should think it should be paid sooner.' The opinions of the Judges in the Inner-House are not given, and the case is not reported in the current series of the Court of Session Cases. The fourth trust-purpose is entirely separate from and unconnected with the fifth trust-purpose, the provisions and construction of the two purposes are different, and the meaning of the fourth trust-purpose does not seem to the Lord

on whom the petition had been served, but who had not appeared in the Outer-House, craving to be heard in support of the Lord Ordinary's interlocutor.

It was maintained for her that the petition should be refused, because the truster had expressed an earnest wish that the estate should not be sold; no case of necessity had been made out; and it was not certain that the residue had as yet vested in Lieut. Allardice. As the truster's heir-at-law, she had an interest in opposing the sale.

LORD PRESIDENT.—If Robert Barclay Allardice has a vested interest in the [759] residue of the trust-estate it is obviously expedient in the highest degree that the estate should be realised, which would give him an income of some £300 or £400 a-year, instead of nothing at all. If, on the other hand, he has not a vested interest, it is a very good reason for not granting power to sell, particularly as the period is so near at hand when the estate will certainly be vested in him, if he survives. The question raised by the reclaiming note depends therefore on whether the interest of Robert Barclay Allardice has vested. I may perhaps have a preconceived opinion on the subject, but I do not feel much diffidence in saying that I regard the point as very clear indeed, and that in no circumstances can there be any right in Mrs. Barclay Allardice, as the heir-at-law of the testator. The trustees are directed "to pay and make over the residue to my eldest son Robert." Words of direct bequest follow,—"and I leave and bequeath to him the same accordingly,"—which must operate at the death of the testator, unless qualified by the words which follow. The first clause which follows is a power to apply the interests of the foregoing bequests in alimenting the sons during their minority, and, if necessary, to apply the principal in settling them in life. The trustees have as ample powers in the application of the residue in the case of the elder son as in the application of the £3000 in the case of the younger son. A power of disposing of the whole residue in settling Robert in life before he attains the age of thirty is very inconsistent with the notion that the truster had any purpose of suspending vesting. A suspension of vesting is a thing very difficult to assume as contemplated by a testator, unless for some definite purpose. Almost the only con-

---

Ordinary to be attended with difficulty. But he considers that this is not the case with reference to the fifth trust-purpose, containing the bequest of the residue, seeing that it is expressly thereby declared that, subject to the exercise of the powers after-mentioned, 'the bequest in favour of my said son Robert shall not take effect until he shall attain the age of thirty years complete, unless my said trustees shall be of opinion that it should take effect sooner,' and that by these powers authority was conferred upon the trustees to apply the annual proceeds of the residue in alimenting and educating his said son during his minority, and, if found advisable, to apply the principal in whole or in part in purchasing commissions, or in otherwise settling him in life, while no direction is given with reference to the payment of the annual proceeds between his majority and the period when he shall attain the age of thirty years. Should he have no vested interest in the residue, and die before attaining that age, the residue would then fall to the testator's lawful daughter, and her issue, as the testator's lawful heirs.

"It is no doubt the case that the testator conferred power upon his trustees to sell all or any parts of his heritable estate; but in doing so he stated it to be his 'earnest wish and desire that they shall, if possible, and if considered by them to be expedient in the circumstances of the trust, make over' his landed property, after making provision for payment of the debts and the other bequests to his said son Robert, 'on his arriving at the age of thirty years, or earlier if deemed expedient.'

"It appears from the judicial factor's statement that a sale would be beneficial, seeing that the free proceeds, when invested at 4 per cent., would yield a surplus income over expenditure, after payment of the annuities of £384 or thereby.

"Such being the position of the trust—the rights of the testator's son Robert in the residue never having been judicially ascertained, the construction of the testator's settlement in regard to these rights being attended with difficulty, and there being no necessity for the sale, the Lord Ordinary is of opinion that the petition, in so far as regards the power to sell the heritable estate, should be refused *in hoc statu*. In less than fourteen months, that is on 22d May 1873, the testator's son Robert, if he survive, will attain the age of thirty, and will have right to the residue under the burden of the annuities and of the debts. He will then be in a position to concur with the petitioner in applying for and in obtaining from the Court authority to sell the heritable estate of which that residue consists."

ceivable purpose is to secure some ulterior interest. Then the truster goes on to declare "that subject to the exercise of these powers the bequest in favour of my said son Robert shall not take effect until he shall attain the age of thirty years complete, unless my said trustees shall be of opinion that it should take effect sooner." It is contended that the declaration that the bequest shall not "take effect" is equivalent to a declaration that it shall not vest. The words "take effect" have no fixed legal meaning, and must therefore receive a meaning from the general scope of the deed. Fortunately for the construction of the deed, they are twice repeated. If they are to be read as equivalent to "vest" in the first clause, they must also be read as equivalent to "vest" in the passage which allows the trustees to cause the bequest to "take effect" sooner. Now, a power to trustees to vary the time of vesting fixed by the testator is so novel as to lead one to speculate in what form it is to be carried out. I do not say that the testator might not declare in express terms that his trustees shall have power to alter the time of vesting. But I am not prepared to hold that any such power can be inferred from ambiguous words.

The only remaining point in the deed is the power of sale given to the trustees, in which the testator expresses his earnest wish that if possible they should make over his landed property in whole or in part to his son Robert. There is no notion whatever here of any interest beyond Robert.

Taking all these passages together, it seems a very clear case of vesting. And this being so, it would be an unnecessary hardship to Lieutenant Allardice that he should be deprived of an income which might be derived from realising this estate, especially as the only wish of the testator which is frustrated is one which must necessarily be frustrated in any case. I am therefore disposed to grant authority to sell.

LORD DEAS.—I do not think it necessary to enter upon the question of vesting. I am very clearly of opinion that the power of sale ought to be granted, whether the residue is vested in Robert Allardice or not. There is no difficulty in the terms of the deed. It does not require that a case of necessity shall be made out. The trustees have power given them by the trust-deed to sell, and there is nothing which tends in an opposite direction, except the wish expressed by the testator that they shall, if possible, make over the landed property to his son Robert. If the sale is allowed, the estate will obviously remain in a better form for whoever may get it than it is now.

LORD ARDMILLAN.—I am of the same opinion with your Lordship in the [760] chair; and I would only remark, in addition, that the passage of the trust-deed expressing the truster's desire that the trustees should, if possible, make over the landed property to his son Robert on his arriving at the age of thirty years, or earlier if deemed expedient, is the exact counterpart of the passage which provides that the bequest shall not take effect until he shall have attained the age of thirty years, unless the trustees should be of opinion that it should take effect sooner. The expression "take effect" in the latter passage is thus clearly shown to refer to the term of payment, and not to that of vesting.

LORD KINLOCH.—I agree that the power of sale should be given. As far as Robert Allardice is concerned that is obviously the proper course to take. The only reason against selling would be if it could be shown that there was some one who was entitled to say that it should not be sold. I agree that such reason has not been made good. I agree with your Lordship as to the question of vesting, but, at the same time, I am disposed to concur with Lord Deas that it is not indispensable to decide that question. Suppose that the lady may come at some time or other to the right of the estate, it is plain she could not retain it. A sale must take place. It resolves itself into a question of expediency. The trustees could have sold without applying to the Court at all, and it is only because Mr. Jamieson is a judicial factor that he has thought it necessary to apply to the Court. I do not think that in regard to the interest of the lady it would benefit her not to sell the lands. In short, there is no reason for denying Mr. Robert Allardice the great benefit he has in selling.

The following interlocutor was pronounced:—"Recall the interlocutor reclaimed against, and remit to the Lord Ordinary to grant authority to the petitioner to sell the heritable estate mentioned in the petition and proceedings."

MITCHELL & BAXTER, W.S.—Agents.

[*Principle applied*, Simson, 1883, 10 R. 540. *Referred to*, White's Trs. *v* White, 1896, 23 R. 836.]

No. 133. X. MACPHERSON, 760. 31 May 1872. 1st Div.—B.

EDWARD JAMES STOPFORD BLAIR AND STUART MACNAGHTEN, Executors of COLONEL W. H. STOPFORD BLAIR OF PENNINGHAME.—*Shand—Balfour.*
EDWARD JAMES STOPFORD BLAIR AND OTHERS, Marriage-Settlement Trustees of MR. AND MRS. EDWARD HERON MAXWELL.—*Sol.-Gen. Clark—Marshall.*
EDWARD HERON MAXWELL, as Administrator-in-Law for his youngest child, MARGARET EMILY HERON MAXWELL.—*Sol.-Gen. Clark—Marshall.*
STUART MACNAGHTEN, Compearer.—*Melville.*

Testament—Legacy—Postnatus—Vesting.—A testator, after a legacy to his daughter, bequeathed "to each of her children by this her present marriage £1000 each, free of duty, but to be placed at the discretion of the marriage trustees for their special benefit while under age." *Held* that the bequest was limited to children alive at the death of the testator, and did not extend to children born after the testator's death.

This was a case for the opinion of the Court sent by the High Court of Chancery in England under the Act 22 & 23 Vict. c. 63, and brought before the Court by a petition in the names of the executors of the deceased Colonel William Henry Stopford Blair of Penninghame, of the marriage-contract trustees of Mr. Edward Heron Maxwell and Mrs. Elizabeth Ellen Stopford Blair or Heron Maxwell, and of the said Edward Heron Maxwell as administrator-in-law for Margaret Emily, his youngest child. Mr. Stuart MacNaghten, one of the executors of the late W. H. Stopford Blair, appeared by counsel, and stated that he desired to take no part in the discussion, either on the one side or the other.

By an antenuptial contract of marriage between Edward Heron Maxwell, and his wife, Elizabeth Ellen Stopford Blair, only daughter of [761] Colonel Stopford Blair, dated 14th October 1847, a sum of £10,000 three per cent. consols, provided by Col. Stopford Blair, as well as all property which his daughter might acquire or succeed to before the dissolution of the intended marriage, were conveyed to trustees to be held for payment of the income to Mr. and Mrs. Heron Maxwell during their joint lives, and to the survivor during his or her survivance, and after the death of the survivor to transfer the capital to the children of the marriage and their issue, whom failing to Mrs. Heron Maxwell's heirs or assigns whomsoever. There was a power to the spouses jointly, and to the wife if she should survive, to divide and apportion the said sums, but failing such apportionment the said stock and other estate were to be divided among the said children, share and share alike, the issue of predeceasers being entitled to their parents' shares.

Colonel Stopford Blair made his last will and testament in May 1848, by which he bequeathed two sums, each consisting of £10,000 three per cent. reduced bank annuities, to be held by the said marriage-contract trustees on the same trusts as were specified in the said marriage-contract, "save only that in lieu of the trust in and by the said contract declared in favour of the heirs or assigns of my said daughter, in the event of the failure of the children and issue of my said daughter, intended to be thereby provided for, the said sums of £10,000 and £10,000 three per centum reduced bank annuities, and hereby respectively bequeathed as aforesaid, and the investment thereof, shall, on the failure of such children and issue, and subject to the provisions made for my said daughter and her husband during their respective lives in and by the said contract, be transferred and made over to the child or children of my said daughter to be procreated of any future marriage or marriages or the survivors of them and lawful issue of any deceased, whom failing to my said son, the said Edward James Stopford Blair."

Colonel Stopford Blair executed a holograph codicil in June 1857 in the following terms:—"This is a codicil to my will, bearing date May 21st, 1848. I desire to leave to my daughter, Mrs. E. H. Maxwell, the remaining term of lease of (now) No. 6 (formerly No. 5) Portman Square, W. My settlement made at her marriage with Mr. Edward Heron Maxwell, viz. ten thousand pds. (£10,000) to be paid over at my death to her marriage trustees, if not sooner done by me. I bequeath to each of her children

by this her present marriage £1000 each, free of duty, but to be placed at the discretion of the marriage trustees for their special benefit while under age." . . . .

Colonel Stopford Blair died 20th September 1868.

The opinion of the Court was requested on the following questions:—"Whether according to the law of Scotland Margaret Emily Heron Maxwell and any other child of the marriage of the said Edward Heron Maxwell and Elizabeth Ellen, his wife, born after the death of the testator, is entitled to a legacy of £1000 under the bequest? or Whether such bequest is limited to the children alive at the death of the testator?"

It was argued for the marriage-contract trustees and Margaret Emily Heron Maxwell;—The presumption which has been held to exist that a bequest to the children of a person is to the children living at the testator's death yields to circumstances showing contrary intention. In this case the codicil was made in 1857, many children of the testator's daughter were born after that, and as it was clear, and was admitted, that he intended all her children to share alike whether born before or after its date, it could not fairly be held that he intended to draw a line between two classes of her children according as they were born before or after another [762] date. The terms of the bequest in the will were rather different, but unless good reason were shown to the contrary a legacy to children of the present marriage ought to receive the same meaning which it clearly had in the previous formal settlements. Moreover, this was not the case of a sum for division, so that the inconvenience on which the rule in question was based would not arise, and the inconvenience ceasing the rule ought to cease also. The previous cases had all been bequests to the children of collateral descendants, and there were no cases in which it had been applied to bequests to direct descendants.

It was argued for Mr. E. Stopford Blair, the executor;—The true question was, when was the vesting period in regard to the legacies to the children in the codicil? It was clear that the residue vested at the testator's death, and the special legacies to the children previously born vested at his death also; children not then alive could have no right at all to a special legacy. Among many differences between the provisions of the will and the special bequests in the codicil, the chief was that the will gave a slump sum among a class, which prevented vesting until the dissolution of the marriage when the members of the class were ascertained. In that case there was no difficulty about vesting; but here the sum bequeathed would remain indeterminate, and it would be impossible to wind up the affairs of the trust. The question as to bequests of this kind to children, was, however, concluded by authority.*

The Court returned the following opinion:—"The Lords having considered the petition of Edward James Stopford Blair and others, with the case prepared and adjusted in the Court of Chancery in England, on which the opinion of this Court is requested by the said Court of Chancery, and having heard counsel for Edward James Stopford Blair and others, being the trustees under the marriage-settlement of Edward Heron Maxwell, Esq., and Mrs. Elizabeth Ellen Stopford Blair, his spouse, and for the said Edward Heron Maxwell, as administrator-in-law for Margaret Emily, his youngest child, on the one part, and for the said Edward James Stopford Blair, as one of the two executors of the deceased William Henry Stopford Blair, Esquire of Penninghame, on the other part, Stuart MacNaghten, the other of the said two executors also appearing by counsel and stating that he declined to take any part in the discussion of the questions stated in the said case, make answer to the said questions as follows, viz.:—According to the law of Scotland Margaret Emily Heron Maxwell and the other child or children who may be born of the marriage of the said Edward Heron Maxwell, and Elizabeth Ellen, his wife, after the death of the testator, are not entitled to a legacy of £1000 each under the bequest set forth in the 3d paragraph of the said case, but such bequest is limited to each of the children who were alive at the death of the testator."

TODS, MURRAY, & JAMIESON, W.S.—J. C. & A. STEUART, W.S.—Agents.

---

* Davidson's Trustees *v.* Davidson, July 15, 1871, *ante*, vol. ix. p. 995; Wood *v.* Wood, January 18, 1861, 23 D. 338; Macdougall *v.* Macdougall, February 6, 1866, *ante*, vol. iv. p. 372—*ante*, vol. vi. H. L. 18; Williams on Executors, 1015, 1016; Ringrose *v.* Branham, 2 Cox, 384; Mann *v.* Thompson, Kay, 638; Parker *v.* Tootall, 11 H. L. 143; 1 M'Laren's Wills and Succession, 651, 652, citing Mackenzie *v.* Holte's Legatees, 1781, M. 6602, and M'Courty *v.* Blackie, 1812, Hume, 270; Stawers *v.* Benbow, 2 My. and K. 46.

No. 134. X. MACPHERSON, 763. 31 May 1872. 1st Div.—B.

DANIEL WALKINSHAW AND ANOTHER (Walkinshaw's Marriage-Contract Trustees).—*Sol.-Gen. Clark—Lorimer.*

ROBERT WALKINSHAW YOUNG AND OTHERS (Mr. and Mrs. Crawford's Marriage-Contract Trustees).—*Sol.-Gen. Clark—Lorimer.*

DANIEL WALKINSHAW AND ANOTHER (Testamentary Trustees of Helen Margaret Walkinshaw).—*Sol.-Gen. Clark—Lorimer.*

DAVID LEE CRAWFORD AND OTHERS (Children of Mr. and Mrs. Crawford).—*Moncreiff.*

MRS. JANE LEE CRAWFORD OR WALKINSHAW.—*Watson—M'Laren.*

Parent and Child—Provisions to Children—Marriage-Contract—Vesting.—By an antenuptial contract of marriage the husband bound himself "to provide and secure to the child or children who may be procreated of the marriage as follows, viz.:—If only one such child £2000, and if more than one such child £3000, and payable at the first term of Whitsunday or Martinmas after the decease of the longest liver" of the spouses, the husband binding himself in security thereof to take out an insurance policy on his life for £1500 in favour of the marriage-contract trustees. A power of apportionment was given to the father, whom failing, to the mother. The deed further contained a declaration that the provisions should be subject to the widow's jointure "during its continuance," and that the provisions to the children "shall be accounted part of their interest in their father's means and estate at his decease." There were two children born of the marriage, both of whom predeceased their father.

Held (*diss.* Lord Kinloch) that each child had a vested interest in the provision from its birth, and that there being two children the provision was £3000.

Husband and Wife—Marriage-Contract—Provisions to Wife and Children.—A husband was bound by an antenuptial contract of marriage to provide and secure £3000 for his children, and in security thereof to take out a policy of insurance in favour of the marriage-contract trustees for £1500. After the provision had vested in two children of the marriage the father contracted a second marriage, before which he granted to his intended wife a writing conveying to her as a provision his household furniture. At the father's death the only funds available for payment of the unsecured balance of the children's provision were the proceeds of the household furniture. In a competition between the children's representatives and the widow, *held* that the widow had a preferable claim to the whole proceeds of the furniture, the provision in her favour being reasonable in amount.

James Walkinshaw, sometime merchant in London, married in 1831 Miss Barbara Walkinshaw, who died in 1867.

By an antenuptial marriage-contract between them Mr. Walkinshaw, after binding himself to pay to his promised spouse a certain annuity or jointure in the event of her surviving him, bound and obliged himself "to provide and secure to the child or children who may be procreated of the said marriage, as follows, viz.:—If only one such child the sum of £2000 sterling, and if more than one such child the sum of £3000 sterling, and payable at the first term of Whitsunday or Martinmas after the decease of the longest liver of the said James Walkinshaw and Barbara Walkinshaw, with one-fifth part more of liquidate penalty in case of failure, and the lawful interest thereof after the said term of payment until payment, which provision shall be divisible among the said children, if more than one, in such shares and proportions as he, the said James Walkinshaw, shall see proper to appoint by a writing under his hand, and failing thereof, the said Barbara Walkinshaw, in case of her surviving him, shall have the like power of division, and failing her exercising such power, then the same shall be divided among the said children share and share alike: Declaring that the said provisions to children are to be subject to [764] the said jointure to the widow during its continuance: And for and towards securing the said annuity or jointure in the first place, and the said provisions to the issue of the marriage in the next place, the said

James Walkinshaw hereby binds and obliges himself forthwith to insure, for and during the term of his natural life, in a responsible life insurance office, and with and under the proviso underwritten to keep insured during the term aforesaid, a sum of money not less than £1500 sterling, at the sight and in the names of Daniel Walkinshaw, merchant in Glasgow, and James Walkinshaw, paper-maker at Overton, near Greenock, brothers of the said Barbara Walkinshaw, or the survivor of them two; whom failing, such other person or persons as may be named by the said James Walkinshaw, and failing thereof, by the said Barbara Walkinshaw, and that in trust to the end and intent that the sum which shall arise and be received from the said insurance at the decease of the said James Walkinshaw shall then be lent out and secured by said trustees or trustee, and the rights and securities thereof taken payable to the said Barbara Walkinshaw if she shall have survived, in liferent for her liferent use of the interest or other proceeds thereof, towards payment of her said annuity or jointure during her life, and the fee at her decease, or in case of her predecease, the sum which may so arise and be received from said insurance shall be applied by the said trustees or trustee towards payment of the before written provisions to the child or children who may be procreated of the marriage, which provisions shall be accounted part of their interest in their father's means and estate at his decease, but shall not preclude them of their proper share and interest therein." An option was given to James Walkinshaw to substitute heritable security for £1500 in name of the marriage-contract trustees for the life insurance security, but this option was not exercised.

On 23d October 1832 James Walkinshaw effected an insurance on his life for £1500, which was assigned to his marriage-contract trustees on 17th January 1833.

There were two children of the marriage.

1. Elizabeth Jane, who married David Rose Crawford in 1860, and died on 23d April 1870, survived by six children. By an antenuptial marriage-contract Mrs. Crawford assigned all her property to marriage-contract trustees.

2. Helen Margaret, who died unmarried in 1860, leaving a general settlement in favour of trustees.

James Walkinshaw married on 1st June 1869 Miss Jane Lee Crawford, who survived him. He died intestate on 6th June 1871. There were no children of the second marriage. His widow was decerned and confirmed executrix-dative *qua* relict.

No writing apportioning the children's provisions under the marriage-contract was executed by Mr. Walkinshaw.

In anticipation of his second marriage with Miss Jane Lee Crawford Mr. James Walkinshaw, on 31st May 1869, executed and delivered to her a holograph writing in these terms:—"17 Dean Terrace, Edinburgh, 31st May 1869.—In view of my marriage with Miss Jane Lee Crawford, to be consummated (D.V.) to-morrow, I hereby make over and give to her in free gift, to be her absolute property, the whole furniture and plenishing belonging to me, with all napery, pictures, wines, and plate, with exception only of such few articles as are enumerated in the note attached to this gift, which excepted articles are to be given to my daughter, Mrs. David Rose Crawford. —JAMES WALKINSHAW."

No other provision was made by Mr. Walkinshaw for his second wife, who never renounced her legal rights.

[765] Mrs. Walkinshaw, as executrix, realised the moveable estate left by her husband, the amount of which, including the furniture, but exclusive of the amount due under the policy of assurance—which, with bonus additions, amounted to £2480—was sufficient to meet the claims of the ordinary creditors, and left a balance of £300. The furniture was worth £600.

The parties to this special case were (1) the trustees under the marriage-contract of James and Barbara Walkinshaw in 1831; (2) the marriage-contract trustees of Mr. and Mrs. Crawford; (3) the testamentary trustees of Miss Helen Margaret Walkinshaw; (4) the children of Mrs. Crawford; (5) Mrs. Jane Lee Crawford or Walkinshaw.

Mr. and Mrs. Crawford's trustees and Miss Walkinshaw's trustees claimed the whole sum of £2480 in equal proportions, maintaining that the full provision of £3000 had vested in the children of Mr. Walkinshaw's first marriage, and was conveyed to them respectively by the foresaid marriage-contract between Mr. and Mrs. Crawford, and trust-disposition and settlement of Helen Walkinshaw. Mr. and Mrs. Crawford's marriage-contract trustees, in the event of their failing in this contention, claimed the fund to the extent of £2000.

An alternative claim was made for Mrs. Crawford's children to £2000, as having vested in them at Mr. Walkinshaw's death, in terms of the marriage-contract of 1831, and in the event of its being held that it was not conveyed to Mr. and Mrs. Crawford's marriage-contract trustees.

Mrs. Walkinshaw maintained that the whole of the said sum was part of the goods in communion between her and her husband, and subject to *jus relictæ*; and alternatively, that the bonus additions (£980) were subject to *jus relictæ*. In any event she maintained that no more than £2000 was due in virtue of the obligation in the marriage-contract of 1831, and claimed *jus relictæ* from £480, the surplus proceeds of the policy of insurance.

The whole parties except the widow, in the event of the children's provisions under the marriage-contract of 1831 being found to be to any extent unsecured, claimed payment of the unsecured balance out of the moveable estate of James Walkinshaw, after payment of debts, but preferably to the widow claiming the furniture, &c., or its value, under the holograph writing of 31st May 1869, or, at least, *pari passu* with her.

On the other hand Mrs. Walkinshaw claimed the furniture, and preferably to the other parties claiming the unsecured balance.

The following questions were submitted for the opinion and judgment of the Court:—"1. Did the full provision of £3000, made by the late Mr. James Walkinshaw in his antenuptial contract of marriage with Miss Barbara Walkinshaw, vest absolutely in the two children of the marriage, or in either of them? 2. Was the said provision of £3000 effectually conveyed to the extent of one-half to the second parties by virtue of Mr. and Mrs. Crawford's marriage-contract, and to the extent of the other half to the third parties by Miss H. M. Walkinshaw's trust-disposition and settlement? 3. In the event of the above questions being answered in the negative, did the provision made by the late Mr. James Walkinshaw in his antenuptial contract of marriage with Miss Barbara Walkinshaw vest absolutely in the fourth parties, or was it effectually carried to the second parties by the antenuptial contract of marriage of Mr. and Mrs. Crawford? 4. Is Mrs. Walkinshaw, the fifth party, entitled to *jus relictæ* from the proceeds, including bonus additions, of the policy of assurance for £1500, effected by her husband on his life? Or, if not, is she entitled to *jus relictæ* from the sum of £980, being the amount of said bonus additions? 5. In the event of the children's provision under the marriage-contract of James and Barbara Walkinshaw being found, to any [766] extent, unsecured by the said policy of assurance, are the parties hereto of the first, second, third, and fourth parts entitled to payment of such unsecured balance out of the moveable estate of the deceased James Walkinshaw after payment of his debts, but preferably to the said Mrs. Jane Lee Crawford or Walkinshaw claiming the furniture, &c., or value thereof, as a reasonable provision made for her by the said James Walkinshaw by his said holograph writing? Or are the said parties only entitled to rank *pari passu* with the said Mrs. Walkinshaw? Or is she entitled to claim the said furniture, &c., or value thereof, preferably to the said other parties hereto?"

Argued for Miss Walkinshaw's trustees and Crawford's trustees;—By the deed of 1831 a trust-estate was created for the children of the marriage, which was the same as if the title to the sum in question had been taken directly to them. Here the destination was clearly expressed. The words "to be procreated" expressed the meaning of the granter without ambiguity. It had been held, in regard to an apportionment under a power, that the omission of a child who had predeceased made the whole apportionment inept.* There was no destination over, and nothing to postpone vesting of the whole sum which the father had become bound to provide and secure to the children of the marriage. The case was intermediate between the cases of Beattie's Trustee and Grant's Trustee, and must be ruled by the principle of the former.†

It was argued for Mrs. Walkinshaw;—Where a father in making provision for his children merely obliged himself to settle a sum on them after his death there was no vesting till his death.‡ Here, indeed, there was simply the personal obligation contemplated by Erskine, fortified by a very peculiar kind of security not available till after

---

* Watson *v.* Marjoribanks, Feb. 17, 1837, 15 S. 586.

† Beattie's Tr. *v.* Cooper's Trs., Feb. 14, 1862, 24 D. 519; Grant's Tr. *v.* Anderson's Tr., Feb. 1, 1866, *ante*, vol. iv. p. 336.

‡ Ersk. iii. 8, 40; Wilson's Trs. *v.* Pagan, July 2, 1856, 18 D. 1096; Routledge *v.* Carruthers, May 19, 1812, F. C.; Pretty *v.* Newbigging, March 2, 1854, 16 D. 667.

the granter's death. The right of the children to the unsecured balance depended to some extent on the writing of 1869.* A father might, notwithstanding a former marriage-contract, settle a reasonable provision on a second wife; and the principles on which this rule rested made it applicable even where there was not a formal antenuptial contract. A constitution of a reasonable provision in any form was sufficient, if a separate estate or a vested interest is created in favour of the wife. Here, the children being in this view entitled to £2000, £1500 of that is preferable in virtue of the security stipulated, and the widow to the extent of £600, the value of the furniture provided to her, is entitled to be paid out of the first head of the estate.

It was argued for the children of Mrs. Crawford (4th parties);—If the first and second questions were answered in the negative the children of Mrs. Crawford were entitled to the £2000 under the *conditio si sine liberis.*

At advising,—

LORD PRESIDENT.—We are here concerned with two instruments, one executed in 1831, being the antenuptial contract of Mr. Walkinshaw on his first marriage, and the other a holograph writing executed by Mr. Walkinshaw on the occasion of his second marriage in 1869. By his first marriage-contract Mr. Walkinshaw bound himself to provide and secure a certain sum for the children, £2000 if there should be only one child of the marriage, and £3000 if there should be [767] more than one. Two children were born of the marriage, both daughters, one of whom, Helen, predeceased both parents without leaving issue, but leaving a settlement. The other, Mrs. Crawford, survived till 1870. Their mother died in 1867. Mrs. Crawford left children, who are the parties to this case of the fourth part. Before her death Mr. Walkinshaw contracted a second marriage; and he died in 1871, thus surviving both his daughters. The main question for our decision is whether the provisions in the marriage-contract of 1831 had vested in his two children, or the vesting was postponed until the death of Mr. Walkinshaw. This question depends entirely on the construction of the contract of marriage. Mr. Walkinshaw binds himself "to provide and secure to the child or children who may be procreated of the said marriage as follows, viz.: If only one such child the sum of £2000 sterling, and if more than one such child the sum of £3000 sterling, and payable at the first term of Whitsunday or Martinmas after the decease of the longest liver of the said James Walkinshaw and Barbara Walkinshaw, with one-fifth part more of liquidate penalty in case of failure, and the lawful interest thereof after the said term of payment until payment, which provision shall be divisible among the said children, if more than one, in such shares and proportions as he, the said James Walkinshaw, shall see proper to appoint by a writing under his hand, and failing thereof, the said Barbara Walkinshaw, in case of her surviving him, shall have the like power of division, and failing her exercising such power, then the same shall be divided among the said children share and share alike: Declaring that the said provisions to children are to be subject to the said jointure to the widow during its continuance." Now, upon this part of the marriage-contract, the question might arise whether this is a provision to the children as they come into existence, and vests in each, or whether the number is to be ascertained at his death, and their right is suspended till then. That might be an important question in itself, but it is still more important when taken in connection with the obligation to secure the provision which follows. Mr. Walkinshaw further binds himself "forthwith to insure for and during the term of his natural life, in a responsible life insurance office, and with and under the proviso underwritten to keep insured during the term aforesaid, a sum of money not less than £1500 sterling, at the sight and in the names of Daniel Walkinshaw, merchant in Glasgow, and James Walkinshaw, paper-maker at Overton, near Greenock, brothers of the said Barbara Walkinshaw, or the survivor of them two; whom failing, such other person or persons as may be named by the said James Walkinshaw and failing thereof, by the said Barbara Walkinshaw, and that in trust to the end and intent that the sum which shall arise and be received from the said insurance at the decease of the said James Walkinshaw, shall then be lent out and secured by said trustees or trustee, and the rights and securities thereof taken payable to the said Barbara Walkinshaw, if she shall have survived, in liferent for her liferent use of the interest or other proceeds thereof, towards payment of her said annuity or jointure during her life, and the fee at her decease, or in case of her predecease the sum which may so arise and be received from said insurance shall be

* Ersk. iii. 8, 42.

applied by the said trustees or trustee towards payment of the before-written provisions to the child or children who may be procreated of the marriage, which provisions shall be accounted part of their interest in their father's means and estate at his decease, but shall not preclude them of their proper share and interest therein." Taking the whole of this part of the marriage-contract together I am of opinion that as soon as two children were procreated of the marriage £3000 vested in them; and that if one of these afterwards failed, the £3000 either went to the survivor, or the half of it went to the representatives of the predeceaser. The money, it is true, was not payable until the death of the testator, which at first sight gives the right of the children the appearance of a right of succession. But certain counter-considerations are to be taken into view.

In the first place, the obligation of Mr. Walkinshaw was not to pay at his death, but to provide and secure. Then the objects of the provisions were the children who might be procreated of the marriage, and that term is carried down by reference through the whole clause. The provision is to be divisible among [768] "the said children," *i.e.* the children who may be procreated of the marriage. But, above all, a security is created, and it is a security of a very substantial and important kind; because, although it is not a provision of a present sum or subject, it is one which will create a very valuable right, always supposing that Mr. Walkinshaw continues able to pay the premiums. I cannot doubt that the brothers of Mrs. Walkinshaw would be entitled to require Mr. Walkinshaw to effect the assurance, and thereafter to pay the premiums. The effect of the obligation here is just the same as if Mr. Walkinshaw had paid up all the premiums at once. In that case undoubtedly there would be a very important estate of present value, and of a certain ultimate value. The fact that the premiums are not paid up diminishes the value of the policy, and perhaps the certainty of the security. But the value increases from year to year.

When, therefore, Mr. Walkinshaw died, the trustees under the marriage-contract were trustees for the children and for nobody else, the mother being dead and there being no claim for jointure. That being so, the difficulty is very much removed. The case is just the same as where a special sum is set apart for children, and is thereby put entirely beyond the power of the father and his creditors. I do not think that his creditors could have attached this policy at his death, or even if he had become insolvent during his life. No doubt insolvency would have stopped the payment of the premiums, but it would not have destroyed the security so far as the present value of the policy went. Hence, the £3000 being a vested interest whenever the second child was born, and being secured to the extent of £2480, that fund in the hands of the trustees belongs absolutely to the two children and their representatives,—*i.e.* one-half to the marriage-contract trustees of Mrs. Crawford, and one-half to the testamentary trustees of Miss Helen Walkinshaw.

The result therefore is that, in my opinion, the first question should be answered in the affirmative, the second in the same way, and the third question is superseded.

There remains for consideration the question as to the interest of Mr. Walkinshaw's widow, as raised by the fourth and fifth questions. It is out of the question to say that Mrs. Walkinshaw is entitled to *jus relictæ* out of the policy, for neither it nor the bonus additions to it formed any part of the estate of Mr. Walkinshaw. But he made a provision for his second wife by a holograph writing before his marriage, and I see no reason to doubt that the provision was quite valid. It was quite reasonable in amount and was thus expressed:—"17 Dean Terrace, Edinburgh, 31st May 1869.—In view of my marriage with Miss Jane Lee Crawford, to be consummated (D.V.) to-morrow, I hereby make over and give to her in free gift, to be her absolute property, the whole furniture and plenishing belonging to me, with all napery, pictures, wines, and plate, with exception only of such few articles as are enumerated in the note attached to this gift, which excepted articles are to be given to my daughter, Mrs. David Rose Crawford.—JAMES WALKINSHAW."

The estate of Mr. Walkinshaw, keeping out of view this policy, which did not belong to him, seems to have been very much swallowed up by his outstanding debts; for the money he left and his furniture have paid off these, but have left a free balance of only £300. This must be taken as all that is left to represent the furniture, and must go to the widow. I do not think the widow can get any more, and I do not think that the children of the first marriage can be made to contribute anything to their father's debt out of their secured provision. It would be a different question if they were asked

to contribute out of an unsecured balance of their provision. I am of opinion that the widow's provision is preferable to the unsecured balance of the provision for the children of the first marriage, and this I hold to be quite consistent with the case of Lamb,* and all the cases on the subject. The fifth question ought therefore to be answered to the effect that the widow is entitled to be so preferred.

LORD KINLOCH.—I have arrived at a different conclusion from that which has been now expressed.

[769] The leading question discussed before us regards the period of vesting of the provisions for children contained in the marriage-contract of Mr. James Walkinshaw and his wife. The point of inquiry is, whether these provisions vested in each child at its birth, or at what other period vesting took place.

By the marriage-contract in question "the said James Walkinshaw binds and obliges himself and his foresaids to provide and secure to the child or children who may be procreated of the said marriage as follows, viz. :—If only one such child the sum of £2000 sterling, and if more than one such child the sum of £3000 sterling, and payable at the first term of Whitsunday or Martinmas after the decease of the longest liver of the said James Walkinshaw and Barbara Walkinshaw, with one-fifth part more of liquidate penalty in case of failure, and the lawful interest thereof after the said term of payment till payment; which provision shall be divisible among the said children, if more than one, in such shares and proportions as he, the said James Walkinshaw, shall see proper to appoint by a writing under his hand." Failing Mr. Walkinshaw, his wife had the power of apportionment; and if no apportionment was made, "then the same shall be divided amongst the said children, share and share alike."

The important characteristic, as it appears to me, of this provision is, that it is a provision by a father for children, out of his own estate, to take effect and be payable after his death. The term of payment expressed is the death of the longest liver of the spouses. This of course implied the death of the husband; and as he was himself the survivor, the case may be taken as simply a provision by a father for children payable after his death. It is not a provision flowing from a third party, such as frequently occurs in marriage-contracts, and creates a very different case. Neither is it a provision having no definite term of payment, but conveying a general right in favour of the class, which is a form of provision also frequently known, and has its own consequences. It is simply a provision by a father to his children, out of his own estate, payable after his death.

I am of opinion that, in itself, and independently of any other clauses, the effect of which I shall afterwards consider, this is, in point of law, a provision of succession. I do not of course mean that the provision is one which the father could gratuitously disappoint. It is succession, but protected succession. The nature of the contract implied an onerous obligation to make good the provision. To this effect there was a proper debt against the father, having to many intents the legal consequences of a debt. But the debt still consisted in an obligation to leave a certain amount of succession,—that is, a certain amount of money payable out of his estate after his death. And the claim was not one capable of coming into competition with third parties, creditors. Except as involving an obligation against the father not to defeat it, the provision is simply one of succession, with the legal characteristics of such. One of these I consider to be, that no right vests till the death of the father, and then vests in the children who survive that event; no others. This is a trite rule as to succession. If a father executes a testament, bequeathing a sum of money, payable after his death to his children amongst them, it is scarcely necessary to say that no right vests in any predeceasing child, and that the bequest devolves amongst the children alive at the father's death. It is exactly so in the present case in regard to the matter of vesting. What the father gives to his children is simply a sum of money payable after his death; £2000 if one child, £3000 if more than one. He binds himself to leave this succession, and his obligation is onerous. But, as in all cases of succession, no right vests till after the father's death, and then exclusively in the children surviving that event.

In the present case both children predeceased the father, but one, Mrs. Crawford, left issue. Admittedly, on all hands, this issue came in the mother's room by virtue of the *conditio si sine liberis*. The case is, therefore, the same in principle as if one child predeceased and the other survived the father. The predeceasing child, Miss Helen

* Arthur and Seymour *v.* Lamb, June 30, 1870, *ante*, vol. viii. p. 928.

Margaret Walkinshaw, had, as I conceive, no right vested in her. The only vested right lay in her sister, Mrs. Crawford, or her children in her room.

It follows, as I think, inevitably, that the sum due under this provision out [770] of the father's estate was £2000, not £3000. There was only one child having right to take, and that child could only take what was provided in the case of a single child. The sum of £3000 could only become due where more children than one were to take, and the sum was to be divided amongst them. Division was an indispensable element of the emergence of the larger sum. One child could never take what was alone provided for a plurality. The only right which, in my apprehension, arose under this provision, was a right to £2000, and interest from the date of Mr. Walkinshaw's death, on the part of Mrs. Crawford's children, as coming in her room.

This is the result which I think follows from the application of well-known general principles to such a provision as that which I have referred to. And I conceive that the contract contains nothing which interferes with the application of these principles.

I do not think that the use of the word "procreated" in the obligation "to provide and secure to the child or children who may be procreated of the said marriage as follows," implies a right vesting in each child at the time of birth. I think the words simply import a general statement that what follows is the obligation undertaken on behalf of the children of the marriage. The words, "who may be procreated," might equally well have been left out, and the clause have run thus—"The said James Walkinshaw binds and obliges himself and his foresaids to provide and secure to the child or children of the said marriage as follows." The words do not import any intendment to rest the constitution of a right on the fact of procreation or birth. They merely intimate that the settlement is now going on to state what is to be done for the children of the marriage. The character and amount of what is done must be gathered from the terms of the actual obligation incurred, not inferred from the employment of this general introductory phrase. When the obligation itself is looked to it is an obligation to pay,—"If only one such child the sum of £2000 sterling, and if more than one such child the sum of £3000 sterling, payable at the first term of Whitsunday or Martinmas after the decease of the longest liver of the said James Walkinshaw and Barbara Walkinshaw." I consider this to be the common obligation to pay after decease a certain smaller sum if only one child then exists, and a certain larger sum if more than one. It is just an obligation to pay £2000 if one child survived the father, and £3000 if two or more. I can make nothing more or less of it than this.

A strong argument has been employed, founded on the fact that security for these provisions was given by the father to the extent of £1500, in a policy of insurance effected on his life to that amount, and vested in trustees for behoof of the children. This argument deserves consideration, but it is, in my apprehension, insufficient to throw the period of vesting earlier than the death of the father, or to place it, as was contended, at the birth of each child.

The fact of security being given for provisions to children in a marriage-contract is often of great importance in any question between the children and creditors of the father; for the circumstance of security being given has often been found to give a proper *jus crediti*, to the extent, at least, of the sum secured. It is not so obvious how the granting of security should affect the question of vesting, which must generally be determined by the terms of the obligation itself. At the same time, I think it fairly urged that the security may be given in such terms as to afford evidence of the intention of the parties regarding the period of vesting. In the present case I do not think that these supply any confirmation of the theory that the provisions vested at the birth of each child. The obligation to pay is unquestionably an obligation prestable only after the father's death. This obligation he secures to the extent of £1500 by a policy of life insurance,—that is to say, by an arrangement which does not yield the fund of payment till after his death has taken place. The policy is vested in trustees by an *inter vivos* assignment, but not to the effect of creating any absolute or present interest in the children, but only "towards securing," as the contract expressly runs, payment of the sums provided after the death of the father. This arrangement appears to me entirely to accord with the idea that it was at the father's death, and not sooner, that the provision [771] vested. At all events it very clearly does not suggest any ground for holding that the provision vested at birth. To say the least, it is equally compatible with the one assumption as with the other. The arrangement simply implies that whether vesting took place at one period or another a fund was wanted at the father's death for

payment; and the policy was the means of finding the fund when it was wanted. Whether one, two, or more children were to share in the fund so provided, or who was to share and who was not, the transaction does not aid us to determine. In other words, the transaction imported nothing but a security for the fulfilment of the primary obligation, whatever that obligation was. If, on the terms of the obligation, the right vested at birth, the policy secured fulfilment of that obligation. If, as I think, it vested only after the father's death, the security applied to that obligation, and made it neither broader nor narrower.

It forms, as I think, no small confirmation of the view which I have taken, that the contract in an after clause declares of these provisions to the children, "which provisions shall be accounted part of their interest in their father's means and estate at his decease, but shall not preclude them of their proper share and interest therein." I consider these words strongly to intimate that the benefit of the provisions belonged to the children surviving the father, and to these only. The children to be entitled to the provisions were those who had "an interest in their father's means and estate at his decease," which interest the provisions were *pro tanto* to satisfy. The funds provided were to be employed in satisfaction of rights arising *mortis causa*, and these only. In other words, they went exclusively to children surviving the father. To allocate any part to a child who predeceased the father, and who therefore had no legal interest in his means and estate at his death, would, as I think, be to abstract a portion of the funds from the purpose to which the contract destined them. I cannot read this clause without feeling satisfied that the children who were to share in the provisions were identical with those who, independently of the provisions, had a legal interest in their father's means and estate at his decease. In other words, the benefit of the provisions was confined to the children alive at their father's death.

I thus draw from a consideration of the whole clauses of the deed the same inference as to vesting which I think follows from the terms containing the destination of the provisions. I fully admit that the question is rightly determined by taking into view the whole clauses of the contract, with the object of gathering from these the true purpose of the granter. It is of course quite competent so to settle provisions on children as to vest the right at birth; and so, should all the children predecease the father, to give the whole provisions to their general representatives or assignees. But the contract must be so worded as clearly to evolve this result. More especially must this be the case where the construction of the provision imports *prima facie* a settlement of succession not vesting till the granter's death. It seems to me that the inference thus arising cannot be over-ruled, except by very clear and unequivocal evidence of the granter's intention being different. I cannot find in the contract now in question any grounds for holding that the intention of the granter was to vest the provisions at the birth of each child; on the contrary, I find sufficient grounds for arriving at a directly opposite conclusion.

The conclusion at which I have arrived seems to me to be unaffected by any of the decisions quoted to us. In truth, each case on the subject forms a special case on the terms of the particular deed. The case mainly discussed was that of Beattie's Trustees *v.* Cooper, Feb. 14, 1862, 24 D. 519, in which provisions to children by a father in an antenuptial contract were held to vest in each child at its birth. But the provisions in that case were not, under the marriage-contract, payable after the father's death. They were granted indefinitely in favour of the children, and arose under an obligation to secure the sums mentioned, within three months after the marriage, by a bond in favour of the spouses in liferent for their liferent right allenarly (thereby constituting them fiduciary fiars), "and to the children, one or more, to be procreated betwixt them, in fee." The marriage was in August 1810. The father, John Myers, by the **[772]** antenuptial contract "bound himself, at Martinmas 1810, to lend out £400 sterling, on a sufficient bond or bonds, and to take the rights and securities thereof to the said John Myers and the said Diana Cooper, and the longest liver of these two in liferent, for their liferent right and use allenarly, and to the children, one or more, to be procreated betwixt them, whom failing, to the said Diana Cooper, her own heirs and assignees, in fee." A bond was accordingly granted to this effect; and the children thereby made present disponees in fee to the sum contained in it. This is plainly an entirely different case from the present; and no sound inference can be drawn from the one case to the other. The other case chiefly brought before our notice is that of Grant's Trustee *v.* Gordon, Feb. 1, 1866, 4 Macph. 336. The provision there in question, though made

in an antenuptial contract, was not made by the intended husband on the children of the marriage, but by the father of the lady. The right did not flow from the father of the children, but from a third party,—thereby involving an essential distinction between the two cases. It was constituted by an obligation on the part of this father-in-law to lay out a certain sum on behalf of the children of the marriage, "at the term of Whitsunday or Martinmas that shall happen next after his death, or as soon thereafter as circumstances will permit." Only one child of the marriage existed, who died when about six months old, long before his father and mother, and before his grandfather, the granter of the provision. The Court held that no right had vested in him to the provision in the marriage-contract, and repelled a plea that such right vested at his birth. The grounds of decision are not, to my mind, all entirely satisfactory. But just as I think the case of Beattie's Trustees no authority against my views, so, on the other hand, I do not rest on this case of Grant's Trustee as any authority in their favour. I think the cases to be in their circumstances essentially different. I decide the present case on its own proper grounds.

The result of these views would be to find that the sum payable to the children under the marriage-contract was £2000, not £3000, and that this sum is due to the children of Mrs. Crawford in their own right. The sum would be payable out of the proceeds of the policy, including the bonus, which are sufficient to pay it, and to leave a surplus for the widow's legal claims. I agree in thinking that the holograph writing of 31st May 1869 has the effect of an antenuptial contract in favour of the second wife.

LORD DEAS.—The important question here is, whether any right vested in the first child at birth. If a right vested in the first child at birth, and a second child was afterwards born, it is plain that the condition was fulfilled on which a provision of £3000 was to be paid. I am of opinion, with your Lordship in the chair, that a right *did* vest in the first child at birth, and that, when the second child was born, the right became absolute to a provision of £3000. I wish, however, to observe that there is no question here with onerous creditors, and that I do not think it necessary to give any opinion on that question, in order to arrive at the same result with your Lordship. I rather assume with Lord Kinloch that there would have been no right in the children to compete with onerous creditors. But supposing that to be so, I still agree in the result arrived at by your Lordship.

The provisions in the marriage-contract of 1831 are in favour of "the child or children who may be procreated of the said marriage." That the first child was a child procreated of the marriage no one doubts. The question then is, why are the words of the deed not to take effect? If in other parts of the deed you could find evidence that, notwithstanding these words, the father meant children surviving the dissolution of the marriage, that would be a good answer. But there is not one word in the deed to qualify the expression, and that being so, it is clear, on the face of the deed, and on authority, that the right vested in each child at birth. The only thing which goes at all the other way is, that the provision is not payable till after the father's death. But there is no authority for holding that, when a provision is made in such terms as we have here, the mere postponement of the term of payment proves that the father did not mean what he said in the obligatory clause of the deed. It appears to me impossible [773] to come to the conclusion aimed at by Lord Kinloch, without directly going in the teeth of the case of Beattie's Trustees, which, to my mind, is on all-fours with this case as regards the provision to children. The only difference, in words, is, that in Beattie's case it was not expressly said that the father's death was to be the term of payment. But that did not need to be said, because the surviving spouse was liferenter, and therefore the implication was plain enough without being expressed. I cannot understand, therefore, how any distinction can be taken between that case and this. The case of Beattie's Trustees in fact is rather *a fortiori* of this, because there were some words in that case that might have been held to qualify the expression, but here there are none.

The subsequent case of Grant's Trustee was also a well-considered case, decided by the same Judges who decided the case of Beattie's Trustees. It would be a startling thing if, after these two solemn decisions, the one confirmatory of the other, any doubt could be raised on the matter.

On the other point I entirely agree with your Lordship.

LORD ARDMILLAN.—It appears important to bear in mind, in disposing of this case, that we are dealing with a marriage-contract in which the obligations are onerous, and

counterparts of each other. When Mr. Walkinshaw entered into it he became bound, not, I think, as Lord Kinloch says, to make a payment at his death, but then and there to provide and secure a certain sum for the children that might be procreated of the marriage. The first remark, therefore, that occurs is, that though the payment of these sums by the trustees to the child or children of the marriage is postponed, the obligation to provide and secure them is present, immediate, and complete. Then the manner in which the provision is to be made is specified. He is to provide, and to make the provision effectual he is to secure it, and the mode of doing so is clearly set forth. The provision is with reference to the state of circumstances set forth in the deed. He is not only to provide for the child or children, but if there is only one child, the provision is to be £2000, and if more than one it is to be £3000. The words "such child" are unintelligible unless you supply the meaning out of the previous words, and that is, "who may be procreated of the said marriage." The words following in the rest of the clause always bear reference to that description, as, "which provision shall be divisible among the said children, if more than one," &c.

I observe, in the next place, and it is a relief to my mind to be able to make the observation, that there is no question here with creditors. I do not quite see my way to what might be the case if there were, but as among heirs or successors of Mr. Walkinshaw, which is the case we have to deal with, it is I think certain that each child born of the marriage has a valid and effectual right.

The obligation to secure is separable from the obligation to provide. The deed sets forth the manner in which that is to be done, viz., by an insurance of not less than £1500, which is to be kept insured during Mr. Walkinshaw's life. That he accomplished, so that both obligations were carried out.

"Now, nothing is clearer to my mind than that, when Mrs. Crawford was born, the trustees held this provision for her to the extent of £2000. But if so, then they held it for two children when the second child was born to the extent of £3000; and they continued to hold that sum in trust. The subsequent death of the second daughter, Helen, did not dissolve the obligation on the trustees to hold that sum of £3000. If Helen had left children I think that they would have succeeded to her share.

On the point of authority, I need add nothing to what I said in the case of Beattie's Trustees, and I see nothing in this case to take it out of the rule of that decision.

On the second part of the case, I have no doubt as to the widow's right to the unsecured balance of the estate.

This interlocutor was pronounced:—"In answer to the first question, find and declare that the full provision of £3000 made by the late Mr. James Walkinshaw in his antenuptial contract of marriage [774] with Miss Barbara Walkinshaw vested in the two children of the marriage on their birth: In answer to the second question, find and declare that the said provision of £3000 was effectually conveyed to the extent of one-half to the second parties by virtue of Mr. and Mrs. Crawford's marriage-contract, and to the extent of the other half to the third parties by Miss Helen M. Walkinshaw's trust-disposition and settlement: Find that the third question is superseded by the answer returned to the first and second questions: In answer to the fourth question, find and declare that Mrs. Walkinshaw, the fifth party, is not entitled to *jus relictæ* out of any parts of the proceeds of the policy of assurance mentioned in the case: In answer to the fifth question, find and declare that the parties hereto of the first, second, third, and fourth parts are not entitled to payment of the unsecured balance of the provision of £3000, over and above the sum of £2480, proceeds of said policy, out of the moveable estate of the deceased James Walkinshaw, in competition with the said fifth party claiming the furniture and other moveables provided to her by the holograph writing of 31st May 1869, or the value thereof, but that she is entitled to claim the said furniture and other moveables, or value thereof, preferably to the said other parties hereto; and decern."

JOHN MARTIN, W.S.—M'EWEN & CARMENT, W.S.—Agents.

No. 135. X. MACPHERSON, 774. 31 May 1872. 2d Div.—Dean of Guild, Glasgow, R.

CHARLES MALLOCH, Petitioner and Respondent.—*Sol.-Gen. Clark—Lancaster.*
COLIN CAMPBELL GRAY, Respondent and Appellant.—*Watson—Orr Paterson.*

Property—Restriction on Building—Servitude.—A proprietor when disponing part of his property barred himself "from erecting at any time hereafter any other building on any other part of the foresaid steading of ground than those at present thereon." *Held* that as the object of the prohibition was to preserve access and light to the tenement conveyed, the disponer was not debarred from making an underground passage under the unbuilt-on space.

JOHN WALLS, S.S.C.—J. & A. PEDDIE, W.S.—Agents.

No. 136. X. MACPHERSON, 774. 4 June 1872. 2d Div.—Lord Mure, I.

MRS. BARCLAY-ALLARDICE, Pursuer.—*Watson—Balfour.*
THE DUKE OF MONTROSE, Defender.—*Sol.-Gen. Clark—Asher.*

Peerage—Exhibition, action of.—A person while prosecuting a claim to certain Scottish peerages before the Committee of Privileges in the House of Lords, raised an action in the Court of Session against a person residing in Scotland, to enforce production of certain charters and other writs which the pursuer alleged to be material evidence in support of the claim. *Held* that the action was incompetent.

Mrs. Barclay-Allardice, who was served heir to the last Earl of Monteith and Airth, presented two petitions to Her Majesty the Queen praying for recognition of her right to the earldoms of Airth, Strathern, and Monteith. These petitions were, in the usual way, referred to the House of Lords, and by them to the Committee of Privileges, before whom they were frequently discussed.

Certain documents which, if in existence, would be important for the petitioner's case, were by her believed to be in the charter-room of the [775] Duke of Montrose, but His Grace refused to allow her to make a search for them.

Accordingly, while her petitions were still before the Committee of Privileges, she raised this summons in the Court of Session against the Duke of Montrose, concluding for an order on him to exhibit and produce before the Court "all and sundry patents of honour and nobility and other creations of dignities and honours, royal warrants and gifts, charters, dispositions, assignations, conveyances, procuratories, and instruments of resignation, precepts and instruments of sasine, special and general services and retours thereof, apprizings, adjudications, reversions, tacks and leases, bonds and obligations, letters of horning, inhibitions, and other diligence, letters of correspondence, and all other writs, evidents, rights, titles, and securities of and concerning or in any way connected with the lands and earldoms of Strathern and Monteith and Airth, or any of them, and lands and baronies of Kilpont and Kilbride, or either of them, and the titles of honour and dignities of Earl of Strathern, Earl of Monteith, Lord Graham of Kilpont and Kilbryde, and Earl of Airth, or any of them, made and granted prior to the 12th day of September 1694, and all inventories of the same: Or otherwise, to make the said writs and documents and inventories patent to the pursuer, or to a person or persons to be named by our said Lords, in such way and manner, and at such time or times and place or places, as our said Lords may direct, with a view to the same being used and made available *in modum probationis*, and in proof and support of the pursuer's claims to the titles and dignities of the earldom of Strathern, earldom of Monteith, earldom of Airth, and lordship of Graham of Kilpont and Kilbryde, presently depending before the House of Lords, and the Committee for Privileges of that House: And the same being so exhibited and produced, or made patent as aforesaid, our said Lords

ought and should authorise and grant warrant to the pursuer, or to such other person or persons as they shall appoint, to take possession of the said writs and documents and inventories, or such of them as shall be selected in the course of the process to follow hereon, and to transmit or remove the same to London, subject to such conditions and safeguards as our said Lords shall ordain, and to exhibit and produce the same before the House of Lords or the said Committee for Privileges in proof and support of the pursuer's said claims, reserving to all parties concerned their rights and interests in the said writs and documents."

The pursuer averred—"It is not in accordance with the rules or practice of the House of Lords, or their Committee for Privileges, to make orders for the exhibition or production of documents, and the pursuer has consequently been unable to obtain from that House or Committee an order for the exhibition or production of the requisite documents. Unless she shall obtain an order for production and exhibition as concluded for she will be unable to recover highly material, and, as she believes, essential evidence, in support of her claims to the foresaid honours and dignities." To which the defender answered—"Admitted that the House of Lords and their Committee for Privileges invariably refuse to make orders in general terms for the production of documents or the contents of charter-chests. *Quoad ultra* denied. The House of Lords and their Committee for Privileges are in the practice of ordering the production of such specific documents as the custodiers thereof may be legitimately required to produce, and as may be necessary for the disposal of the claim before the House."

The pursuer pleaded;—1. As heir duly served and retoured to the last Earl of Monteith and Airth, and as the claimant of the titles, dignities, and honours above condescended on, the pursuer is entitled to exhibition [776] of the whole of the said documents, and to have the same made available in proof and support of her claims to the said titles, dignities, and honours under such conditions as the Court may appoint.

The defender pleaded;—2. That the statements of the pursuer were not relevant or sufficient to support the conclusions of the summons.

The Lord Ordinary sustained the second plea in law for the defender, and dismissed the action.*

The pursuer reclaimed, and argued that the case of Campbell, relied on by the Lord Ordinary, was not in point; that was a suit for perpetuating evidence at the instance of a person who had himself no title (he was only the younger brother of a

---

* "NOTE.—This is an action for exhibition and production of documents *in modum probationis*, which appears to the Lord Ordinary to be, in its leading features, substantially the same with that of Campbell, May 13, 1869, 7 Macph. p. 759, referred to at the debate, and to be ruled by that decision.

"There is no process depending in this Court to which the present action is accessory. But it is brought as incidental to proceedings before a Committee of Privileges in the House of Lords relative to the Airth peerage, and the main difference between the present case and that of Campbell seems to consist in this, that there is here an allegation that it is not in accordance with the practice of the House of Lords, or of the Committee of Privileges, to make orders for production of documents of the description here called for, and that the pursuer has consequently been unable to obtain the requisite order. But it is not alleged that the House of Lords has not the power to make such an order, should it in their opinion be just and reasonable to do so. Having regard, however, to the grounds on which this Court proceeded in disposing of the case of Campbell, it appears to the Lord Ordinary to be settled that an action of the present description, where there is no substantive and relative action going on in the Court, can only be sustained when the Court before whom the substantive action is proceeding has not of itself power to enforce the requisite productions. And as no doubt seems to have been entertained by the Judges who decided the case of Campbell, that the House of Lords itself, whatever might be the case with a Committee of Privileges, had power, upon the report of a committee, to compel production of documents necessary for the determination of peerage questions, should they deem it expedient to do so, nothing short of a distinct allegation of refusal on the part of the House of Lords itself to make an order for production of the documents of which exhibition is here sought, in respect of their want of power to do so, would, as the Lord Ordinary conceives, warrant him in entertaining an action of this description."

No. 134. X. MACPHERSON, 763. 31 May 1872. 1st Div.—B.

DANIEL WALKINSHAW AND ANOTHER (Walkinshaw's Marriage-Contract Trustees).—*Sol.-Gen. Clark—Lorimer.*

ROBERT WALKINSHAW YOUNG AND OTHERS (Mr. and Mrs. Crawford's Marriage-Contract Trustees).—*Sol.-Gen. Clark—Lorimer.*

DANIEL WALKINSHAW AND ANOTHER (Testamentary Trustees of Helen Margaret Walkinshaw).—*Sol.-Gen. Clark—Lorimer.*

DAVID LEE CRAWFORD AND OTHERS (Children of Mr. and Mrs. Crawford).—*Moncreiff.*

MRS. JANE LEE CRAWFORD OR WALKINSHAW.—*Watson—M'Laren.*

Parent and Child—Provisions to Children—Marriage-Contract—Vesting.—By an antenuptial contract of marriage the husband bound himself "to provide and secure to the child or children who may be procreated of the marriage as follows, viz.:—If only one such child £2000, and if more than one such child £3000, and payable at the first term of Whitsunday or Martinmas after the decease of the longest liver" of the spouses, the husband binding himself in security thereof to take out an insurance policy on his life for £1500 in favour of the marriage-contract trustees. A power of apportionment was given to the father, whom failing, to the mother. The deed further contained a declaration that the provisions should be subject to the widow's jointure "during its continuance," and that the provisions to the children "shall be accounted part of their interest in their father's means and estate at his decease." There were two children born of the marriage, both of whom predeceased their father.

Held (*diss.* Lord Kinloch) that each child had a vested interest in the provision from its birth, and that there being two children the provision was £3000.

Husband and Wife—Marriage-Contract—Provisions to Wife and Children.—A husband was bound by an antenuptial contract of marriage to provide and secure £3000 for his children, and in security thereof to take out a policy of insurance in favour of the marriage-contract trustees for £1500. After the provision had vested in two children of the marriage the father contracted a second marriage, before which he granted to his intended wife a writing conveying to her as a provision his household furniture. At the father's death the only funds available for payment of the unsecured balance of the children's provision were the proceeds of the household furniture. In a competition between the children's representatives and the widow, *held* that the widow had a preferable claim to the whole proceeds of the furniture, the provision in her favour being reasonable in amount.

James Walkinshaw, sometime merchant in London, married in 1831 Miss Barbara Walkinshaw, who died in 1867.

By an antenuptial marriage-contract between them Mr. Walkinshaw, after binding himself to pay to his promised spouse a certain annuity or jointure in the event of her surviving him, bound and obliged himself "to provide and secure to the child or children who may be procreated of the said marriage, as follows, viz.:—If only one such child the sum of £2000 sterling, and if more than one such child the sum of £3000 sterling, and payable at the first term of Whitsunday or Martinmas after the decease of the longest liver of the said James Walkinshaw and Barbara Walkinshaw, with one-fifth part more of liquidate penalty in case of failure, and the lawful interest thereof after the said term of payment until payment, which provision shall be divisible among the said children, if more than one, in such shares and proportions as he, the said James Walkinshaw, shall see proper to appoint by a writing under his hand, and failing thereof, the said Barbara Walkinshaw, in case of her surviving him, shall have the like power of division, and failing her exercising such power, then the same shall be divided among the said children share and share alike: Declaring that the said provisions to children are to be subject to [764] the said jointure to the widow during its continuance: And for and towards securing the said annuity or jointure in the first place, and the said provisions to the issue of the marriage in the next place, the said

James Walkinshaw hereby binds and obliges himself forthwith to insure, for and during the term of his natural life, in a responsible life insurance office, and with and under the proviso underwritten to keep insured during the term aforesaid, a sum of money not less than £1500 sterling, at the sight and in the names of Daniel Walkinshaw, merchant in Glasgow, and James Walkinshaw, paper-maker at Overton, near Greenock, brothers of the said Barbara Walkinshaw, or the survivor of them two; whom failing, such other person or persons as may be named by the said James Walkinshaw, and failing thereof, by the said Barbara Walkinshaw, and that in trust to the end and intent that the sum which shall arise and be received from the said insurance at the decease of the said James Walkinshaw shall then be lent out and secured by said trustees or trustee, and the rights and securities thereof taken payable to the said Barbara Walkinshaw if she shall have survived, in liferent for her liferent use of the interest or other proceeds thereof, towards payment of her said annuity or jointure during her life, and the fee at her decease, or in case of her predecease, the sum which may so arise and be received from said insurance shall be applied by the said trustees or trustee towards payment of the before written provisions to the child or children who may be procreated of the marriage, which provisions shall be accounted part of their interest in their father's means and estate at his decease, but shall not preclude them of their proper share and interest therein." An option was given to James Walkinshaw to substitute heritable security for £1500 in name of the marriage-contract trustees for the life insurance security, but this option was not exercised.

On 23d October 1832 James Walkinshaw effected an insurance on his life for £1500, which was assigned to his marriage-contract trustees on 17th January 1833.

There were two children of the marriage.

1. Elizabeth Jane, who married David Rose Crawford in 1860, and died on 23d April 1870, survived by six children. By an antenuptial marriage-contract Mrs. Crawford assigned all her property to marriage-contract trustees.

2. Helen Margaret, who died unmarried in 1860, leaving a general settlement in favour of trustees.

James Walkinshaw married on 1st June 1869 Miss Jane Lee Crawford, who survived him. He died intestate on 6th June 1871. There were no children of the second marriage. His widow was decerned and confirmed executrix-dative *qua* relict.

No writing apportioning the children's provisions under the marriage-contract was executed by Mr. Walkinshaw.

In anticipation of his second marriage with Miss Jane Lee Crawford Mr. James Walkinshaw, on 31st May 1869, executed and delivered to her a holograph writing in these terms:—"17 Dean Terrace, Edinburgh, 31st May 1869.—In view of my marriage with Miss Jane Lee Crawford, to be consummated (D.V.) to-morrow, I hereby make over and give to her in free gift, to be her absolute property, the whole furniture and plenishing belonging to me, with all napery, pictures, wines, and plate, with exception only of such few articles as are enumerated in the note attached to this gift, which excepted articles are to be given to my daughter, Mrs. David Rose Crawford. —JAMES WALKINSHAW."

No other provision was made by Mr. Walkinshaw for his second wife, who never renounced her legal rights.

[765] Mrs. Walkinshaw, as executrix, realised the moveable estate left by her husband, the amount of which, including the furniture, but exclusive of the amount due under the policy of assurance—which, with bonus additions, amounted to £2480—was sufficient to meet the claims of the ordinary creditors, and left a balance of £300. The furniture was worth £600.

The parties to this special case were (1) the trustees under the marriage-contract of James and Barbara Walkinshaw in 1831; (2) the marriage-contract trustees of Mr. and Mrs. Crawford; (3) the testamentary trustees of Miss Helen Margaret Walkinshaw; (4) the children of Mrs. Crawford; (5) Mrs. Jane Lee Crawford or Walkinshaw.

Mr. and Mrs. Crawford's trustees and Miss Walkinshaw's trustees claimed the whole sum of £2480 in equal proportions, maintaining that the full provision of £3000 had vested in the children of Mr. Walkinshaw's first marriage, and was conveyed to them respectively by the foresaid marriage-contract between Mr. and Mrs. Crawford, and trust-disposition and settlement of Helen Walkinshaw. Mr. and Mrs. Crawford's marriage-contract trustees, in the event of their failing in this contention, claimed the fund to the extent of £2000.

An alternative claim was made for Mrs. Crawford's children to £2000, as having vested in them at Mr. Walkinshaw's death, in terms of the marriage-contract of 1831, and in the event of its being held that it was not conveyed to Mr. and Mrs. Crawford's marriage-contract trustees.

Mrs. Walkinshaw maintained that the whole of the said sum was part of the goods in communion between her and her husband, and subject to *jus relictæ*; and alternatively, that the bonus additions (£980) were subject to *jus relictæ*. In any event she maintained that no more than £2000 was due in virtue of the obligation in the marriage-contract of 1831, and claimed *jus relictæ* from £480, the surplus proceeds of the policy of insurance.

The whole parties except the widow, in the event of the children's provisions under the marriage-contract of 1831 being found to be to any extent unsecured, claimed payment of the unsecured balance out of the moveable estate of James Walkinshaw, after payment of debts, but preferably to the widow claiming the furniture, &c., or its value, under the holograph writing of 31st May 1869, or, at least, *pari passu* with her.

On the other hand Mrs. Walkinshaw claimed the furniture, and preferably to the other parties claiming the unsecured balance.

The following questions were submitted for the opinion and judgment of the Court:—"1. Did the full provision of £3000, made by the late Mr. James Walkinshaw in his antenuptial contract of marriage with Miss Barbara Walkinshaw, vest absolutely in the two children of the marriage, or in either of them? 2. Was the said provision of £3000 effectually conveyed to the extent of one-half to the second parties by virtue of Mr. and Mrs. Crawford's marriage-contract, and to the extent of the other half to the third parties by Miss H. M. Walkinshaw's trust-disposition and settlement? 3. In the event of the above questions being answered in the negative, did the provision made by the late Mr. James Walkinshaw in his antenuptial contract of marriage with Miss Barbara Walkinshaw vest absolutely in the fourth parties, or was it effectually carried to the second parties by the antenuptial contract of marriage of Mr. and Mrs. Crawford? 4. Is Mrs. Walkinshaw, the fifth party, entitled to *jus relictæ* from the proceeds, including bonus additions, of the policy of assurance for £1500, effected by her husband on his life? Or, if not, is she entitled to *jus relictæ* from the sum of £980, being the amount of said bonus additions? 5. In the event of the children's provision under the marriage-contract of James and Barbara Walkinshaw being found, to any [766] extent, unsecured by the said policy of assurance, are the parties hereto of the first, second, third, and fourth parts entitled to payment of such unsecured balance out of the moveable estate of the deceased James Walkinshaw after payment of his debts, but preferably to the said Mrs. Jane Lee Crawford or Walkinshaw claiming the furniture, &c., or value thereof, as a reasonable provision made for her by the said James Walkinshaw by his said holograph writing? Or are the said parties only entitled to rank *pari passu* with the said Mrs. Walkinshaw? Or is she entitled to claim the said furniture, &c., or value thereof, preferably to the said other parties hereto?"

Argued for Miss Walkinshaw's trustees and Crawford's trustees;—By the deed of 1831 a trust-estate was created for the children of the marriage, which was the same as if the title to the sum in question had been taken directly to them. Here the destination was clearly expressed. The words "to be procreated" expressed the meaning of the granter without ambiguity. It had been held, in regard to an apportionment under a power, that the omission of a child who had predeceased made the whole apportionment inept.* There was no destination over, and nothing to postpone vesting of the whole sum which the father had become bound to provide and secure to the children of the marriage. The case was intermediate between the cases of Beattie's Trustee and Grant's Trustee, and must be ruled by the principle of the former.†

It was argued for Mrs. Walkinshaw;—Where a father in making provision for his children merely obliged himself to settle a sum on them after his death there was no vesting till his death.‡ Here, indeed, there was simply the personal obligation contemplated by Erskine, fortified by a very peculiar kind of security not available till after

---

* Watson *v.* Marjoribanks, Feb. 17, 1837, 15 S. 586.

† Beattie's Tr. *v.* Cooper's Trs., Feb. 14, 1862, 24 D. 519; Grant's Tr. *v.* Anderson's Tr., Feb. 1, 1866, *ante*, vol. iv. p. 336.

‡ Ersk. iii. 8, 40; Wilson's Trs. *v.* Pagan, July 2, 1856, 18 D. 1096; Routledge *v.* Carruthers, May 19, 1812, F. C.; Pretty *v.* Newbigging, March 2, 1854, 16 D. 667.

the granter's death. The right of the children to the unsecured balance depended to some extent on the writing of 1869.* A father might, notwithstanding a former marriage-contract, settle a reasonable provision on a second wife; and the principles on which this rule rested made it applicable even where there was not a formal antenuptial contract. A constitution of a reasonable provision in any form was sufficient, if a separate estate or a vested interest is created in favour of the wife. Here, the children being in this view entitled to £2000, £1500 of that is preferable in virtue of the security stipulated, and the widow to the extent of £600, the value of the furniture provided to her, is entitled to be paid out of the first head of the estate.

It was argued for the children of Mrs. Crawford (4th parties);—If the first and second questions were answered in the negative the children of Mrs. Crawford were entitled to the £2000 under the *conditio si sine liberis.*

At advising,—

LORD PRESIDENT.—We are here concerned with two instruments, one executed in 1831, being the antenuptial contract of Mr. Walkinshaw on his first marriage, and the other a holograph writing executed by Mr. Walkinshaw on the occasion of his second marriage in 1869. By his first marriage-contract Mr. Walkinshaw bound himself to provide and secure a certain sum for the children, £2000 if there should be only one child of the marriage, and £3000 if there should be [767] more than one. Two children were born of the marriage, both daughters, one of whom, Helen, predeceased both parents without leaving issue, but leaving a settlement. The other, Mrs. Crawford, survived till 1870. Their mother died in 1867. Mrs. Crawford left children, who are the parties to this case of the fourth part. Before her death Mr. Walkinshaw contracted a second marriage; and he died in 1871, thus surviving both his daughters. The main question for our decision is whether the provisions in the marriage-contract of 1831 had vested in his two children, or the vesting was postponed until the death of Mr. Walkinshaw. This question depends entirely on the construction of the contract of marriage. Mr. Walkinshaw binds himself "to provide and secure to the child or children who may be procreated of the said marriage as follows, viz.: If only one such child the sum of £2000 sterling, and if more than one such child the sum of £3000 sterling, and payable at the first term of Whitsunday or Martinmas after the decease of the longest liver of the said James Walkinshaw and Barbara Walkinshaw, with one-fifth part more of liquidate penalty in case of failure, and the lawful interest thereof after the said term of payment until payment, which provision shall be divisible among the said children, if more than one, in such shares and proportions as he, the said James Walkinshaw, shall see proper to appoint by a writing under his hand, and failing thereof, the said Barbara Walkinshaw, in case of her surviving him, shall have the like power of division, and failing her exercising such power, then the same shall be divided among the said children share and share alike: Declaring that the said provisions to children are to be subject to the said jointure to the widow during its continuance." Now, upon this part of the marriage-contract, the question might arise whether this is a provision to the children as they come into existence, and vests in each, or whether the number is to be ascertained at his death, and their right is suspended till then. That might be an important question in itself, but it is still more important when taken in connection with the obligation to secure the provision which follows. Mr. Walkinshaw further binds himself "forthwith to insure for and during the term of his natural life, in a responsible life insurance office, and with and under the proviso underwritten to keep insured during the term aforesaid, a sum of money not less than £1500 sterling, at the sight and in the names of Daniel Walkinshaw, merchant in Glasgow, and James Walkinshaw, paper-maker at Overton, near Greenock, brothers of the said Barbara Walkinshaw, or the survivor of them two; whom failing, such other person or persons as may be named by the said James Walkinshaw and failing thereof, by the said Barbara Walkinshaw, and that in trust to the end and intent that the sum which shall arise and be received from the said insurance at the decease of the said James Walkinshaw, shall then be lent out and secured by said trustees or trustee, and the rights and securities thereof taken payable to the said Barbara Walkinshaw, if she shall have survived, in liferent for her liferent use of the interest or other proceeds thereof, towards payment of her said annuity or jointure during her life, and the fee at her decease, or in case of her predecease the sum which may so arise and be received from said insurance shall be

* Ersk. iii. 8, 42.

applied by the said trustees or trustee towards payment of the before-written provisions to the child or children who may be procreated of the marriage, which provisions shall be accounted part of their interest in their father's means and estate at his decease, but shall not preclude them of their proper share and interest therein." Taking the whole of this part of the marriage-contract together I am of opinion that as soon as two children were procreated of the marriage £3000 vested in them; and that if one of these afterwards failed, the £3000 either went to the survivor, or the half of it went to the representatives of the predeceaser. The money, it is true, was not payable until the death of the testator, which at first sight gives the right of the children the appearance of a right of succession. But certain counter-considerations are to be taken into view.

In the first place, the obligation of Mr. Walkinshaw was not to pay at his death, but to provide and secure. Then the objects of the provisions were the children who might be procreated of the marriage, and that term is carried down by reference through the whole clause. The provision is to be divisible among [768] "the said children," *i.e.* the children who may be procreated of the marriage. But, above all, a security is created, and it is a security of a very substantial and important kind; because, although it is not a provision of a present sum or subject, it is one which will create a very valuable right, always supposing that Mr. Walkinshaw continues able to pay the premiums. I cannot doubt that the brothers of Mrs. Walkinshaw would be entitled to require Mr. Walkinshaw to effect the assurance, and thereafter to pay the premiums. The effect of the obligation here is just the same as if Mr. Walkinshaw had paid up all the premiums at once. In that case undoubtedly there would be a very important estate of present value, and of a certain ultimate value. The fact that the premiums are not paid up diminishes the value of the policy, and perhaps the certainty of the security. But the value increases from year to year.

When, therefore, Mr. Walkinshaw died, the trustees under the marriage-contract were trustees for the children and for nobody else, the mother being dead and there being no claim for jointure. That being so, the difficulty is very much removed. The case is just the same as where a special sum is set apart for children, and is thereby put entirely beyond the power of the father and his creditors. I do not think that his creditors could have attached this policy at his death, or even if he had become insolvent during his life. No doubt insolvency would have stopped the payment of the premiums, but it would not have destroyed the security so far as the present value of the policy went. Hence, the £3000 being a vested interest whenever the second child was born, and being secured to the extent of £2480, that fund in the hands of the trustees belongs absolutely to the two children and their representatives,—*i.e.* one-half to the marriage-contract trustees of Mrs. Crawford, and one-half to the testamentary trustees of Miss Helen Walkinshaw.

The result therefore is that, in my opinion, the first question should be answered in the affirmative, the second in the same way, and the third question is superseded.

There remains for consideration the question as to the interest of Mr. Walkinshaw's widow, as raised by the fourth and fifth questions. It is out of the question to say that Mrs. Walkinshaw is entitled to *jus relictæ* out of the policy, for neither it nor the bonus additions to it formed any part of the estate of Mr. Walkinshaw. But he made a provision for his second wife by a holograph writing before his marriage, and I see no reason to doubt that the provision was quite valid. It was quite reasonable in amount and was thus expressed:—"17 Dean Terrace, Edinburgh, 31st May 1869.—In view of my marriage with Miss Jane Lee Crawford, to be consummated (D.V.) to-morrow, I hereby make over and give to her in free gift, to be her absolute property, the whole furniture and plenishing belonging to me, with all napery, pictures, wines, and plate, with exception only of such few articles as are enumerated in the note attached to this gift, which excepted articles are to be given to my daughter, Mrs. David Rose Crawford.—JAMES WALKINSHAW."

The estate of Mr. Walkinshaw, keeping out of view this policy, which did not belong to him, seems to have been very much swallowed up by his outstanding debts; for the money he left and his furniture have paid off these, but have left a free balance of only £300. This must be taken as all that is left to represent the furniture, and must go to the widow. I do not think the widow can get any more, and I do not think that the children of the first marriage can be made to contribute anything to their father's debt out of their secured provision. It would be a different question if they were asked

to contribute out of an unsecured balance of their provision. I am of opinion that the widow's provision is preferable to the unsecured balance of the provision for the children of the first marriage, and this I hold to be quite consistent with the case of Lamb,* and all the cases on the subject. The fifth question ought therefore to be answered to the effect that the widow is entitled to be so preferred.

LORD KINLOCH.—I have arrived at a different conclusion from that which has been now expressed.

[769] The leading question discussed before us regards the period of vesting of the provisions for children contained in the marriage-contract of Mr. James Walkinshaw and his wife. The point of inquiry is, whether these provisions vested in each child at its birth, or at what other period vesting took place.

By the marriage-contract in question "the said James Walkinshaw binds and obliges himself and his foresaids to provide and secure to the child or children who may be procreated of the said marriage as follows, viz. :—If only one such child the sum of £2000 sterling, and if more than one such child the sum of £3000 sterling, and payable at the first term of Whitsunday or Martinmas after the decease of the longest liver of the said James Walkinshaw and Barbara Walkinshaw, with one-fifth part more of liquidate penalty in case of failure, and the lawful interest thereof after the said term of payment till payment; which provision shall be divisible among the said children, if more than one, in such shares and proportions as he, the said James Walkinshaw, shall see proper to appoint by a writing under his hand." Failing Mr. Walkinshaw, his wife had the power of apportionment; and if no apportionment was made, "then the same shall be divided amongst the said children, share and share alike."

The important characteristic, as it appears to me, of this provision is, that it is a provision by a father for children, out of his own estate, to take effect and be payable after his death. The term of payment expressed is the death of the longest liver of the spouses. This of course implied the death of the husband; and as he was himself the survivor, the case may be taken as simply a provision by a father for children payable after his death. It is not a provision flowing from a third party, such as frequently occurs in marriage-contracts, and creates a very different case. Neither is it a provision having no definite term of payment, but conveying a general right in favour of the class, which is a form of provision also frequently known, and has its own consequences. It is simply a provision by a father to his children, out of his own estate, payable after his death.

I am of opinion that, in itself, and independently of any other clauses, the effect of which I shall afterwards consider, this is, in point of law, a provision of succession. I do not of course mean that the provision is one which the father could gratuitously disappoint. It is succession, but protected succession. The nature of the contract implied an onerous obligation to make good the provision. To this effect there was a proper debt against the father, having to many intents the legal consequences of a debt. But the debt still consisted in an obligation to leave a certain amount of succession,—that is, a certain amount of money payable out of his estate after his death. And the claim was not one capable of coming into competition with third parties, creditors. Except as involving an obligation against the father not to defeat it, the provision is simply one of succession, with the legal characteristics of such. One of these I consider to be, that no right vests till the death of the father, and then vests in the children who survive that event; no others. This is a trite rule as to succession. If a father executes a testament, bequeathing a sum of money, payable after his death to his children amongst them, it is scarcely necessary to say that no right vests in any predeceasing child, and that the bequest devolves amongst the children alive at the father's death. It is exactly so in the present case in regard to the matter of vesting. What the father gives to his children is simply a sum of money payable after his death; £2000 if one child, £3000 if more than one. He binds himself to leave this succession, and his obligation is onerous. But, as in all cases of succession, no right vests till after the father's death, and then exclusively in the children surviving that event.

In the present case both children predeceased the father, but one, Mrs. Crawford, left issue. Admittedly, on all hands, this issue came in the mother's room by virtue of the *conditio si sine liberis*. The case is, therefore, the same in principle as if one child predeceased and the other survived the father. The predeceasing child, Miss Helen

* Arthur and Seymour *v.* Lamb, June 30, 1870, *ante*, vol. viii. p. 928.

Margaret Walkinshaw, had, as I conceive, no right vested in her. The only vested right lay in her sister, Mrs. Crawford, or her children in her room.

It follows, as I think, inevitably, that the sum due under this provision out [770] of the father's estate was £2000, not £3000. There was only one child having right to take, and that child could only take what was provided in the case of a single child. The sum of £3000 could only become due where more children than one were to take, and the sum was to be divided amongst them. Division was an indispensable element of the emergence of the larger sum. One child could never take what was alone provided for a plurality. The only right which, in my apprehension, arose under this provision, was a right to £2000, and interest from the date of Mr. Walkinshaw's death, on the part of Mrs. Crawford's children, as coming in her room.

This is the result which I think follows from the application of well-known general principles to such a provision as that which I have referred to. And I conceive that the contract contains nothing which interferes with the application of these principles.

I do not think that the use of the word "procreated" in the obligation "to provide and secure to the child or children who may be procreated of the said marriage as follows," implies a right vesting in each child at the time of birth. I think the words simply import a general statement that what follows is the obligation undertaken on behalf of the children of the marriage. The words, "who may be procreated," might equally well have been left out, and the clause have run thus—"The said James Walkinshaw binds and obliges himself and his foresaids to provide and secure to the child or children of the said marriage as follows." The words do not import any intendment to rest the constitution of a right on the fact of procreation or birth. They merely intimate that the settlement is now going on to state what is to be done for the children of the marriage. The character and amount of what is done must be gathered from the terms of the actual obligation incurred, not inferred from the employment of this general introductory phrase. When the obligation itself is looked to it is an obligation to pay,—"If only one such child the sum of £2000 sterling, and if more than one such child the sum of £3000 sterling, payable at the first term of Whitsunday or Martinmas after the decease of the longest liver of the said James Walkinshaw and Barbara Walkinshaw." I consider this to be the common obligation to pay after decease a certain smaller sum if only one child then exists, and a certain larger sum if more than one. It is just an obligation to pay £2000 if one child survived the father, and £3000 if two or more. I can make nothing more or less of it than this.

A strong argument has been employed, founded on the fact that security for these provisions was given by the father to the extent of £1500, in a policy of insurance effected on his life to that amount, and vested in trustees for behoof of the children. This argument deserves consideration, but it is, in my apprehension, insufficient to throw the period of vesting earlier than the death of the father, or to place it, as was contended, at the birth of each child.

The fact of security being given for provisions to children in a marriage-contract is often of great importance in any question between the children and creditors of the father; for the circumstance of security being given has often been found to give a proper *jus crediti*, to the extent, at least, of the sum secured. It is not so obvious how the granting of security should affect the question of vesting, which must generally be determined by the terms of the obligation itself. At the same time, I think it fairly urged that the security may be given in such terms as to afford evidence of the intention of the parties regarding the period of vesting. In the present case I do not think that these supply any confirmation of the theory that the provisions vested at the birth of each child. The obligation to pay is unquestionably an obligation prestable only after the father's death. This obligation he secures to the extent of £1500 by a policy of life insurance,—that is to say, by an arrangement which does not yield the fund of payment till after his death has taken place. The policy is vested in trustees by an *inter vivos* assignment, but not to the effect of creating any absolute or present interest in the children, but only "towards securing," as the contract expressly runs, payment of the sums provided after the death of the father. This arrangement appears to me entirely to accord with the idea that it was at the father's death, and not sooner, that the provision [771] vested. At all events it very clearly does not suggest any ground for holding that the provision vested at birth. To say the least, it is equally compatible with the one assumption as with the other. The arrangement simply implies that whether vesting took place at one period or another a fund was wanted at the father's death for

payment; and the policy was the means of finding the fund when it was wanted. Whether one, two, or more children were to share in the fund so provided, or who was to share and who was not, the transaction does not aid us to determine. In other words, the transaction imported nothing but a security for the fulfilment of the primary obligation, whatever that obligation was. If, on the terms of the obligation, the right vested at birth, the policy secured fulfilment of that obligation. If, as I think, it vested only after the father's death, the security applied to that obligation, and made it neither broader nor narrower.

It forms, as I think, no small confirmation of the view which I have taken, that the contract in an after clause declares of these provisions to the children, "which provisions shall be accounted part of their interest in their father's means and estate at his decease, but shall not preclude them of their proper share and interest therein." I consider these words strongly to intimate that the benefit of the provisions belonged to the children surviving the father, and to these only. The children to be entitled to the provisions were those who had "an interest in their father's means and estate at his decease," which interest the provisions were *pro tanto* to satisfy. The funds provided were to be employed in satisfaction of rights arising *mortis causa*, and these only. In other words, they went exclusively to children surviving the father. To allocate any part to a child who predeceased the father, and who therefore had no legal interest in his means and estate at his death, would, as I think, be to abstract a portion of the funds from the purpose to which the contract destined them. I cannot read this clause without feeling satisfied that the children who were to share in the provisions were identical with those who, independently of the provisions, had a legal interest in their father's means and estate at his decease. In other words, the benefit of the provisions was confined to the children alive at their father's death.

I thus draw from a consideration of the whole clauses of the deed the same inference as to vesting which I think follows from the terms containing the destination of the provisions. I fully admit that the question is rightly determined by taking into view the whole clauses of the contract, with the object of gathering from these the true purpose of the granter. It is of course quite competent so to settle provisions on children as to vest the right at birth; and so, should all the children predecease the father, to give the whole provisions to their general representatives or assignees. But the contract must be so worded as clearly to evolve this result. More especially must this be the case where the construction of the provision imports *prima facie* a settlement of succession not vesting till the granter's death. It seems to me that the inference thus arising cannot be over-ruled, except by very clear and unequivocal evidence of the granter's intention being different. I cannot find in the contract now in question any grounds for holding that the intention of the granter was to vest the provisions at the birth of each child; on the contrary, I find sufficient grounds for arriving at a directly opposite conclusion.

The conclusion at which I have arrived seems to me to be unaffected by any of the decisions quoted to us. In truth, each case on the subject forms a special case on the terms of the particular deed. The case mainly discussed was that of Beattie's Trustees *v.* Cooper, Feb. 14, 1862, 24 D. 519, in which provisions to children by a father in an antenuptial contract were held to vest in each child at its birth. But the provisions in that case were not, under the marriage-contract, payable after the father's death. They were granted indefinitely in favour of the children, and arose under an obligation to secure the sums mentioned, within three months after the marriage, by a bond in favour of the spouses in liferent for their liferent right allenarly (thereby constituting them fiduciary fiars), "and to the children, one or more, to be procreated betwixt them, in fee." The marriage was in August 1810. The father, John Myers, by the [772] antenuptial contract "bound himself, at Martinmas 1810, to lend out £400 sterling, on a sufficient bond or bonds, and to take the rights and securities thereof to the said John Myers and the said Diana Cooper, and the longest liver of these two in liferent, for their liferent right and use allenarly, and to the children, one or more, to be procreated betwixt them, whom failing, to the said Diana Cooper, her own heirs and assignees, in fee." A bond was accordingly granted to this effect; and the children thereby made present disponees in fee to the sum contained in it. This is plainly an entirely different case from the present; and no sound inference can be drawn from the one case to the other. The other case chiefly brought before our notice is that of Grant's Trustee *v.* Gordon, Feb. 1, 1866, 4 Macph. 336. The provision there in question, though made

Margaret Walkinshaw, had, as I conceive, no right vested in her. The only vested right lay in her sister, Mrs. Crawford, or her children in her room.

It follows, as I think, inevitably, that the sum due under this provision out [770] of the father's estate was £2000, not £3000. There was only one child having right to take, and that child could only take what was provided in the case of a single child. The sum of £3000 could only become due where more children than one were to take, and the sum was to be divided amongst them. Division was an indispensable element of the emergence of the larger sum. One child could never take what was alone provided for a plurality. The only right which, in my apprehension, arose under this provision, was a right to £2000, and interest from the date of Mr. Walkinshaw's death, on the part of Mrs. Crawford's children, as coming in her room.

This is the result which I think follows from the application of well-known general principles to such a provision as that which I have referred to. And I conceive that the contract contains nothing which interferes with the application of these principles.

I do not think that the use of the word "procreated" in the obligation "to provide and secure to the child or children who may be procreated of the said marriage as follows," implies a right vesting in each child at the time of birth. I think the words simply import a general statement that what follows is the obligation undertaken on behalf of the children of the marriage. The words, "who may be procreated," might equally well have been left out, and the clause have run thus—"The said James Walkinshaw binds and obliges himself and his foresaids to provide and secure to the child or children of the said marriage as follows." The words do not import any intendment to rest the constitution of a right on the fact of procreation or birth. They merely intimate that the settlement is now going on to state what is to be done for the children of the marriage. The character and amount of what is done must be gathered from the terms of the actual obligation incurred, not inferred from the employment of this general introductory phrase. When the obligation itself is looked to it is an obligation to pay,—"If only one such child the sum of £2000 sterling, and if more than one such child the sum of £3000 sterling, payable at the first term of Whitsunday or Martinmas after the decease of the longest liver of the said James Walkinshaw and Barbara Walkinshaw." I consider this to be the common obligation to pay after decease a certain smaller sum if only one child then exists, and a certain larger sum if more than one. It is just an obligation to pay £2000 if one child survived the father, and £3000 if two or more. I can make nothing more or less of it than this.

A strong argument has been employed, founded on the fact that security for these provisions was given by the father to the extent of £1500, in a policy of insurance effected on his life to that amount, and vested in trustees for behoof of the children. This argument deserves consideration, but it is, in my apprehension, insufficient to throw the period of vesting earlier than the death of the father, or to place it, as was contended, at the birth of each child.

The fact of security being given for provisions to children in a marriage-contract is often of great importance in any question between the children and creditors of the father; for the circumstance of security being given has often been found to give a proper *jus crediti*, to the extent, at least, of the sum secured. It is not so obvious how the granting of security should affect the question of vesting, which must generally be determined by the terms of the obligation itself. At the same time, I think it fairly urged that the security may be given in such terms as to afford evidence of the intention of the parties regarding the period of vesting. In the present case I do not think that these supply any confirmation of the theory that the provisions vested at the birth of each child. The obligation to pay is unquestionably an obligation prestable only after the father's death. This obligation he secures to the extent of £1500 by a policy of life insurance,—that is to say, by an arrangement which does not yield the fund of payment till after his death has taken place. The policy is vested in trustees by an *inter vivos* assignment, but not to the effect of creating any absolute or present interest in the children, but only "towards securing," as the contract expressly runs, payment of the sums provided after the death of the father. This arrangement appears to me entirely to accord with the idea that it was at the father's death, and not sooner, that the provision [771] vested. At all events it very clearly does not suggest any ground for holding that the provision vested at birth. To say the least, it is equally compatible with the one assumption as with the other. The arrangement simply implies that whether vesting took place at one period or another a fund was wanted at the father's death for

payment; and the policy was the means of finding the fund when it was wanted. Whether one, two, or more children were to share in the fund so provided, or who was to share and who was not, the transaction does not aid us to determine. In other words, the transaction imported nothing but a security for the fulfilment of the primary obligation, whatever that obligation was. If, on the terms of the obligation, the right vested at birth, the policy secured fulfilment of that obligation. If, as I think, it vested only after the father's death, the security applied to that obligation, and made it neither broader nor narrower.

It forms, as I think, no small confirmation of the view which I have taken, that the contract in an after clause declares of these provisions to the children, "which provisions shall be accounted part of their interest in their father's means and estate at his decease, but shall not preclude them of their proper share and interest therein." I consider these words strongly to intimate that the benefit of the provisions belonged to the children surviving the father, and to these only. The children to be entitled to the provisions were those who had "an interest in their father's means and estate at his decease," which interest the provisions were *pro tanto* to satisfy. The funds provided were to be employed in satisfaction of rights arising *mortis causa*, and these only. In other words, they went exclusively to children surviving the father. To allocate any part to a child who predeceased the father, and who therefore had no legal interest in his means and estate at his death, would, as I think, be to abstract a portion of the funds from the purpose to which the contract destined them. I cannot read this clause without feeling satisfied that the children who were to share in the provisions were identical with those who, independently of the provisions, had a legal interest in their father's means and estate at his decease. In other words, the benefit of the provisions was confined to the children alive at their father's death.

I thus draw from a consideration of the whole clauses of the deed the same inference as to vesting which I think follows from the terms containing the destination of the provisions. I fully admit that the question is rightly determined by taking into view the whole clauses of the contract, with the object of gathering from these the true purpose of the granter. It is of course quite competent so to settle provisions on children as to vest the right at birth; and so, should all the children predecease the father, to give the whole provisions to their general representatives or assignees. But the contract must be so worded as clearly to evolve this result. More especially must this be the case where the construction of the provision imports *prima facie* a settlement of succession not vesting till the granter's death. It seems to me that the inference thus arising cannot be over-ruled, except by very clear and unequivocal evidence of the granter's intention being different. I cannot find in the contract now in question any grounds for holding that the intention of the granter was to vest the provisions at the birth of each child; on the contrary, I find sufficient grounds for arriving at a directly opposite conclusion.

The conclusion at which I have arrived seems to me to be unaffected by any of the decisions quoted to us. In truth, each case on the subject forms a special case on the terms of the particular deed. The case mainly discussed was that of Beattie's Trustees *v.* Cooper, Feb. 14, 1862, 24 D. 519, in which provisions to children by a father in an antenuptial contract were held to vest in each child at its birth. But the provisions in that case were not, under the marriage-contract, payable after the father's death. They were granted indefinitely in favour of the children, and arose under an obligation to secure the sums mentioned, within three months after the marriage, by a bond in favour of the spouses in liferent for their liferent right allenarly (thereby constituting them fiduciary fiars), "and to the children, one or more, to be procreated betwixt them, in fee." The marriage was in August 1810. The father, John Myers, by the [772] antenuptial contract "bound himself, at Martinmas 1810, to lend out £400 sterling, on a sufficient bond or bonds, and to take the rights and securities thereof to the said John Myers and the said Diana Cooper, and the longest liver of these two in liferent, for their liferent right and use allenarly, and to the children, one or more, to be procreated betwixt them, whom failing, to the said Diana Cooper, her own heirs and assignees, in fee." A bond was accordingly granted to this effect; and the children thereby made present disponees in fee to the sum contained in it. This is plainly an entirely different case from the present; and no sound inference can be drawn from the one case to the other. The other case chiefly brought before our notice is that of Grant's Trustee *v.* Gordon, Feb. 1, 1866, 4 Macph. 336. The provision there in question, though made

in an antenuptial contract, was not made by the intended husband on the children of the marriage, but by the father of the lady. The right did not flow from the father of the children, but from a third party,—thereby involving an essential distinction between the two cases. It was constituted by an obligation on the part of this father-in-law to lay out a certain sum on behalf of the children of the marriage, "at the term of Whitsunday or Martinmas that shall happen next after his death, or as soon thereafter as circumstances will permit." Only one child of the marriage existed, who died when about six months old, long before his father and mother, and before his grandfather, the granter of the provision. The Court held that no right had vested in him to the provision in the marriage-contract, and repelled a plea that such right vested at his birth. The grounds of decision are not, to my mind, all entirely satisfactory. But just as I think the case of Beattie's Trustees no authority against my views, so, on the other hand, I do not rest on this case of Grant's Trustee as any authority in their favour. I think the cases to be in their circumstances essentially different. I decide the present case on its own proper grounds.

The result of these views would be to find that the sum payable to the children under the marriage-contract was £2000, not £3000, and that this sum is due to the children of Mrs. Crawford in their own right. The sum would be payable out of the proceeds of the policy, including the bonus, which are sufficient to pay it, and to leave a surplus for the widow's legal claims. I agree in thinking that the holograph writing of 31st May 1869 has the effect of an antenuptial contract in favour of the second wife.

LORD DEAS.—The important question here is, whether any right vested in the first child at birth. If a right vested in the first child at birth, and a second child was afterwards born, it is plain that the condition was fulfilled on which a provision of £3000 was to be paid. I am of opinion, with your Lordship in the chair, that a right *did* vest in the first child at birth, and that, when the second child was born, the right became absolute to a provision of £3000. I wish, however, to observe that there is no question here with onerous creditors, and that I do not think it necessary to give any opinion on that question, in order to arrive at the same result with your Lordship. I rather assume with Lord Kinloch that there would have been no right in the children to compete with onerous creditors. But supposing that to be so, I still agree in the result arrived at by your Lordship.

The provisions in the marriage-contract of 1831 are in favour of "the child or children who may be procreated of the said marriage." That the first child was a child procreated of the marriage no one doubts. The question then is, why are the words of the deed not to take effect? If in other parts of the deed you could find evidence that, notwithstanding these words, the father meant children surviving the dissolution of the marriage, that would be a good answer. But there is not one word in the deed to qualify the expression, and that being so, it is clear, on the face of the deed, and on authority, that the right vested in each child at birth. The only thing which goes at all the other way is, that the provision is not payable till after the father's death. But there is no authority for holding that, when a provision is made in such terms as we have here, the mere postponement of the term of payment proves that the father did not mean what he said in the obligatory clause of the deed. It appears to me impossible [773] to come to the conclusion aimed at by Lord Kinloch, without directly going in the teeth of the case of Beattie's Trustees, which, to my mind, is on all-fours with this case as regards the provision to children. The only difference, in words, is, that in Beattie's case it was not expressly said that the father's death was to be the term of payment. But that did not need to be said, because the surviving spouse was liferenter, and therefore the implication was plain enough without being expressed. I cannot understand, therefore, how any distinction can be taken between that case and this. The case of Beattie's Trustees in fact is rather *a fortiori* of this, because there were some words in that case that might have been held to qualify the expression, but here there are none.

The subsequent case of Grant's Trustee was also a well-considered case, decided by the same Judges who decided the case of Beattie's Trustees. It would be a startling thing if, after these two solemn decisions, the one confirmatory of the other, any doubt could be raised on the matter.

On the other point I entirely agree with your Lordship.

LORD ARDMILLAN.—It appears important to bear in mind, in disposing of this case, that we are dealing with a marriage-contract in which the obligations are onerous, and

counterparts of each other. When Mr. Walkinshaw entered into it he became bound, not, I think, as Lord Kinloch says, to make a payment at his death, but then and there to provide and secure a certain sum for the children that might be procreated of the marriage. The first remark, therefore, that occurs is, that though the payment of these sums by the trustees to the child or children of the marriage is postponed, the obligation to provide and secure them is present, immediate, and complete. Then the manner in which the provision is to be made is specified. He is to provide, and to make the provision effectual he is to secure it, and the mode of doing so is clearly set forth. The provision is with reference to the state of circumstances set forth in the deed. He is not only to provide for the child or children, but if there is only one child, the provision is to be £2000, and if more than one it is to be £3000. The words "such child" are unintelligible unless you supply the meaning out of the previous words, and that is, "who may be procreated of the said marriage." The words following in the rest of the clause always bear reference to that description, as, "which provision shall be divisible among the said children, if more than one," &c.

I observe, in the next place, and it is a relief to my mind to be able to make the observation, that there is no question here with creditors. I do not quite see my way to what might be the case if there were, but as among heirs or successors of Mr. Walkinshaw, which is the case we have to deal with, it is I think certain that each child born of the marriage has a valid and effectual right.

The obligation to secure is separable from the obligation to provide. The deed sets forth the manner in which that is to be done, viz., by an insurance of not less than £1500, which is to be kept insured during Mr. Walkinshaw's life. That he accomplished, so that both obligations were carried out.

"Now, nothing is clearer to my mind than that, when Mrs. Crawford was born, the trustees held this provision for her to the extent of £2000. But if so, then they held it for two children when the second child was born to the extent of £3000; and they continued to hold that sum in trust. The subsequent death of the second daughter, Helen, did not dissolve the obligation on the trustees to hold that sum of £3000. If Helen had left children I think that they would have succeeded to her share.

On the point of authority, I need add nothing to what I said in the case of Beattie's Trustees, and I see nothing in this case to take it out of the rule of that decision.

On the second part of the case, I have no doubt as to the widow's right to the unsecured balance of the estate.

This interlocutor was pronounced:—"In answer to the first question, find and declare that the full provision of £3000 made by the late Mr. James Walkinshaw in his antenuptial contract of marriage [774] with Miss Barbara Walkinshaw vested in the two children of the marriage on their birth: In answer to the second question, find and declare that the said provision of £3000 was effectually conveyed to the extent of one-half to the second parties by virtue of Mr. and Mrs. Crawford's marriage-contract, and to the extent of the other half to the third parties by Miss Helen M. Walkinshaw's trust-disposition and settlement: Find that the third question is superseded by the answer returned to the first and second questions: In answer to the fourth question, find and declare that Mrs. Walkinshaw, the fifth party, is not entitled to *jus relictæ* out of any parts of the proceeds of the policy of assurance mentioned in the case: In answer to the fifth question, find and declare that the parties hereto of the first, second, third, and fourth parts are not entitled to payment of the unsecured balance of the provision of £3000, over and above the sum of £2480, proceeds of said policy, out of the moveable estate of the deceased James Walkinshaw, in competition with the said fifth party claiming the furniture and other moveables provided to her by the holograph writing of 31st May 1869, or the value thereof, but that she is entitled to claim the said furniture and other moveables, or value thereof, preferably to the said other parties hereto; and decern."

JOHN MARTIN, W.S.—M'EWEN & CARMENT, W.S.—Agents.

No. 135. X. MACPHERSON, 774. 31 May 1872. 2d Div.—Dean of Guild, Glasgow, R.

CHARLES MALLOCH, Petitioner and Respondent.—*Sol.-Gen. Clark—Lancaster.*
COLIN CAMPBELL GRAY, Respondent and Appellant.—*Watson—Orr Paterson.*

Property—Restriction on Building—Servitude.—A proprietor when disponing part of his property barred himself "from erecting at any time hereafter any other building on any other part of the foresaid steading of ground than those at present thereon." *Held* that as the object of the prohibition was to preserve access and light to the tenement conveyed, the disponer was not debarred from making an underground passage under the unbuilt-on space.

JOHN WALLS, S.S.C.—J. & A. PEDDIE, W.S.—Agents.

No. 136. X. MACPHERSON, 774. 4 June 1872. 2d Div.—Lord Mure, I.

MRS. BARCLAY-ALLARDICE, Pursuer.—*Watson—Balfour.*
THE DUKE OF MONTROSE, Defender.—*Sol.-Gen. Clark—Asher.*

Peerage—Exhibition, action of.—A person while prosecuting a claim to certain Scottish peerages before the Committee of Privileges in the House of Lords, raised an action in the Court of Session against a person residing in Scotland, to enforce production of certain charters and other writs which the pursuer alleged to be material evidence in support of the claim. *Held* that the action was incompetent.

Mrs. Barclay-Allardice, who was served heir to the last Earl of Monteith and Airth, presented two petitions to Her Majesty the Queen praying for recognition of her right to the earldoms of Airth, Strathern, and Monteith. These petitions were, in the usual way, referred to the House of Lords, and by them to the Committee of Privileges, before whom they were frequently discussed.

Certain documents which, if in existence, would be important for the petitioner's case, were by her believed to be in the charter-room of the [775] Duke of Montrose, but His Grace refused to allow her to make a search for them.

Accordingly, while her petitions were still before the Committee of Privileges, she raised this summons in the Court of Session against the Duke of Montrose, concluding for an order on him to exhibit and produce before the Court "all and sundry patents of honour and nobility and other creations of dignities and honours, royal warrants and gifts, charters, dispositions, assignations, conveyances, procuratories, and instruments of resignation, precepts and instruments of sasine, special and general services and retours thereof, apprizings, adjudications, reversions, tacks and leases, bonds and obligations, letters of horning, inhibitions, and other diligence, letters of correspondence, and all other writs, evidents, rights, titles, and securities of and concerning or in any way connected with the lands and earldoms of Strathern and Monteith and Airth, or any of them, and lands and baronies of Kilpont and Kilbride, or either of them, and the titles of honour and dignities of Earl of Strathern, Earl of Monteith, Lord Graham of Kilpont and Kilbryde, and Earl of Airth, or any of them, made and granted prior to the 12th day of September 1694, and all inventories of the same: Or otherwise, to make the said writs and documents and inventories patent to the pursuer, or to a person or persons to be named by our said Lords, in such way and manner, and at such time or times and place or places, as our said Lords may direct, with a view to the same being used and made available *in modum probationis*, and in proof and support of the pursuer's claims to the titles and dignities of the earldom of Strathern, earldom of Monteith, earldom of Airth, and lordship of Graham of Kilpont and Kilbryde, presently depending before the House of Lords, and the Committee for Privileges of that House: And the same being so exhibited and produced, or made patent as aforesaid, our said Lords

ought and should authorise and grant warrant to the pursuer, or to such other person or persons as they shall appoint, to take possession of the said writs and documents and inventories, or such of them as shall be selected in the course of the process to follow hereon, and to transmit or remove the same to London, subject to such conditions and safeguards as our said Lords shall ordain, and to exhibit and produce the same before the House of Lords or the said Committee for Privileges in proof and support of the pursuer's said claims, reserving to all parties concerned their rights and interests in the said writs and documents."

The pursuer averred—"It is not in accordance with the rules or practice of the House of Lords, or their Committee for Privileges, to make orders for the exhibition or production of documents, and the pursuer has consequently been unable to obtain from that House or Committee an order for the exhibition or production of the requisite documents. Unless she shall obtain an order for production and exhibition as concluded for she will be unable to recover highly material, and, as she believes, essential evidence, in support of her claims to the foresaid honours and dignities." To which the defender answered—"Admitted that the House of Lords and their Committee for Privileges invariably refuse to make orders in general terms for the production of documents or the contents of charter-chests. *Quoad ultra* denied. The House of Lords and their Committee for Privileges are in the practice of ordering the production of such specific documents as the custodiers thereof may be legitimately required to produce, and as may be necessary for the disposal of the claim before the House."

The pursuer pleaded;—1. As heir duly served and retoured to the last Earl of Monteith and Airth, and as the claimant of the titles, dignities, and honours above condescended on, the pursuer is entitled to exhibition [776] of the whole of the said documents, and to have the same made available in proof and support of her claims to the said titles, dignities, and honours under such conditions as the Court may appoint.

The defender pleaded;—2. That the statements of the pursuer were not relevant or sufficient to support the conclusions of the summons.

The Lord Ordinary sustained the second plea in law for the defender, and dismissed the action.*

The pursuer reclaimed, and argued that the case of Campbell, relied on by the Lord Ordinary, was not in point; that was a suit for perpetuating evidence at the instance of a person who had himself no title (he was only the younger brother of a

---

* "NOTE.—This is an action for exhibition and production of documents *in modum probationis*, which appears to the Lord Ordinary to be, in its leading features, substantially the same with that of Campbell, May 13, 1869, 7 Macph. p. 759, referred to at the debate, and to be ruled by that decision.

"There is no process depending in this Court to which the present action is accessory. But it is brought as incidental to proceedings before a Committee of Privileges in the House of Lords relative to the Airth peerage, and the main difference between the present case and that of Campbell seems to consist in this, that there is here an allegation that it is not in accordance with the practice of the House of Lords, or of the Committee of Privileges, to make orders for production of documents of the description here called for, and that the pursuer has consequently been unable to obtain the requisite order. But it is not alleged that the House of Lords has not the power to make such an order, should it in their opinion be just and reasonable to do so. Having regard, however, to the grounds on which this Court proceeded in disposing of the case of Campbell, it appears to the Lord Ordinary to be settled that an action of the present description, where there is no substantive and relative action going on in the Court, can only be sustained when the Court before whom the substantive action is proceeding has not of itself power to enforce the requisite productions. And as no doubt seems to have been entertained by the Judges who decided the case of Campbell, that the House of Lords itself, whatever might be the case with a Committee of Privileges, had power, upon the report of a committee, to compel production of documents necessary for the determination of peerage questions, should they deem it expedient to do so, nothing short of a distinct allegation of refusal on the part of the House of Lords itself to make an order for production of the documents of which exhibition is here sought, in respect of their want of power to do so, would, as the Lord Ordinary conceives, warrant him in entertaining an action of this description."

person who had made a claim), and in that case the defenders had no power to produce the deeds because they were not in possession of them. She maintained that an heir has right to call for exhibition *ad probandum.**

The defender relied on the cases of Campbell *v.* Lindsay Crawford, House of Lords, May 26, 1826, 2 W. and Sh. 441, reversing the decision of the Court of Session, 2 Sh. 615; and of Campbell *v.* Breadalbane, March 18, 1868, *ante*, vol. vi. 632, House of Lords, *ante*, vol. vii. p. 101; and Campbell *v.* Campbell, May 13, 1869, *ante*, vol. vii. p. 759.

At advising,—

LORD JUSTICE-CLERK.—This is an unusual application, and in disposing of it it is desirable to attend to the special terms of the conclusions of this summons. It concludes against the defender, the Duke of Montrose, for a general exhibition of all writs, under a most exhaustive enumeration, relating to the earldoms of Strathern, Monteith, and Airth, in order that they may be used before a Committee of Privileges in the House of Lords, in support of a claim which the pursuer has made to these earldoms. The summons then proceeds to conclude [777] that the Court shall give special instructions as to the exhibition and delivery of these writs, and take measures for their being conveyed to and produced before the Committee of Privileges.

I am of opinion that the application is incompetent, both in its general conception, and in its details. No instance of such a use of the process of exhibition has been referred to, and having looked through the authorities on this subject I am satisfied it has no sanction from any recorded case.

I think it unnecessary, in coming to this conclusion, to consider how far the pursuer, as alleged heir to the earldoms, may have an interest in the titles to the landed estates which were conveyed to the Duke of Montrose as a singular successor; or how far her allegation of pedigree is fortified by her general service. It is no doubt possible that the titles to the lands which were conveyed to the Duke of Montrose may also be the evidents of the titles of honour, which were not conveyed. But even if this application rested on an alleged joint interest in these writs, it would have been necessary, as has been frequently determined, to have specified the particular instruments of which exhibition was demanded. A general demand such as this has never been sustained.

But that is not the nature of the present application. It is a process of exhibition *ad probandum*, and is incidental to a pending proceeding before the Committee of Privileges. We have no jurisdiction over the subject of that proceeding, which is the right to a peerage, and on the other hand we must assume that for the purpose of advising the Crown on that matter the Committee of Privileges, or the House of Lords, have power to do everything which is essential to justice in the discharge of that duty. That they have ample power for that purpose I cannot doubt; although it is highly probable that they would not make, and are not in the habit of making, such orders as we are here asked to pronounce. With that, however, we have no right to interfere. It is enough that the inquiry in aid of which this action is brought is pending before a British tribunal of competent jurisdiction, and relates to a matter of which we are not entitled to take cognizance. The case of Campbell seems entirely in point on this subject, and I think our decision should be in conformity with it.

I need only add that the decision of this Court in the case of Lindsay Crawford was reversed, and neither the decision itself nor the dicta ascribed to the Judges in pronouncing it can be regarded as authority in favour of this application.

LORD COWAN.—I concur. This is an action for exhibition, and such as an heir usually would not be entitled to. It is substantially in aid of a claim now before the House of Lords. The case of Campbell is a direct authority; the mere expeding of a general service is not material. We have no evidence that the House of Lords would not do what justice to the parties required. I cannot take the mere evidence of the minutes of the Committee on Privileges as conclusive, as it does not appear what would have been done if a special application had been made. The statement on this point amounts to nothing more than a statement of what the House of Lords consider fair and just, and it is out of the question for us to interfere.

LORD BENHOLME.—My opinion is that the action is incompetent. That is the ground on which I think our judgment should rest. I think this ought to be clearly

* Stair, iv. 33, 1, 2, 3.

expressed in the interlocutor to be pronounced; all the more so, as that is not the ground of the Lord Ordinary's judgment.

LORD NEAVES.—I lean to Lord Benholme's view that it is incompetent. The question here is the bearing of these documents on the destination in the Peerage patent—a matter entirely out of our jurisdiction. The House of Lords must know its own forms and machinery for doing justice between claimants, and we cannot interfere to assist them.

We have the case of Campbell. It was argued that the want of service there was the turning point, but as dignities and titles of honour descend *jure sanguinis* no one is bound to take service, so that the want of service cannot afford a distinction between the two cases, although, as the question there was one of propinquity, the absence of service might be of importance.

[778] The vagueness of this demand is another element in my judgment—a general demand to walk into a man's charter-chest, and precognosce the title-deeds, which the Court cannot entertain.

THE COURT pronounced this interlocutor:—"Refuse the note: Find that the action is incompetent, and therefore adhere to the Lord Ordinary's interlocutor in so far as it dismisses the action and finds the pursuer liable in expenses: Find the pursuer liable in additional expenses."

JOHN SHAND, W.S.—DUNDAS & WILSON, C.S.—Agents.

No. 137. X. MACPHERSON, 778. 8 June 1872. 2d Div.—I.

THOMAS TENNENT (Trustee for Mr. and Mrs. Murray and Children), First Party—*Scott.*

EDMUND J. MURRAY, Second Party.—*Strachan.*

CHARLES J. B. MURRAY, Third Party.—*Sol.-Gen. Clark—M'Laren.*

AUGUSTUS B. MURRAY AND OTHERS, Fourth Parties.—*Watson.*

THOMAS F. IVENS (J. E. Murray's Assignee), Fifth Party.—*MacLean.*

Apportionment—Revocation—Error.—A father, in implement of a reserved power of dividing a trust-estate of which he was liferenter among his children in such proportions as he might appoint, which failing, equally among them, disponed one-third *pro indiviso* part of the lands of N. to his second son. This deed was delivered, and infeftment followed on it. Ten years afterwards he executed a settlement directing the trustee, on his death, to sell the whole estate of N. and divide the proceeds among his children in certain proportions, viz., to his eldest son £3000, and to each of his other children an equal share of the residue. *Held* that the first deed was a valid exercise of the reserved power of apportionment, and irrevocable; that the second deed, having been granted under error of his legal powers, was inept; and that the second son was entitled to a share of the two-thirds unapportioned equally with the other children.

By disposition dated 30th April 1829, Robert Rollo, writer in Edinburgh, sold the estate of Newton to trustees for the use of Margaret Maxwell Hamilton, wife of John Murray, Esquire, in liferent, for her liferent alimentary use allenarly, and exclusive always of the *jus mariti* and right of administration of her said husband; and after her death, in trust for the use of the said John Murray, in liferent for his liferent alimentary use allenarly; and in trust for the use and behoof of any child or children lawfully procreated or to be procreated of the body of the said John Murray, in such share and proportion, or shares and proportions, as he, the said John Murray, might appoint by a writing under his hand.

The trustees were infeft on the disposition.

Mrs. Murray died on 12th July 1833, leaving three children of her marriage. Mr. Murray married a second time on 19th May 1834, and by his second marriage

had five children. On 27th September 1851 he granted a disposition in favour of Charles J. B. Murray, his second son by his first marriage. This disposition proceeded on the narrative of the disposition of Robert Rollo, and that it was executed in implement of the power and faculty reserved in his favour to divide and apportion the estate among his children. Accordingly, with consent of the then surviving trustees under the disposition by Robert Rollo in 1829, Mr. Murray conveyed to Charles J. B. Murray, his second son, his heirs and assignees whomsoever, heritably and irredeemably, one-third part or share *pro indiviso* of all the subjects contained in the disposition by Robert Rollo, with entry at the term of Whitsunday after the death of the said John Murray. Charles J. B. Murray was infeft on this disposi-[779]-tion, and afterwards granted a bond over his one-third share of the lands in security of £460 borrowed by him.

John Murray died on 6th September 1868. He left a deed of settlement dated 18th May 1861, and codicils thereto dated 14th March 1865 and 15th August 1868. By this deed he directed and appointed the sole surviving trustee under that deed immediately after his death to sell his estate of Newton, and to divide the proceeds among his children as follows, viz. :—To his eldest son, Edmund John Murray, £3000; and the balance equally among his other remaining children, viz., Charles James Boehm Murray, Augustus Berney Murray, Elizabeth Murray, Joseph Hutchison Murray, William Strang Murray, Frederick Murray, and Henry Murray, share and share alike, declaring that the share or proportion falling to any of his children above named who should predecease him should be divided in equal proportions among his surviving children. He further directed his trustee to burden his said children with an annuity of £50 to his second wife, declaring that if any of them should refuse to accept of the sums thereby provided for them, or to act up to his said last will and settlement, he thereby cancelled and annulled his or her right to any share of the proceeds arising from the sale of said property; and he directed his trustee to divide the same equally among his other children who should accept thereof, and he revoked and cancelled any former deeds, and reserved power to alter or revoke the said deed.

The estate was ultimately sold, with consent of all parties, for the sum of £8210, and this case was brought to settle the rights of parties in that sum.

A special case was accordingly adjusted between Mr. Murray's trustee, his eldest son, his second son (Charles B. Murray), his other children (except one), and the assignee of the remaining child.

The questions of law submitted to the Court were—"1. Whether the disposition of 27th September 1851 was a valid exercise by the deceased John Murray of the power of apportionment conferred upon him by the trust-deed of Mr. Rollo; and whether, in virtue of the said disposition, the parties of the third part had or have a valid claim to one-third share of the lands of Easter Newton and Wester Newton, or the price thereof? 2. If question 1 be answered in the affirmative—(1) whether the trust-settlement of the said John Murray contains any valid apportionment of the remaining two-thirds of the said lands or the price thereof? (2) whether said trust-settlement contains a valid apportionment of the remaining two-thirds in favour of the whole children of the truster? (3) whether Charles Murray is entitled to claim any share of the said two-thirds, in addition to one-third share previously apportioned to him? 3. If question 1 be answered in the negative—(1) whether the said lands or price thereof are validly apportioned amongst the children of the truster, the late John Murray, by his deed of settlement? or (2) whether the said lands or the price thereof are unapportioned, and belong to said children in equal shares?"

It was argued for the parties of the first and second part—(1) That the deed of 1851 was not a good exercise of the power of apportionment by Mr. Murray; (2) that it was revokable and was revoked by the deed of 1861; (3) that the deed of 1861 was inept.

It was argued for the party of the third part—(1) That he was entitled to one-third of the estate under the deed of 1851; and (2) to an equal share of the estate remaining unappointed.

It was argued for the parties of the fourth and fifth part that both the deeds of 1851 and 1861 were bad, and the estate fell to be equally divided.

[780] At advising,—

LORD COWAN.—The circumstances in which the Court are asked for their opinion and judgment on the questions of law in this special case are fully set forth, and need

not be resumed except in so far as necessary to explain the grounds of the opinion which I have formed.

The deed disponing the property, and conferring the power of apportionment, was executed by Robert Rollo in 1829. It conveyed the estate of Newton to trustees, in consideration of the sum of money therein mentioned, in trust for the use and behoof of Margaret Murray, wife of John Murray, "in liferent for her liferent alimentary use allenarly," excluding the *jus mariti* and right of administration of her husband; and after her death in trust for the use and behoof of her husband John Murray, "in liferent for his liferent alimentary use allenarly," declaring the same not effectable for his debts or deeds, "and in trust for the use and behoof of any child or children lawfully procreated or to be procreated of the body of the said John Murray, in such share and proportion, or shares and proportions as he the said John Murray may appoint by a writing under his hand; which failing, equally amongst them." The trustees appointed by this deed were duly infeft in the lands; and it is not disputed that the only right conferred on John Murray was a right of liferent allenarly, that the fee vested in his children as a class, and that the estate was held by the trustees for their behoof, subject merely to the father's power of division.

Margaret Murray died in July 1833, leaving three sons of her marriage with John Murray. He married a second time, in May 1834, and by his second wife he had five children, and died in September 1868; two deeds relative to the estate of Newton having been executed by him, the one in 1851, being a disposition in favour of his second son, Charles James, and the other a deed of settlement executed in 1861, and relative codicils dated in 1865 and 1868.

The deed of 1851 in favour of the second son proceeds on the narrative of the disposition in trust in 1829, conveying the lands of Newton in the terms aforesaid, and of the decease of his first wife, Margaret Murray, leaving several children, and then, "in implement of the reserved power and faculty" contained in the deed, and with consent of the trustees, he disponed to his second son the one-third share *pro indiviso* of the said estate, "heritably and irredeemably"; the term of entry is declared to be the term of Whitsunday after his death, the granter's liferent being thus preserved to him; and the deed further contains all the usual clauses of an absolute disposition. Upon this deed infeftment followed in favour of the second son; and thereafter the said disponee borrowed the sum of £460 upon the security of the subjects disponed to him, the bond in favour of the heritable creditor being duly recorded.

The deed of settlement of John Murray, bearing date 1861, with relative codicils, came into operation on the testator's death in 1868. And in relation to the estate of Newton he appointed that after his death the trustees in whom the estate was vested in trust for his children should sell the lands, and divide the proceeds thereof amongst them in the shares and proportions therein stated, viz., "to his eldest son £3000," and the balance of the proceeds to be "equally divided among his other remaining children, share and share alike." The deed recalls and revokes any deed of settlement made by him at any time previously, and reserves power and liberty to alter the deed during his lifetime. There are other provisions in the settlement and relative codicils, to which it is not necessary at present to advert.

The primary question is, whether these deeds, or either of them, are valid, as in due exercise of the power of division.

As regards the deed of 1851, I see no good ground on which its validity can be successfully impugned. The estate of Newton was in 1851 held by the trustees under the deed of 1829, for the use and behoof of the children who were the sole fiars and beneficiaries, subject only to the liferent of their father, the survivor of the spouses, and his power of division. The deed of 1851 narrates that power, and gives over to his second son, his heirs and assignees, one-third of the estate, in absolute terms, subject to no power of revocation. The deed [781] was delivered and took full effect; and the subjects were thereafter burdened with a security by the second son on the footing of his being absolute proprietor. Now, that a power of division or apportionment may be partially exercised cannot be doubted, after the recent decision and the opinions delivered in the House of Lords in the case of Anstruther; and this being so, the deed took effect as a delivered deed, and became irrevocable. The father had reserved no power to recall it, and it is not of a character to make it revocable *sua natura*. It fixed the proportion of the common estate which was to be taken by the

second son, the remainder of the property being left to be taken by or apportioned among the other children. Further, having regard to the principle recognised and acted on in the authoritative decision to which I have referred, this deed of 1851 must be held to remain valid, although no attempt had been made by the father to execute any other deed of apportionment among the rest of the children. There remained enough for them all, so that no objection could be taken to the deed of 1851 on the ground of any one of them being left to take a mere elusory share. Failing any other deed, the result merely was that effect would be given to the direction in the deed of 1829, that on such failure the unappropriated fund fell to be divided equally.

Then, as regards the validity of the deed of 1861, I am of opinion that it cannot be held a valid and effectual deed. The narrative states that the estate of Newton was held by the trustees under a deed of disposition *granted by him* in their favour for his liferent use, and in trust for his children, in such proportions as he might appoint. This was an erorr as to the origin of the rights in him and his children, inasmuch as no such deed existed, the deed bestowing the estate in fee to the children, and conferring the power of division on the father, having been the deed of Robert Rollo in 1829. The deed proceeds to direct the trustees to sell the estate of Newton, and to pay over and divide the proceeds among his children, whereas he had no power to direct the sale of the estate, and had no right in it beyond a mere liferent. Then his direction to the trustees is to divide the proceeds of the estate in shares or proportions, "viz., my eldest son the sum of £3000 sterling, and the balance or remainder of the sum arising from the sale of the estate to be equally divided" among his other children, including the second son, "share and share alike," so that this was not an exercise of the power conferred by the deed of 1829, which gave the fee of the estate of Newton to the children, subject merely to the father's power to regulate the shares and proportions thereof to be taken by them severally. There is further a general clause of revocation of deeds of settlement previously executed by him, which was no doubt intended by the granter to strike, *inter alia*, at the deed of 1851, but which he had no power to revoke. Again, it is manifest from the whole deed and its several provisions that the granter of it was under the conviction that, at the time of its execution, it was within his power to divide the whole estate of Newton among his children, or the proceeds of it when sold, on the footing that the deed of 1851 had been effectually recalled, or, at all events, of its not being entitled to any effect. This being so, the apportionment made by the deed of 1861 cannot be sustained. Apart from the other objections to its validity, how can it be predicted that if he had known that not the whole but only two-thirds of the estate of Newton remained to be divided he would have given so large a precipuum to his eldest son? The whole estate was stated to have been worth less than £9000, and the eldest son getting £3000, there remained only £6000 to be divided amongst the other seven children. Had the father appreciated the fact that one-third of the estate was already effectually apportioned, leaving only £6000 to be divided, it cannot be assumed that he would have given £3000 to his eldest son. There was thus essential error in the exercise of the power of division, which is fatal to this deed. And, in addition, there is the other ground of objection to the deed, viz., that it purports to be a division of money to be realised from the sale, which he had no power to direct, instead of an appointment of the shares or proportions of the landed estate to which the sons were severally to be entitled. On the whole, therefore, it seems to me that this apportionment cannot stand.

Holding, then, the deed of 1851 to be a valid deed in favour of the second [782] son, and the deed of 1861 to be invalid, there remain the two-thirds of the estate undivided, and the result is to bring into operation the direction of the deed, that failing an appointment by the father, the estate, in so far as undivided, is to be taken by the children equally. And in this division I think the second son, although entitled to take under the deed of 1851, must be included. This result appears to me consistent with the principles recognised and acted on in the case to which I have referred, and in the other English decisions to which references were made in the course of the argument.

The other Judges concurred.

THE COURT accordingly answered the first question in the affirmative, the first two branches of the second in the negative, and the last branch of the second in the affirmative.

JOHN WALLS, S.S.C.—A. KIRK MACKIE, S.S.C.—RENTON & GRAY, S.S.C.—W. ROSS SKINNER, S.S.C.—Agents.

No. 138. X. MACPHERSON, 782. 11 June 1872. 2d Div., with three Judges of the 1st Division.—Lord Ormidale, R.

WILLIAM FULTON LOVE, Pursuer.—*Sol.-Gen. Clark—Adam.*
WILLIAM LANG AND OTHERS, Defenders.—*Millar—Hall.*

Road—Jurisdiction—Justice of Peace—Expenses—1 & 2 *Will. IV. c.* 43 (*Turnpike Roads* (*Scotland*) *Act*, 1831), *sec.* 70.—The above section enacts that when any old road shall have become useless it shall be lawful for the Justices at any stated meeting, on the application of the trustees for such road, to give orders for shutting up such road. *Held* that Justices in granting or refusing such applications act ministerially not judicially, and are not entitled to award expenses.

Ante, vol. vii. p. 448.

The road trustees for the district of Beith and Largs, in Ayrshire, instructed their clerk, Mr. Love, to institute proceedings under section 70 of the Turnpike Roads (Scotland) Act, 1831 (1 & 2 Will. IV. cap. 43), which was incorporated in their local Act, for the purpose of having a certain road in the district shut up, as having become useless and of no importance to the public. The section is in the following terms:—"Where any new turnpike road shall be made in lieu of an old road, or where any bye-road shall be used for the purpose of evading the toll-duties imposed by any local Act, or where any old road or any bye-road shall have become useless, or of no importance to the public, it shall be lawful for the Justices, at any stated meeting, on the application of the trustees of such road, to give orders for shutting up such old road or bye-road after the expiration of six months from the date of such orders or resolution, if not appealed from as hereinafter mentioned: Provided always that thirty days' notice of the intention to propose a resolution or order to that effect shall be given by advertisement in any newspaper usually circulated in the county or counties, and by advertisement affixed to the church door of any parish or parishes in which respectively such road proposed to be shut up may be situated; and that any person interested may complain of the determination of the trustees in any such matter within six months after the date of such order or resolution, but not afterwards, to the Justices of the Peace assembled in their Quarter Sessions, or to the Sheriff of any county through any part of which the road so proposed to be shut up may pass, which Justices or Sheriff are hereby authorised finally to determine all such complaints; and all such determinations of the trustees not so complained of, and all such determinations of the Quarter Sessions or the Sheriff shall be final and conclusive, and shall not be subject to challenge or review in any Court or by any process or proceeding whatever; 783 and no trustee who shall have been present at the passing of any such resolution shall act as a Justice of the Peace on the hearing of any such complaint." Mr. Love accordingly, in December 1865, presented a petition to the Justices of Peace for Ayrshire, craving the requisite authority.

The petition was opposed by William Lang and others.

The Justices ordered proof, and, after evidence had been led on several occasions and at great length, on 17th July 1866, found that the petitioner had failed to prove that the road in question had become useless and of no importance to the public, and therefore refused to grant authority for shutting up the road as craved, and also found the respondents entitled to expenses as these should be taxed by the Clerk of Court.

Four sets of respondents shortly afterwards lodged four separate accounts of expenses, and on 6th August 1866 the Justices decerned against Mr. Love for £156, 18s. sterling, being the amount of these accounts as taxed. The respondents extracted this decree for expenses, and charged Mr. Love upon it both as clerk of the road trustees and as being personally liable. Mr. Love then raised a suspension of the charge, in which he pleaded, *inter alia*;—3. It was incompetent and *ultra vires* to insert in the extract of the Justices' alleged decree a warrant to charge, such warrant being only legal in decrees of the Court of Session or of the Sheriff, and the charge was therefore illegal. 5. The Justices had no power to pronounce the decree for expenses, and the same was illegal and null and void.

On 18th July 1868 the Lord Ordinary (Mure) suspended the charge and its grounds

and warrants. The Second Division of the Court, upon 30th January, adhered to the Lord Ordinary's interlocutor, "with the qualification and declaration that the charge and grounds and warrants thereof are only suspended in so far as they may be made the foundation of personal diligence against the suspender as an individual, or his individual funds and estate, and with a view to which the chargers admit that the charge was given, but without prejudice to the said charge and grounds and warrants to any other effect." (*Ante*, vol. vii. p. 448.)

The respondents thereupon, under their decree, arrested £180 of statute-labour road conversion money in the hands of the collectors, and subsequently brought an action of furthcoming.

Mr. Love accordingly, in the name of the road trustees, brought this action to have the decrees of the Justices and the arrestment following on them reduced.

The pursuer pleaded;—1. The decree ought to be reduced, in respect that the Justices had no power to pronounce a decree for expenses against the pursuer, and the same was illegal and null and void. 2. The proceedings in which the said decree was pronounced were not of a judicial nature, and it was *ultra vires* of the Justices to deal with them as such. 3. The Justices had no authority under the Acts of Parliament founded on to deal with the matter of expenses of the said proceedings.

The defenders pleaded;—1. The action was incompetent, and should be dismissed, in respect that under the 70th section of the General Turnpike Act (1 & 2 Will. IV. c. 43), the proceedings of the Justices were not subject to reduction. 2. In respect that the pursuer did not avail himself of the only means of review permitted by said 70th section of the General Turnpike Act, by an appeal to the Quarter Sessions or to the Sheriff, he was not entitled to raise or resist in the present action, and the same should be dismissed. 3. It was *res judicata* that as against the road trustees the decree of the Justices was valid and effectual, and more particularly that it could not legally be challenged upon any of the grounds on which the present action of reduction was rested.

[784] The Lord Ordinary (Ormidale), a record having been made up and closed, and after hearing parties, reported the case to the Second Division.*

---

* "NOTE.— . . . The defenders, in their third plea in law, maintain that the validity of the decree of the Justices sought to be reduced is *res judicata*, and they have strenuously insisted in this plea as a complete bar to the present action. The pursuer, on the other hand, has contended that there was no *res judicata*, or any other bar to the Lord Ordinary proceeding to dispose of this case in the usual way.

"A short report of the suspension case, the judgment in which is founded on by the defenders, in support of their plea of *res judicata*, is reported of date 30th January 1869, in the 7th volume of Macpherson, p. 448, and the interlocutor pronounced in that case by the Court is there given at length.

"There can be no question that the suspension process referred to was between the same parties as those in the present case, the complainer in the suspension being the pursuer here, while the defenders here were the respondents in the suspension case. Neither can it, the Lord Ordinary thinks, be disputed that in the two processes precisely the same matters were and are brought into controversy. The printed record in the suspension case, with the full interlocutor and relative note of Lord Mure therein, which were exhibited to the Lord Ordinary, satisfied him of this.

"The interlocutor, however, pronounced by the Court in the suspension case is expressed in terms somewhat peculiar, owing probably to what is stated in the report to the effect that, after intimation had been ordered to be made to the road trustees, 'it was intimated that they did not intend to state any defences to the liability of the road funds for the sum charged for.' It was, it is presumed, in consequence of this statement on the part of the road trustees that the interlocutor of the Court was expressed in the terms it bears.

"But by that interlocutor 'the charge and grounds and warrants thereof are only suspended in so far as they may be made the foundation of personal diligence against the suspender' (present pursuer), 'as an individual, or his individual funds and estate, and with a view to which the chargers (present defenders) admit that the charge was given, but without prejudice to the said charge, grounds, and warrants to any other effect.'

"The pursuer maintained at the debate before the Lord Ordinary in the present

[785] After counsel had been heard upon the whole cause the Second Division pronounced the following interlocutor:—"7th March 1872.—The Lords appoint the cause to be heard before the Judges of this Division, with the addition of three Judges of the First Division, upon the question raised by the pursuer as to the power of the Justices of the Peace to pronounce a decree for expenses against him, and appoint copies of the printed papers and of this interlocutor to be laid before the Judges of the First Division."

The pursuer argued;—The Justices were empowered only to come to a resolution, not to give a judgment. They were to act only on their own local knowledge, and were not constituted a Court by the Act. Their duty was to consider whether or not they would affirm the resolution of the road trustees. If they were not acting as a Court they had no power to award expenses.

The defenders argued;—The office of Justice of Peace was a judicial office, and though the Justices might be required by statute to act ministerially in certain cases this was not to be presumed. Here the terms of the statute and the nature of the duty imposed alike showed that the Justices were called on to act judicially. The application was to be made to them by the road trustees, and the Justices had the power to grant or refuse the application, and thus implied a power to award expenses, for every tribunal had that power.*

At advising,—

LORD PRESIDENT.—My Lords, the cause in which this reference is made to us by the Second Division of the Court is an action of reduction at the instance of Mr. Fulton Love, clerk to the trustees on the turnpike and parish roads in the district of Beith and Largs, in Ayrshire, by which he seeks to reduce two decrees of the Justices of the Peace for the county of Ayr, the first dated 17th July 1866, by which the

---

case that, by this interlocutor, no judgment can be held to have been given on the validity of the decree and proceedings now in question, so far as the road trustees and road funds, which alone he now represents, were or are concerned. On the other hand, the defenders maintained—First, that, if not in express terms, at least by plain, unmistakeable implication, the decision of the Court was in favour of the validity of the judgment and proceedings now challenged, and if so, that the plea of *res judicata* is well founded; and, secondly, that, independently of such plain implication, it was undeniable that the interlocutor of Lord Mure, whose judgment as Ordinary was under review in the suspension case, having been expressly adhered to, except in so far as it might be thought to impose personal liability on the suspender (present pursuer), the whole matters now brought into dispute in the present action must be held to have been in the former process of suspension finally settled in their, the defenders', favour.

"It is in these circumstances, and in respect of the dispute now raised as to the object and intention of the Court in pronouncing the interlocutor referred to in the suspension case, and as to the true meaning and effect of that interlocutor, that the present case is reported. The Lord Ordinary may add that, as at present advised, he is not satisfied that the defenders' plea in bar can be got over, for even although it might not be held that the whole matter in this dispute is *res judicata*, he does not see how the pursuer, as representing the road trustees and road funds, can be allowed, in the present action, to disregard the intimation which, according to the published report of the suspension case, the trustees distinctly made in that case to the effect that they were 'not to state any defences to the liability of the road funds for the sum charged for.' But [785] whether such an intimation was in point of fact made, and for what purpose, and in what circumstances, must be better known to the Second Division of the Court than to the Lord Ordinary."

* Ledgerwood *v.* M'Kenna, Dec. 18, 1868, *ante*, vol. vii. p. 261; Ferrier *v.* Alison, April 18, 1845, 4 Bell's App. 161; Hutchison on Justices, vol. i. p. 7; Erskine, i. 2, 6; Tait on Justices, p. 424; M. *voce* Jurisdiction, *passim*; Blaw *v.* Geddes, July 9, 1754, M. 7610; 4 Geo. IV. cap. 34; 2 & 3 Will. IV. c. 65, secs. 14, 17, 18, 23, and 24; Statute 1669, cap. 17; Justices of Clackmannan *v.* Magistrates of Stirling, December 4, 1772, Hailes, 506; 1 & 2 Vict. cap. 119; Crawford *v.* Lennox, July 15, 1852, 14 D. 1029; Forrest *v.* Harvey, April 25, 1845, 4 Bell's App. 197; Shedden *v.* Patrick, May 15 and July 6, 1854, 17 D. (H. L.) p. 22; Magistrates of Renfrew *v.* Hoby, June 12, 1856, 19 D. (H. L.) p. 2; Bickett *v.* Morris, July 13, 1866, 1 Law Rep. (H. of L. Scot.), p. 47.

Justices found by a majority that the petitioner—that is, the pursuer of this action—had failed to prove that a road had become useless and of no importance to the public, and refused to authorise the shutting up of that road, and found the defenders entitled to expenses. The second decree was dated 6th August 1866, and in it the Justices decerned against Mr. Love for £156, 18s. of expenses, being the amount of the defenders' account as taxed. The grounds of reduction are distinctly stated in the first and second pleas in law for the pursuer, and are as follows:—"(1) The said decree ought to be reduced, in respect that the Justices had no power to pronounce a decree for expenses against the pursuer, and the same is illegal, and null and void. (2) The proceedings in which the said decree was pronounced were not of a judicial nature, and it was *ultra vires* of the Justices to deal with them as such." The proceedings before the Justices commenced with a petition by the pursuer, as the clerk of the trustees, setting forth that a particular road in the district under their charge had become useless and of no importance to the public, and that [786] the trustees had come to a resolution that it ought to be shut up, and had instructed the pursuer to institute the necessary proceedings for that purpose. The petitioner accordingly prayed the Justices to appoint a day for hearing parties, and to direct and ordain that thirty days' notice of the intention to propose a resolution or order for shutting up the road should be given, and thereafter that the Justices should order the road to be shut up.

When this petition was called in Court a number of parties appeared as respondents, and these, or some of them, are the defenders in the present action. The case came before the Justices on several days, and a proof was ordered, and at length, after a consideration of the whole matter, the Justices, on 17th July 1866, by a majority, found that the petitioner had failed to prove that the road in question had become useless, and of no importance to the public, and refused to grant authority for shutting it up, and found the defenders entitled to expenses. Thereafter, on 6th August, the defenders' account having been taxed they decerned for the amount thereof against the pursuer. In these circumstances the question put to us by the Second Division regards the power of the Justices of the Peace to pronounce decree for expenses against the pursuer. But it appears to me there is another question which must be first decided, whether the proceedings before the Justices were proper judicial proceedings,—I mean not in form, because, as far as one can judge from the extracts, everything was done in the most regular judicial form, but whether, acting under the statute, the Justices were acting in a judicial or ministerial capacity, because if they acted judicially when only authorised by the statute to act ministerially, then what they may have done will not be protected so as to become a judicial proceeding. As far as one can see all they did was regular and orderly if they were entitled so to proceed. But the whole question turns upon the interpretation of the 70th section of the General Turnpike Act. That section provides for procedure in three cases: (1) where any new turnpike road is made in lieu of an old road; (2) where any bye-road is used for the purpose of evading the toll-duties imposed by any local Act; and (3) where any old road or any bye-road has become useless or of no importance to the public—the case we have here. In all these cases it is provided that "it shall be lawful for the Justices at any stated meeting, on the application of the trustees of such road, to give orders for shutting up such old road or bye-road, after the expiration of six months from the date of such order or resolution if not appealed as hereinafter mentioned. Now, considering this part of the clause by itself, it appears that the Justices are to be set in motion by an application by the trustees, and upon that application they are to give the required order. This order is not to take effect until "six months from the date of such order or resolution," and then only if not appealed from. There is a further provision that "thirty days' notice of the intention to propose a resolution or order to that effect shall be given," as therein directed. This notice is not of the application of the trustees, still less of the resolution to which the trustees have come, but it is a notice of an intention on the part of a Justice or Justices to propose to make a resolution or order, —that is, an intention on the part of the Justices to endorse the resolution of the trustees, and so to give it practical and legal effect. So far there appears somewhat of a judicial character in the proceedings. There is notice to all parties interested, and the operation of the order is suspended that an opportunity of appeal may be given. If the statute had stopped there it would have been more difficult to construe. I should then have been rather in favour of the judicial character of the proceedings. But when the nature of the appeal "hereinafter mentioned" is taken into account, the

aspect of the matter is changed. The statute proceeds as follows:—"But any person interested may complain of this determination of the trustees in any such matter within six months after the date of such order or resolution, but not afterwards, to the Justices of the Peace assembled in their Quarter Sessions, or to the Sheriff of any county through any part of which the road so proposed to be shut up may pass, which Justices or Sheriff are hereby authorised finally to determine all such complaints." Now, by that clause the right given to any person interested is not to appeal against the order of the Justices, but to complain of the resolution of the trustees, and [787] it cannot be said that that is a judicial proceeding. The trustees pass the resolution at their own meeting, and it is that, and that only, against which any person interested may complain. A complainer cannot go to the Petty Sessions. He may go either to the Quarter Sessions or to one of the Sheriffs, as already described. But what he is to complain of is the determination of the trustees, and if that be not complained of for six months it becomes final. It seems to me, therefore, that the meaning of the Legislature is that the trustees at their own meeting, and acting on their own knowledge, are intended to come to a resolution to close the road if they see fit. That resolution is of no avail until it is endorsed by the Justices in Petty Sessions. It has no effect without this order of the Justices. The fact that six months is given for what in one part of the clause is called an appeal, but in another and more important part, is more properly called a complaint, does not necessarily make the granting of the order a judicial proceeding. The only judicial proceeding commences with the complaint. I do not think that the framers of the Act meant that there should be a law-suit in the Petty Sessions, only to go over ground which would require to be gone over before the Quarter Sessions or the Sheriff if there were a complaint.

It is also most important to observe that only one party can complain, not both—the private party only, and not the trustees. That this is so is evident, because the complaint is only against the determination of the road trustees, and that they should complain of their own determination is absurd.

I therefore come to the conclusion that the whole of this procedure is entirely without warrant in the statute; and the award of expenses here in question is inept, as being *ultra vires* of the Justices under this clause of the statute.

LORD COWAN.—When this case came before the Second Division of the Court we felt that the construction of this clause of the statute raised matter of general importance affecting the jurisdiction and procedure of Justices of the Peace under the Road Acts, which ought to be decided by an authoritative judgment of the Court. At first I had great difficulty in seeing in what capacity the Justices act in such proceedings as the present, but I have come to the same result as your Lordship, that they act ministerially and not judicially. The clause allows thirty days' public notice in order that any one interested may state objections to the road being shut up, and after hearing parties and taking such steps by visiting the grounds or otherwise as they consider necessary, the order desired by the road trustees is either granted or refused. In all this the Justices act ministerially in the exercise of that power of superintending the roads of the county which they have possessed by statute from a very early period. Then comes the appeal to the Quarter Sessions, which is given only to one side, and is not limited to those who appear before the Justices, but may be insisted in by any one interested. Altogether, having regard to the whole provisions of the Act, I concur in the judgment which your Lordship proposes.

LORD DEAS.—There is room for great doubt whether the Justices acted judicially or ministerially. The phraseology of sec. 70 of the statute is vague, and somewhat inconsistent with itself. Taking one part of it by itself, it might seem to import that the Justices were to act as a Court. But when we come to other parts of it the import seems to be that they were to act ministerially. The whole difficulty arises from the vagueness and inaccuracy, if not inconsistency, of the language used in the statute; and that being so, I am not prepared to differ from the result at which your Lordships have arrived.

A view occurred to me which was not stated at the bar, and to which I presume, therefore, there is some good answer. It was this: The Justices have undoubted jurisdiction to act as a Court in many matters, although this may not be one of them. If, then, a party brings before them, in a judicial form, a matter which is not judicial, and his application is consequently refused as incompetent, have the Justices not jurisdiction to award expenses?

Justices found by a majority that the petitioner—that is, the pursuer of this action—had failed to prove that a road had become useless and of no importance to the public, and refused to authorise the shutting up of that road, and found the defenders entitled to expenses. The second decree was dated 6th August 1866, and in it the Justices decerned against Mr. Love for £156, 18s. of expenses, being the amount of the defenders' account as taxed. The grounds of reduction are distinctly stated in the first and second pleas in law for the pursuer, and are as follows:—"(1) The said decree ought to be reduced, in respect that the Justices had no power to pronounce a decree for expenses against the pursuer, and the same is illegal, and null and void. (2) The proceedings in which the said decree was pronounced were not of a judicial nature, and it was *ultra vires* of the Justices to deal with them as such." The proceedings before the Justices commenced with a petition by the pursuer, as the clerk of the trustees, setting forth that a particular road in the district under their charge had become useless and of no importance to the public, and that [786] the trustees had come to a resolution that it ought to be shut up, and had instructed the pursuer to institute the necessary proceedings for that purpose. The petitioner accordingly prayed the Justices to appoint a day for hearing parties, and to direct and ordain that thirty days' notice of the intention to propose a resolution or order for shutting up the road should be given, and thereafter that the Justices should order the road to be shut up.

When this petition was called in Court a number of parties appeared as respondents, and these, or some of them, are the defenders in the present action. The case came before the Justices on several days, and a proof was ordered, and at length, after a consideration of the whole matter, the Justices, on 17th July 1866, by a majority, found that the petitioner had failed to prove that the road in question had become useless, and of no importance to the public, and refused to grant authority for shutting it up, and found the defenders entitled to expenses. Thereafter, on 6th August, the defenders' account having been taxed they decerned for the amount thereof against the pursuer. In these circumstances the question put to us by the Second Division regards the power of the Justices of the Peace to pronounce decree for expenses against the pursuer. But it appears to me there is another question which must be first decided, whether the proceedings before the Justices were proper judicial proceedings,—I mean not in form, because, as far as one can judge from the extracts, everything was done in the most regular judicial form, but whether, acting under the statute, the Justices were acting in a judicial or ministerial capacity, because if they acted judicially when only authorised by the statute to act ministerially, then what they may have done will not be protected so as to become a judicial proceeding. As far as one can see all they did was regular and orderly if they were entitled so to proceed. But the whole question turns upon the interpretation of the 70th section of the General Turnpike Act. That section provides for procedure in three cases: (1) where any new turnpike road is made in lieu of an old road; (2) where any bye-road is used for the purpose of evading the toll-duties imposed by any local Act; and (3) where any old road or any bye-road has become useless or of no importance to the public—the case we have here. In all these cases it is provided that "it shall be lawful for the Justices at any stated meeting, on the application of the trustees of such road, to give orders for shutting up such old road or bye-road, after the expiration of six months from the date of such order or resolution if not appealed as hereinafter mentioned. Now, considering this part of the clause by itself, it appears that the Justices are to be set in motion by an application by the trustees, and upon that application they are to give the required order. This order is not to take effect until "six months from the date of such order or resolution," and then only if not appealed from. There is a further provision that "thirty days' notice of the intention to propose a resolution or order to that effect shall be given," as therein directed. This notice is not of the application of the trustees, still less of the resolution to which the trustees have come, but it is a notice of an intention on the part of a Justice or Justices to propose to make a resolution or order, —that is, an intention on the part of the Justices to endorse the resolution of the trustees, and so to give it practical and legal effect. So far there appears somewhat of a judicial character in the proceedings. There is notice to all parties interested, and the operation of the order is suspended that an opportunity of appeal may be given. If the statute had stopped there it would have been more difficult to construe. I should then have been rather in favour of the judicial character of the proceedings. But when the nature of the appeal "hereinafter mentioned" is taken into account, the

aspect of the matter is changed. The statute proceeds as follows:—"But any person interested may complain of this determination of the trustees in any such matter within six months after the date of such order or resolution, but not afterwards, to the Justices of the Peace assembled in their Quarter Sessions, or to the Sheriff of any county through any part of which the road so proposed to be shut up may pass, which Justices or Sheriff are hereby authorised finally to determine all such complaints." Now, by that clause the right given to any person interested is not to appeal against the order of the Justices, but to complain of the resolution of the trustees, and [787] it cannot be said that that is a judicial proceeding. The trustees pass the resolution at their own meeting, and it is that, and that only, against which any person interested may complain. A complainer cannot go to the Petty Sessions. He may go either to the Quarter Sessions or to one of the Sheriffs, as already described. But what he is to complain of is the determination of the trustees, and if that be not complained of for six months it becomes final. It seems to me, therefore, that the meaning of the Legislature is that the trustees at their own meeting, and acting on their own knowledge, are intended to come to a resolution to close the road if they see fit. That resolution is of no avail until it is endorsed by the Justices in Petty Sessions. It has no effect without this order of the Justices. The fact that six months is given for what in one part of the clause is called an appeal, but in another and more important part, is more properly called a complaint, does not necessarily make the granting of the order a judicial proceeding. The only judicial proceeding commences with the complaint. I do not think that the framers of the Act meant that there should be a law-suit in the Petty Sessions, only to go over ground which would require to be gone over before the Quarter Sessions or the Sheriff if there were a complaint.

It is also most important to observe that only one party can complain, not both—the private party only, and not the trustees. That this is so is evident, because the complaint is only against the determination of the road trustees, and that they should complain of their own determination is absurd.

I therefore come to the conclusion that the whole of this procedure is entirely without warrant in the statute; and the award of expenses here in question is inept, as being *ultra vires* of the Justices under this clause of the statute.

LORD COWAN.—When this case came before the Second Division of the Court we felt that the construction of this clause of the statute raised matter of general importance affecting the jurisdiction and procedure of Justices of the Peace under the Road Acts, which ought to be decided by an authoritative judgment of the Court. At first I had great difficulty in seeing in what capacity the Justices act in such proceedings as the present, but I have come to the same result as your Lordship, that they act ministerially and not judicially. The clause allows thirty days' public notice in order that any one interested may state objections to the road being shut up, and after hearing parties and taking such steps by visiting the grounds or otherwise as they consider necessary, the order desired by the road trustees is either granted or refused. In all this the Justices act ministerially in the exercise of that power of superintending the roads of the county which they have possessed by statute from a very early period. Then comes the appeal to the Quarter Sessions, which is given only to one side, and is not limited to those who appear before the Justices, but may be insisted in by any one interested. Altogether, having regard to the whole provisions of the Act, I concur in the judgment which your Lordship proposes.

LORD DEAS.—There is room for great doubt whether the Justices acted judicially or ministerially. The phraseology of sec. 70 of the statute is vague, and somewhat inconsistent with itself. Taking one part of it by itself, it might seem to import that the Justices were to act as a Court. But when we come to other parts of it the import seems to be that they were to act ministerially. The whole difficulty arises from the vagueness and inaccuracy, if not inconsistency, of the language used in the statute; and that being so, I am not prepared to differ from the result at which your Lordships have arrived.

A view occurred to me which was not stated at the bar, and to which I presume, therefore, there is some good answer. It was this: The Justices have undoubted jurisdiction to act as a Court in many matters, although this may not be one of them. If, then, a party brings before them, in a judicial form, a matter which is not judicial, and his application is consequently refused as incompetent, have the Justices not jurisdiction to award expenses?

LORDS BENHOLME, NEAVES, KINLOCH, and ORMIDALE concurred.

THE COURT pronounced the following interlocutor:—"The Lords of the Second Division having, along with three Judges of the First [788] Division, and Lord Ormidale in room of the Lord Justice-Clerk, heard counsel for the parties upon the question stated in the interlocutor of 7th March last, find, in conformity with the opinion of the whole seven Judges, that the Justices of the Peace of Ayrshire had no power to pronounce a decree for expenses againt the pursuer, and reduce, decern, and declare in terms of the second conclusion of the summons: Find no expenses due to or by either party."

TODS, MURRAY, & JAMIESON, W.S.—J. & R. D. Ross, W.S.—Agents.

No. 139. X. MACPHERSON, 788. 11 June 1872. 1st Div.—Sheriff of Renfrewshire, M.

DENNISTON GALLOWAY, Pursuer and Appellant.—*Shand—Hall.*
WALTER KING, Defender and Respondent.—*Watson—Maclean.*

Reparation—Damages—Culpa—Trespass—Contributory Negligence.—In an action of damages for injuries sustained by the pursuer from an explosion of nitro-glycerine on the defender's premises it appeared from a proof that the pursuer, a lad of 16 years of age, had, along with others, after climbing a fence, trespassed on a field belonging to the defender, and entered an open hut where a tin can which had contained nitro-glycerine was lying; that the defender had previously given instructions to have the nitro-glycerine destroyed, and that the can had been emptied of as much of its contents as would pour from it, but an explosion was caused by one of the pursuer's companions striking the can with a hammer. *Held* that the defender had used reasonable precautions against accident, and was not liable in damages. *Question* as to trespass and contributory negligence.

This action of damages was brought by Denniston Galloway, residing in Greenock, against Walter King, contractor in Greenock, to recover damages for injuries sustained by the pursuer through the explosion of a quantity of nitro-glycerine belonging to the defender.

The pursuer stated "that on the afternoon of Sunday the 11th day of September last the pursuer left his house to take a walk. At the public bowling-ground of Wellington Park he met ten or eleven young men, and with them proceeded to go up the Whinhill, which, or a part of it, is in the occupation of the corporation of Greenock as public recreation ground. They proceeded down the south side or slope of this hill till they reached a stone dyke erected near the north boundary of a piece of ground belonging to the Water Trust of Greenock, on which the trust have recently erected new water filters. That these water filters were constructed by the defender, Walter King, under a contract between him and the said Water Trust, and were completed towards the close of 1868 or beginning of 1869. That, for the convenience of those employed by him, the defender had erected two wooden huts or sheds upon the piece of ground between the Whinhill reservoir and the site of the new water filters, the northmost hut being used partly as a smithy and partly as a joiner's shop or dwelling-house. That the use of said hut for these purposes had been discontinued, and previous to the 11th September it was made use of by the defender to a limited extent as a receptacle for old tools and other rubbish, and the door had, ever since the completion of the water filters, or at least since the beginning of 1869, been by the defender left unsecured and open; and the public had been in the habit of entering and frequenting said hut at all times since then, without objection by any one. That the other or southmost hut was at a distance of not more than five yards, and was occupied as a powder magazine by the defender, or his tenant, or person authorised by or known to him, and then contained about [789] eighty barrels of gunpowder. The piece of ground on which the huts stood was open and frequented by the public, and access could be had to it by two gates in the fence surrounding it, which were never locked or secured. That these gates were made use of by the public, who regularly frequented said piece of ground for recreation or amusement, and who in addition

could get access to it by steps in the wall. On the pursuer arriving at the dyke a heavy shower came on, and seeing no other shelter within reach, he, and the other young men accompanying him, went over the steps towards the northmost hut, the door of which was open. On entering the hut the pursuer saw that it contained a quantity of old tools and labourers' materials, and observed amongst the rest a square tin can or case. The pursuer did not touch or interfere with said can or case in any way whatever. The pursuer remained under the shelter of the hut for a few minutes, and while standing near the door, preparatory to leaving, he was knocked down by an explosion within the hut. On recovering his senses he found that the hut had been entirely destroyed, and the young men who had been in the hut at the time of the explosion were all, with one exception, lying on the ground more or less seriously injured." (Art. 17) "The pursuer alleges and avers that said explosion was caused by or arose from the culpable negligence and gross carelessness of the defender, or of those acting under him, or for whom he is responsible, in allowing a quantity of nitro-glycerine or other dangerous explosive substance belonging to him, and which was contained within the said tin or metal can or case, culpably and negligently, and unknown to the pursuer, to lie or remain about the floor of or in some other dangerous and unenclosed part of said northmost hut or shed, whereby the said nitro-glycerine or other explosive substance exploded, causing the injuries aftermentioned."

He pleaded;—The injuries sustained by the pursuer having been occasioned by and through the culpable negligence or gross carelessness of the defender, or of those acting under him, or for whom he is responsible, the pursuer is entitled to decree as concluded for, with expenses.

The defender stated as a preliminary plea;—1. The action is irrelevant, and falls to be dismissed, in respect (1) It is not averred that the defender, or anyone for whom he is responsible, placed the alleged explosive substance in the alleged place of danger; (2) It is not averred that the premises in question were the property of the defender, or were in his charge or under his control, and that he knew of the said substance being allowed to remain in a dangerous place; and (3) It is not stated how the explosion took place,—whether spontaneously, or through the act of any one; and no facts or circumstances are averred connecting, or tending to connect, the defender with the alleged injuries.

He pleaded farther on the merits;—2. The pursuer is barred from insisting in the present action, in respect the injuries sustained by him have arisen through his own fault, inasmuch as (1) The explosion was the result of his own wanton conduct and and that of his associates; (2) His injuries were sustained when he was in a place where he had no right to be, and in consequence of his being there. 3. The injuries sustained by the pursuer not having been caused by the fault of the defender, or of any one for whom he is responsible, he is not liable in damages.

The Sheriff-substitute (H. L. Tennent) sustained the plea of irrelevancy, and dismissed the action.

The Sheriff (Fraser) having allowed an amendment of the pursuer's record, to the effect that the can which had contained the nitro-glycerine had been lifted by some of the party and then dropped on the floor and struck "by one or other of which acts, or in some other way to the pursuer unknown, the contents of said can exploded, causing the injuries [790] aftermentioned," dismissed the appeal, and adhered to the interlocutor appealed from.*

---

* "NOTE.—The pursuer was allowed to amend the record, the defender not objecting. As amended, it is somewhat more specific than it was when the Sheriff-substitute pronounced his interlocutor; but still it is irrelevant. After studying this record in the light both of the English and Scotch cases upon this subject the Sheriff is unable to hold that there is anything stated which would render the defender responsible in damages for the injuries which the pursuer sustained; and enough is admitted on the record to enable the Court to dispose of the case upon the relevancy, and without a proof.

"The pursuer and a number of other lads went into a hut the door of which was open, and into which they had no business whatever to go. They were simply trespassers, and did wrong in entering into this hut, which was not in their way, and with the contents of which they had no right whatever to interfere. One of the band, however, proceeds to strike a can the contents of which turned out to be nitro-glycerine, and in a

The pursuer appealed.

On 31st January 1872, the Court having heard counsel, recalled *in hoc statu* the interlocutor of the Sheriff and Sheriff-substitute complained of, and before answer allowed the pursuer (appellant) a proof of his averments, and the defender (respondent) a conjunct probation.

A proof was led, from which it appeared that the field in which the hut was situated was fenced, and that the gates were generally locked on Sundays; that the pursuer and his companions had gone over the wall for the purpose of going to the hut for shelter from rain, by some projecting stones, and that the door of the hut was open. It further appeared that members of the public frequently trespassed on the field, and were sometimes challenged for doing so. With reference to the cause of the accident it appeared that while in the hut one of the pursuer's companions had taken up the can and found that nothing would pour from it, that thereafter another of his companions had struck the can with a hammer while it lay upon the ground, and that the explosion followed.

Claud Storie deponed—"In 1870 I was timekeeper and superintendent under James King, who had the general superintendence of the works [791] at Greenock for the Greenock Water Trust. Part of the work was a tunnel. There was considerable dampness experienced in the tunnelling, and in consequence a can of nitro-glycerine was got. Just a single can was got. I was instructed in the use of it, along with Mr. King. Part of it was used as a trial, but not very much. The can was kept in the powder magazine on Whinhill Park. The park was not then a public park. In 1869 the nitro-glycerine was destroyed, under the orders of Mr. James King. These orders were given to me. He told me to get it destroyed, but he gave no directions as to how it was to be done. I poured it out on the Whinhill, a little bit from the magazine, into a run of water, running past the magazine to the bye-wash leading from Beith's Dam. I took out the stopper, laid it down on its end, and let it run out; and after it had run for a length of time I went forward, lifted it, held the mouth of it down, and poured it all out, till I was satisfied that nothing remained in the can. I put the can into the smith's shop, the hut in which the explosion afterwards took place. I put it in below the bellows. I saw it about four months after I put it there. It was lying in the same place. I handled it. It was empty."

The defender argued;—(1) That reasonable care had been taken to dispose of the nitro-glycerine, therefore he was not in fault; and (2) The ground had been properly fenced, and trespassers duly warned. The boys had trespassed on the ground and in the hut, and further, when there they had behaved with such recklessness as to exempt him from all liability.*

---

moment there was an explosion, and all the lads except one suffered injuries or were killed.

"Now, what legal obligation was there upon the defender to the pursuer or his associates? What duty was it which he violated, and for the breach of which he must now pay damages? It is said that nitro-glycerine is very explosive, and therefore dangerous, and that in consequence of this all due precautions ought to be taken for the safety of the public. This is quite true; and if the defender had placed a can of nitro-glycerine at the wayside, where the public must pass and repass, and where a passer-by would naturally (seeing the deserted article) take it up with the view of discovering its contents or its owner, and an explosion had followed, it might be very fairly concluded that the defender in that case was guilty of such reckless or thoughtless conduct as to render him culpable and liable in damages. But the present case is exactly the reverse of that. In a field to which the public have no access by right (although it appears they often go into it), and in the midst of that field, there is a hut to which no one has a right of access but the defender, and in this hut he keeps his private goods, which are interfered with by a trespasser, who enters therein without his leave or licence,—such is the case for the pursuer as against the defender, the only point being that the defender had not locked the door,—which is no point at all. A man may, if he please, leave the door of his private house open, but this will not entitle a passer-by to enter and meddle with his goods. If the defender had left his gun loaded in the hut, an action of damages would be maintainable against him (supposing the pursuer had been shot by one of his companions with the gun) if the present action were sustained as relevant."

* Chapman *v.* Parlane, Feb. 25, 1825, 3 S. 585 (N. E. 401); Hislop *v.* Sir P.

At advising,—

LORD DEAS.—This is a case that requires and has received great attention. We have had a long proof, and a very able argument upon it. If the question of law were to turn upon the fault of the boys who were injured,—on the fact of their being trespassers, and of their having committed certain little acts of violence in the hut while they were there sheltering themselves from the rain upon the Sunday in question,—it would raise very difficult and delicate questions, and would take us into that department of the law and the authorities last referred to in the observations by Mr. MacLean and formally discussed at great length during the argument upon the relevancy of the action. But it appears to me that there is a question well deserving of consideration which takes precedence of all others, viz. whether, in the whole circumstances of this case, there can be held to have been such fault or negligence on the part of the master, or of his servants for whom he was undoubtedly responsible, as to lay the foundation of the claim against him,—because unless there is fault or negligence on the part of the defender, or those for whom he is responsible, there is no foundation for the claim, and no room for the question what sort of conduct on the part of those who were injured would prevent that claim which they otherwise might have had. The explosive substance which caused this lamentable accident is clearly proved to be a substance of a very peculiar description,—very dangerous, very easily exploded, and most destructive in its effects when it does explode. To some extent that was known to the defender, and to those for whom he is responsible; but there were other qualities of this substance which we see no reason to suppose were known to him, or to any one in his employment, and which we seen no reason to suppose they were to blame for not knowing. I refer particularly to this,—that it is distinctly proved by Dr. Macadam and others that nitro-glycerine, although it is a liquid article when used for the [792] purposes of blasting, has a tendency, at a low temperature, to become solid; and when the temperature is raised it again becomes liquid. Now, I see no reason whatever throughout the whole of this proof to suppose that either the defender or anybody in his employment had the least knowledge or suspicion of that quality of the article. Over and above that, it is proved that when it is in a solid state, as well as when it is in a liquid state, it is very explosive, and calculated to produce such effects as those that were produced here. The use of it was new in that part of the country, and it appears that the workmen did not find it to answer their purpose, and consequently only a comparatively small portion of it was used for blasting purposes. The use of it was then given up. It was kept in places of safety for some time, and then the defender directed that the can should be emptied before being laid aside; and I have no doubt at all, upon the evidence, that the men who say they emptied the can are telling the truth to the best of their belief, and that they did turn up the can and pour out into the stream all that would come, until they thought there was not a drop left in the can. They explanation of that is to be found in the evidence of Dr. Macadam, particularly in answer to the questions I put to him latterly,—that at that time there must have been a quantity of the substance in a solid state in the can; and the fact that certain parties say that some time afterwards they poured a quantity out of it is fully accounted for by Dr. Macadam's evidence, that at a high temperature it would become liquid, and at a lower temperature it would again become solid. It appears to me that the explanation of the whole matter is that at the time when it was supposed to be all poured out a portion of it was in a solid state,—that part of it had become liquid at the time the two witnesses say they took some out,—that the rest of it remained or again became solid, and on the occasion in question, when the boys were in the hut and struck it with a hammer, the portion left in the can exploded and caused the accident. The question is important undoubtedly, but I cannot find reasonable ground for attributing fault to the defender or to those in his employment for not knowing or suspecting that the substance was of that nature, and that such a result might take place.

If, therefore, there is no sufficient fault to lay the foundation of this action, it would not, to my mind, have inferred liability, although the persons injured had been persons

---

Durham, March 14, 1842, 4 D. 1168; Marshall *v.* Stewart, H. L. March 13, 1865, 2 M'Q. 30; Hardcastle *v.* South Yorkshire Railway Company, 28 L. J. (Ex.) 139; Lumsden *v.* Russel, Feb. 1, 1856, 18 D. 468; Balfour *v.* Baird and Brown, Dec. 5, 1857, 20 D. 238; Mangan *v.* Atterton, 1 L. R. (Ex.) 239; Hughes *v.* M'Fie, 33 L. J. (Ex.) 177.

entitled to be in the hut, and who had either accidentally tumbled the can, or, if there had been boys along with them, the boys had struck it with a hammer. If that be so, it is plain enough that there cannot be liability to persons who had no right to be in the hut, —which is this case. If I were to go into the question of the fault of the boys I confess I could not bring myself to think that there was any very great fault on their part. It was a trespass beyond all question to go into that field, but it was a trespass of a very venial kind. It was a trespass that grown people might have committed readily enough without thinking that they were doing anything wrong. Having a curiosity to see the filters, few would hesitate to go over such a fence and look at them, without the intention of doing any harm, and trusting that the explanation of innocent curiosity would be accepted if a challenge was made. Here the object was shelter, and it was but a venial fault to step over a low fence to obtain shelter from a heavy shower. I should find great difficulty in attributing much fault to the boys in the way of contributory negligence, if it were necessary to go into that question. But I am very glad to avoid all that together, because it raises very delicate questions. The opinion which I have formed on the whole matter, after hearing the proof and attending to the argument, is, that there was no substantial fault or negligence on the part of the defender or those in his employment, such as will lay the foundation of this action. Undoubtedly it is a case which excites all one's sympathies on the side of the complaining party, but we must look at it according to law and common sense, and the result that I am compelled to arrive at is that there is no legal ground of claim here on the part of the pursuer.

LORD ARDMILLAN.—There are two questions here for our consideration, as Lord Deas has very correctly stated, and if we come to a decided view on one [793] of these questions it renders the consideration of the second unnecessary. The first question is, was there any blame on the part of the defender? Now, undoubtedly the material about which we have heard so much is one of such extreme danger that, knowing what we now know, it must be apparent that no party in the knowledge that a jar which had contained such material ought to have allowed it to remain in an open and exposed position where anybody could be hurt by it. But it is in evidence before us that Mr. King purchased this single jar of nitro-glycerine for blasting purposes, at a time when there was no Act of Parliament on the subject, and when there was no prevailing knowledge on the subject of its peculiar dangers. He used a little of it, but became, as I think, alarmed at the hazard of using it without great precautions; and when the Act of Parliament came into operation he directed an experienced servant to put it away—I think it proved that he directed him to put it away safely—and that servant, getting aid from another—so that we have two witnesses to the fact—poured it out of the jar, and, according to the best of their judgment and belief, poured out the whole of the contents. They turned it up, and they were quite satisfied that they left it empty. They reported this to their master, and it is put aside in the belief that it is quite empty. Now, had it been entirely liquid, all that would have been quite satisfactory. But it now appears, although it does not seem to have been known to Mr. King, or suspected by him, that the material, though liquid at one time, has a tendency to solidify, and may remain in a solid state in a vessel for a considerable time. The result in this case, according to the evidence, and to the opinion of skilled witnesses, is, that some portion of this very dangerous material remained in a solid state in this jar, susceptible to explosion by being struck. If that was the case—and I do not think more can be made of that part of it —I confess I agree with Lord Deas that there is not sufficient evidence to attribute blame to Mr. King. I think that whenever he suspected that the material was too dangerous to be kept by him, and when he saw the Act of Parliament about it, he dealt with it as a man desirous of getting safely quit of it would have done, and he directed it to be poured out, and this was done so far as his men thought practicable, and they believed it to be completely done. I do not think that he had any suspicion, or that we can hold he ought to have had any suspicion, that there remained any portion of it in the can. I therefore come to the conclusion that there is no sufficient proof of fault on his part. On the other question, I do not wish to enter. It is a question in many respects of great delicacy and some difficulty. I have not altered the opinion which I expressed in the case of Lumsden. If this boy now suing the action had himself hit the jar with a hammer, and exploded it with his own hand, I doubt very much if he must not have been held as in law [illegible] to the result, which result he actually physically accomplished by [illegible] if he had not struck the blow the result would

not have been produced. But instead of doing it himself, he was along with a body of youths with whom he was associated in partnership of going together to this place, of trespassing, and first one and then the other striking it,—whether these acts by the other lads are to be held as contributions by the company to the result is not the question. I think they had no business there, and especially they had no business to be going there and amusing themselves with hammers on the afternoon of the Sabbath day. I think they were under every possible obligation both not to be there and not to be there amusing themselves with hammers; but I do not go into that part of the case.

LORD KINLOCH.—I agree in thinking that the first question to which we must apply our minds is whether there was sufficient negligence on the part of the defender or those acting for him to infer liability, that is, to infer liability, supposing there was no imputation on the young men themselves. I concur in the opinion that it has not been established that there was negligence to this extent on his part. It is plain that the dangerousness of this substance was well known, but all its qualities were not. It was treated as a dangerous substance, and stowed away in a powder magazine, which was quite right, and when the powder magazine was no longer used the employer properly instructed his [794] foreman—a careful man—either to put the canister into a safe place, or to destroy it; and what was done by the foreman and his brother workman was to take the canister, and, as they thought, to pour out every drop of what was in it. Now, I think that they were reasonably entitled to believe that they had got rid of the whole of this dangerous substance, and it is not very easy to see what they could have done better. To put it two or three feet under ground might have still left a great deal of danger, and all that was suggested to us was, that they should have carried it out to the middle of the sea—the centre of the Firth of Clyde—and sunk it to the bottom of the Clyde, which would probably have caused an explosion among the fishes, for it explodes under water, but would do no other harm. Now, I think it was too much for the defender to be expected to think that this was an indispensable course of procedure. I am satisfied that there were reasonable precautions used on the part of Mr. King and his workmen to get rid of this dangerous material, and that at all events no sufficient negligence has been established to infer responsibility. Upon the other question, I will not say that I have not an impression, and I am not prepared to be so tolerant of my own juvenile exploits as my brother on my left. My impression is not quite so favourable to young men who amuse themselves in that way, but it is better not to enter into the consideration of what may be a delicate and difficult part of the case. There is enough in the other view to enable us to assoilzie the defender, and I think he was rightly assoilzied by the Sheriff.

LORD PRESIDENT.—If it were necessary to consider the special defences in this case I think we should be dealing with questions of very considerable nicety, upon which I have not formed any opinion, and mean to indicate no impression whatever. But we are precluded from considering the questions raised by these special defences, by the opinion which we have all formed, that the pursuer has failed to make out the ground on which his action is raised, viz., the negligence of the defender. If he has not succeeded in establishing negligence on the part of the defender, the action is at an end, for that is the sole ground of action. Now, as regards the evidence, I entirely concur with all your Lordships in holding that the defender, or rather his son, for whom he is answerable, was entitled to believe that he had safely disposed of the dangerous material called nitro-glycerine which was in his possession. He obviously intended to dispose of it safely, and he employed what appeared to be reasonable and sufficient precautions for that purpose. Most unfortunately they failed, and failed in a way that at first sight appears to be very mysterious, but which I think is explained by the evidence referred to by your Lordships, that when the workmen set about pouring out the contents of the jar of nitro-glycerine, and imagined that they had extracted the last drop of the liquid, there nevertheless remained in the jar some portion of the nitro-glycerine which had become solid. It must be kept in mind that the time when this operation was performed was towards the end of the year. The precise month is not particularly specified, but it was towards the end of the year, and we have scientific evidence to the effect that a temperature of between 40° and 50° will have the effect of solidifying the nitro-glycerine. So that very easily accounts for a portion of the nitro-glycerine remaining in the vessel in a solid state after the workmen supposed, and very naturally supposed, that they had poured out the whole of it. The evidence connected with the accident itself satisfies me further that there was not at that time any nitro-glycerine in the vessel in a fluid

state. But then that was also in the month of September, a time of the year at which a temperature of between 40°and 50° is the prevailing temperature, and when therefore it was quite natural, according to the evidence which we have before us, that the remains of the nitro-glycerine in the vessel should again be in a solid state. That peculiar quality of nitro-glycerine was not generally known,—its tendency, I mean, to solidify at a particular temperature,—and most assuredly it was quite excusable on the part of Mr. King as the manager of the work, and of the workmen whom he employed to get rid of it, that they should not be aware of this occult scientific fact. If there was anyhing on their part that contributed to the accident at all it was their ignorance of that scientific fact. But is that negligence in the eye [795] of the law? I apprehend not. If this had been a well-known substance, constantly in use in trade, and with the qualities and properties of which every man who used it was naturally well acquainted, the case would have stood very differently. But the ignorance in this case which alone contributed to the accident was certainly excusable ignorance, because it was ignorance that they had no means of getting rid of, ignorance which they had no means of dispelling, no means of learning the contrary of. And therefore I cannot say that I think there is anything approaching negligence here on the part of Mr. King. On the contrary, I think he did all that he thought, and reasonably thought, was sufficient to get rid of this dangerous material. I therefore concur with your Lordships in holding that the ground of action is not established.

The following interlocutor was pronounced:—"Assoilzie the respondent (defender in the inferior Court) from the conclusions of the summons, and decern: Find the appellant liable in expenses in this Court and in the inferior Court: Allow an account," &c.

FYFE, MILLER, & FYFE, S.S.C.—MURRAY, BEITH, & MURRAY, W.S.—Agents.

No. 140. X. MACPHERSON, 795. 12 June 1872. 1st Div.—Lord Mackenzie, P.

GEORGE LOVE AND OTHERS, Pursuers.—*Watson—Strachan.*
JAMES MARSHALL AND OTHERS, Defenders.—*Millar—Crichton.*

Proof—Obligation—Locus Pœnitentiæ—Compromise.—The compromise of an action may be proved by writings which are neither holograph nor tested, taken in combination with parole evidence.

In 1870 George Love and others raised an action against James Marshall and others, the trustees and beneficiaries under a trust-disposition and settlement executed by the late James Carstairs of Kelmonhead, which conveyed his whole heritable and moveable estates, including, *inter alia*, the farm of Kelmonhead, concluding for reduction of the settlement, *inter alia*, upon the ground of fraud.

On 13th March 1871 Thomas Marshall and James Marshall, two of the defenders, granted a mandate to Mr. George Sinclair, their country agent, authorising him to compromise the action.

On 15th March 1871 the following letter was addressed by Gifford and Simpson, the defenders' agents in the Court of Session, and by George Sinclair, the defenders' country agent, to Messrs. J. and R. Macandrew, the pursuers' agents:—"On behalf of and as authorised by our clients, the whole defenders in this case, we hereby offer to settle and compromise the action on the following terms, videlicet. . . . 6th, In the event of this offer being accepted by your clients a formal minute of agreement to be entered into between the parties.—We are, yours truly, GIFFORD AND SIMPSON, GEORGE SINCLAIR."

The above letter was not holograph of either of the parties who signed, but was sent as an enclosure in the following holograph note by Mr. R. R. Simpson to Mr. John Macandrew, to whom it was addressed:—"Edinburgh, 15th March 1871.—Dear Sir,—I now send the letter adjusted by us to-day, signed by Mr. Sinclair and my firm, and return your draft. I have, as you will observe, made a slight alteration on the 3d head, which in no way affects the terms of compromise.—Yours faithfully, R. R. SIMPSON."

The terms of compromise were agreed to on the part of the pursuers by a letter dated 20th March 1871, signed by Messrs. Macandrew as duly authorised by the pursuers.

In August 1871 an action was raised by George Love and others, the pursuers in the former action, to enforce implement of the compromise.

Among other defences to this action the defenders pleaded;—(2) Even [796] although the letter by Messrs. Gifford and Simpson and Mr. Sinclair, of date 15th March 1871, had been written by the authority of all the defenders, it was competent for them to resile from the conditions contained therein, so long as they had not been embodied in a probative deed, or in a minute to which the authority of the Court had been interponed. (4) The letter by Messrs. Gifford and Simpson and Mr. Sinclair to Messrs. Macandrew of 15th March 1871, and the letter by Messrs. Macandrew to Messrs. Gifford and Simpson of 20th March 1871, not being holograph or tested, are insufficient to warrant decree of adjudication.

After proof the Lord Ordinary pronounced an interlocutor repelling these along with the other defences, and found the compromise to be binding.*

The defenders reclaimed.

LORD KINLOCH.—(After adverting to the other defences)—I conceive that no difficulty arises from the fact of the letter of Messrs. Gifford and Simpson, by which the terms which were accepted were offered, not being holograph of either of the agents signing it. There is strong ground for holding that Mr. Simpson's holograph note, enclosing this letter, entitles us to read the enclosure as thus having transferred to it the probativeness of the holograph note itself. But independently of this consideration, the authorities referred to by the Lord Ordinary determine, as I conceive, that probative instruments are not necessary to instruct the compromise of a suit, but that this may be proved by the combination of informal writings with parole evidence. We are therefore, I conceive, fully put in possession of the terms of the compromise; and the compromise, as I think, is liable to no legal exception, and has been rightly enforced by the Lord Ordinary.

The other Judges concurred.

THE COURT adhered to the Lord Ordinary's interlocutor.

J. & R. MACANDREW, W.S.—WADDELL & M'INTOSH, W.S.—Agents.

[*Recognised*, Dewar *v.* Ainslie, 1892, 20 R. 203. *Referred to*, Gow *v.* Henry, 1899, 2 F. 48.]

---

* NOTE.— . . . "The defenders further pleaded that it was competent to them to resile from the compromise, in respect that the letter or offer of 15th March 1871, subscribed by Mr. Sinclair and Messrs. Gifford and Simpson, was not holograph or tested, and that a transaction or compromise can only be proved by writ or oath. In support of this proposition they cited the old cases of Cranstown, February 11 and March 6, 1533; and Somerville, January 21, 1540, Dict. 12,297; and of Fotheringham, November 27, 1708, Dict. 12,414. The case of Fotheringham is not in point, and the other two cases cannot now be considered of authority, after the decision in the case of Thomson *v.* Fraser, October 30, 1868, 7 Macph. 39, in which it was decided that a compromise or transaction may be proved *prout de jure*. See also Jaffray *v.* Simpson, July 1, 1835, 13 S. 1122. The defenders also cited the case of Taylor *v.* Carron Paper Company, July 14, 1869, shortly reported in the Journal of Jurisprudence, vol. xiii. 463, but that report is incorrect. In that case, the defender moved for a discharge of the notice of trial, on the ground that the action was compromised on the terms embodied in a letter by the pursuer. The defenders having tendered a condescendence of *res noviter*, setting forth the compromise alleged by them, the Court, by interlocutor dated 20th July 1869, discharged the notice of trial for the ensuing sittings, on condition of the defenders paying the expenses incurred by the pursuer in preparing for trial, in so far as not available for the future trial of the cause, held that condescendence as a minute for the defenders, and appointed the same to be answered by the pursuer on or before the first sederunt day in October. The case was thereafter compromised, and no decision was pronounced on the alleged compromise."

No. 141. X. MACPHERSON. 797. 12 June 1872. 1st Div.—Sheriff of Edinburgh, M.

GEORGE WHIFFIN, Petitioner and Respondent.—*Millar—Burnet.*
RICHARD LEES, Respondent and Appellant.—*Sol.-Gen. Clark—Balfour.*

Executor—Foreign—Stat. 21 *&* 22 *Vict. cap.* 56, *sec.* 14.—In a competition in the English Court of Probate between several claimants for the office of executor to a deceased foreigner who left personal property in Great Britain the Court appointed an administrator to collect and hold the personalty in England during the dependence of the suit, but without any power of distribution. This person having afterwards presented a petition to the Sheriff-commissary, craving to be appointed executor-dative *qua* administrator of the defunct's personal property in Scotland, *held* (*diss.* Lord Deas) (1) that he had no sufficient title on which to be appointed to that office, his appointment as administrator in England being merely for a limited and temporary purpose; and (2) that the 14th section of the Act 21 & 22 Vict. cap. 56, did not apply, both because the deceased did not die domiciled in England, and also because of the limited nature of the powers of administration granted by the English Court.

Francisco Solano Lopez, president of the Republic of Paraguay, died in March 1870, possessed of personal property both in England and Scotland. At his death Lopez was domiciled in Paraguay, and his personal estate in Great Britain was claimed by Eliza Alicia Lynch as universal legatee under a will in her favour executed by the deceased in 1868, of which a copy was produced in the Court of Probate in England.

On 24th January 1871 Lord Penzance, Judge of the Court of Probate, "decreed letters of administration with the copy will annexed, limited until the original or a more authentic copy be brought in, of the personal estate and effects of Francisco Solano Lopez, deceased, to be granted to Eliza Alicia Lynch, the universal legatee therein named, on all caveats entered herein being subducted, there being no executor named therein; the said will being good as a *testamentum militare* by the law of the country in which the deceased died domiciled. A caveat had been entered against granting letters of administration to Madame Lynch by Richard Lees, writer in Galashiels, as attorney for the government of Paraguay, alleging that by decree of the government dated 4th May 1870 all property belonging to the deceased, wherever situated, was declared to be the property of the nation of Paraguay, and that no will or testamentary paper of the late President was entitled to probate or had any validity in England or elsewhere. To this statement Madame Lynch demurred, and on 20th June 1871 Lord Penzance "pronounced for the demurrer of the plaintiff (Lynch) and against the interests of the defendants, and condemned the defendants in the costs incurred and to be incurred in this cause on behalf of the plaintiff."

Another caveat against granting letters of administration to Madame Lynch was entered on behalf of Juana Paulo Carillo de Lopez, mother of the deceased, who disputed the validity of the will in favour of Lynch, and alleged that by the law of Paraguay she (his mother) was entitled to his personal estate.

On 11th July 1871 Lord Penzance, on the application of counsel for the plaintiff (Lynch), with consent of the defendant (Lopez), appointed George Whiffin "to be the administrator, pending the said suit, of the personal estate and effects of Francisco Solano Lopez, the deceased, in the said cause: And be it also known that on the 6th day of September 1871 letters of administration of the personal estate and effects of the said deceased, pending the said suit, were granted by Her Majesty's Court of Probate at the Principal Registry to the said George Whiffin, he having been first sworn well and faithfully to administer the same, save distributing the residue thereof, under the directions and control of the [798] said Court, and to exhibit a true and perfect inventory of all and singular the said estate and effects, and to render a just and true account thereof, whenever required by law so to do. Effects under £18,000 in England."

Thereafter Whiffin presented a petition to the Sheriff-commissary of Edinburgh

setting forth that he had been appointed "to be the administrator of the personal estate and effects of the said deceased Francisco Solano Lopez, conform to letters of administration granted by Her Majesty's Court of Probate, at the Principal Registry, on 6th September 1871, in favour of the petitioner, a certified office copy of which letters of administration is herewith produced. That in order to enable the petitioner to recover and realise the personal estate and effects situated in Scotland of the said Francisco Solano Lopez it is necessary that he should be appointed by this Court executor to the said deceased."

The petitioner craved in these circumstances to be decerned executor-dative to the deceased, *qua* administrator of his personal estate and effects.

The petitioner pleaded that having been appointed by the English Court administrator of the deceased's estate in England, and it being convenient and advantageous to the estate that the same person should be appointed to recover the estate so far as situated in Scotland, the prayer of the petition should be granted.

The petition was opposed by Lees, who pleaded that the fact of the petitioner having been appointed administrator of Lopez's estate by the Court in England *pendente lite* gives him no title to the office of executor in Scotland, and the petition is therefore incompetent, and falls to be dismissed.

The Commissary-depute (Hallard) on 8th March 1872 decerned in terms of the prayer of the petition, and found the respondent liable in expenses.

To this interlocutor the Sheriff-commissary (Davidson) adhered on 19th April 1872, and the respondent appealed.*

---

* "NOTE.—There is at present depending in the English Court of Probate a litigation respecting the succession to the personal estate of the late President Lopez of Paraguay. To that suit Mr. Lees, the respondent, as representing the Republic of Paraguay, is a party; and in the course of it, with the consent of all parties (including Mr. Lees), the petitioner, Mr. Whiffin, was appointed 'to be the administrator, pending the said suit, of the personal estate and effects' of the deceased; and on 6th September 1871 letters of administration of the personal estate and effects of the deceased were granted to him. Looking at the terms of the appointment, it seems an appointment to the administration of the whole personal estate, wherever Mr. Whiffin may be able to find it. The words at the end of the copy letters produced—'Effects under eighteen thousand pounds in England'—do not, it is supposed, limit Mr. Whiffin's administration to specific funds or effects of the value of £18,000 or otherwise.

"With these letters of administration the petitioner comes to this Court and asks to be decerned executor-dative to President Lopez, *qua* administrator of his personal estate. He has been, by the interlocutor under appeal, decerned executor-dative, conform to the letters of administration from the Court of Probate.

"The respondent, as representing the Republic of Paraguay, opposes the petitioner's appointment. He is not himself a competitor for the office of executor. The petitioner is not met by any competitor. Why the respondent, having been a party to the appointment of Mr. Whiffin in England, now opposes his application for a title here to collect the funds which may be in Scotland, is not explained.

"His contention is, that the petitioner has no title, and that it is incompetent to decern him.

"The title or ground of the petitioner's application is, that he has been appointed administrator by the English Court, and that it is expedient and right [799] that he should also be executor in Scotland—that the whole funds of the deceased may in the meantime be under one administration. No one has appeared with a better title to the office; and if it is not absolutely incompetent, the petitioner ought to be appointed. This application is undoubtedly unusual. It does not follow that it is therefore incompetent, and the appointment illegal. In a competition in this Court for the office of executor it is not usual to appoint, in the process of competition, a person meanwhile to take charge of the estate. In the general case a judicial factor is, if it is advisable, appointed by the Court of Session.

"But in the Commissary Court it is not unusual to decern an executor-dative with limited or temporary powers, as in the case of a minor. There the minor is decerned executor-dative *qua* next of kin, and a factor is appointed by the Court for the minor, and he is decerned executor-dative *qua* factor, and confirmed in his

[799] At advising,—

LORD PRESIDENT.—My Lords, in this case a petition was presented to the Commissary by George Whiffin, designing himself as of No. 8 Old Jewry, in the city of London, public accountant, in which he states that he was, on 11th July 1871, appointed by the Judge of Her Majesty's Court of Probate to be the administrator of the personal estate and effects of the deceased Franciso Solano Lopez, conform to letters of administration granted by Her Majesty's Court of Probate at the Principal Registry on 6th September 1871, and that in order to enable the petitioner to recover and realise the personal estate of the deceased in Scotland it is necessary that he should be appointed executor. The petition prays that the petitioner may be decerned "executor-dative to the said deceased Francisco Solano Lopez, *qua* administrator of the personal estate and effects of the said deceased."

On first reading this petition, without looking further into the case, one would naturally take it for granted that the applicant had obtained letters of administration from the Probate Court in London, by which he would have been in exactly the same position as an executor-dative here, and, had that been so, I should have been disposed to say that he was the proper person to be appointed executor-dative. But when we come to look into the proceedings we find that the nature of the petitioner's appointment is very different from what at first [800] sight one might have supposed. The appointment was made in the course of a suit touching the validity of the defunct's will, at the instance of Eliza Alicia Lynch against Juana Paulo Carillo de Lopez, the mother of the deceased. By decree of the Probate Court of London, dated 24th January 1871, the Judge "decreed letters of administration with the copy will annexed, limited until the original or a more authentic copy be brought in, of the personal estate and effects of Francisco Solano Lopez, deceased, to be granted to Eliza Alicia Lynch, the universal legatee therein named, on all caveats entered herein being subducted, there being no executor named therein; the said will being good as a *testamentum militare* by the law of the country in which the deceased died domiciled."

This is obviously a provisional recognition of the title of Eliza Alicia Lynch as universal legatee of the deceased, but it is provisional only, because all that she had then produced was merely a copy of the will. After some further proceedings the Judge issued the so-called letters of administration in favour of the petitioner, on the application of the counsel for the plaintiff, with consent of the defendant, appointing Mr. Whiffin "to be the administrator, pending the said suit, of the personal estate and effects of Francisco Solan Lopez, the deceased, in the said cause." It seems to me very plain that this is nothing more than an interim appointment during the dependence of the suit to ingather the effects of the deceased "in the said cause,"—

---

own name. There may be different ways of making such an appointment (see Johnstone *v.* Lowden, February 15, 1838, 16 S. 541); but appointments of this kind are made.

"If the question now raised is, so far as known, new, there is at least no contrary practice, and no adverse case or authority has been stated. The Commissary has not heard, and does not see, any principle to which this appointment is opposed.

"The case of the Marchioness of Hastings is undoubtedly not identical with this, but the views and principles stated there are obviously of importance, and applicable in the present case.

"The respondent denies that there are funds of Lopez in Scotland. If that be so, what is the object of the respondent's opposition? But at present the existence of funds must be assumed. If the petitioner attempts to take hold of funds which did not belong to the deceased, then the respondent, if he has an interest, may interpose.

"To the Commissary it seems advisable, that as the questions between the parties have been raised for adjudication in the English Court, and the petitioner has pending the suit been appointed, with the consent of all parties, administrator of the personal estate of the deceased, he should also be administrator of such estate as may be in Scotland, for its safe custody and ingathering, and, further, probably for its ultimate disposal by the judgment of the Court in that country. The law which will regulate that judgment will be the law of the domicile, as it would be the law of any judgment given in Scotland. At any rate, in the meantime the funds in Scotland will be in safe keeping, and the proper disposal of them will be guaranteed by the caution which the petitioner must find in this process."

that is to say, embraced by the cause, and within the jurisdiction of the Probate Court of London, and I am at a loss to understand how an appointment of this limited description can confer authority on the petitioner to ingather personal estate beyond the jurisdiction of the Court which made the appointment. There is not the slightest appearance of any such intention on the part of the learned Judge, and the appointment which was made on the application of one of the parties with consent of the other obviously could not last beyond the final determination of the cause. In that state of matters I am of opinion that the petitioner has no title to the office of executor-dative. It is not an office to which anyone can be appointed by the Commissary on grounds of expediency merely, but the person to be appointed must have a legal title to the office, and the order in which parties interested are entitled is very clearly stated by Professor Bell in his Commentaries, vol. ii. (5th edit.) p. 82—"The person claiming the office of executor must show either his title by will, or his right as next of kin, &c. 1. Those named by a valid will of the deceased are preferred to all others, and the Commissaries at once confirm the title of the executor-nominate. . . . 2. The next in order are universal disponees, who take under a general disposition and settlement. 3. The next of kin, one or many (all of the same degree being equally entitled to the office), are preferred in the third place. 4. The widow in the fourth place. And last of all come creditors and legatees; not that they have a weaker title to the property of the deceased, but that they have not the character of general trustees for all concerned, but proceed only for their own benefit."

This is trite law, and the result is that no one can claim the office of executor on his own account, unless he is qualified either by express nomination, by propinquity, or by interest. Some confusion, I think, has been imported into the case by reference to the appointment of factors to the office, a practice which, I think, takes its origin from the Act of Sederunt, 13th February 1730, which provides (sec. 7) that where by law it is necessary that a title to moveable property should be confirmed, a factor *loco tutoris*, or *loco absentis*, or *curator bonis*, may confirm in his own name as executor-dative, and as factor appointed by the Court for behoof of the ward, and of all having interest, unless some other person having a title offers to confirm.

In these cases the factor is allowed to confirm, because of the title to the office in the person whom he represents, and in like manner a practice prevails in the Commissary Courts to pronounce decree of confirmation in favour of the factor for the person entitled to the office of executor *qua* next of kin, where that person is a minor. That was very clearly brought out in the case of Johnstone *v.* Lowden (16 S. 541), referred to by the Commissary, but with that exception, viz., of a factor representing the person who has the title, no one can be appointed executor who has not himself a title, founded either upon the express nomination [801] of the deceased, or his propinquity, or his direct interest as creditor or legatee. It seems to me, therefore, that the petitioner has no title to the office which he claims.

I should desire, however, not to be misunderstood as to the respect which I think should be paid, *ex comitate*, to the title of an administrator duly appointed by any foreign Court. The case of the Marchioness of Hastings (14 D. 489) shews that the title to administer the personal estate of a domiciled Englishman will be recognised by the Court without inquiry, on the presentation of letters of administration by the person in whose favour probate has been granted. But we are not dealing with a case of that kind. The deceased was domiciled, not in England, but in Paraguay. and I think it might require consideration whether comity could be extended so far as to recognise letters of administration granted by the English Court of Probate in regard to the estate of a person domiciled abroad. But when we see the limited nature of the appointment which has been made, an appointment restricted to administering the personal effects of the deceased within the jurisdiction of the English Court, and made only for the purposes of the suit depending in that Court, on the termination of which it must necessarily come to an end, I entertain no doubt that the petitioner has not produced a sufficient title, and that we should remit to the Commissary to refuse the application.

LORD DEAS.—I think there can be no doubt that if it was in the power of the Commissary to grant this petition, it was expedient that he should do so. There is a fund in this country, which is admittedly in the hands of a debtor, and the only party who opposes this appointment is a partner in business of that debtor. It is quite clear that that fund should be in safe custody, and it is also clear that it should,

if possible be in the hands of the same person who has the management of the funds in England. It is not expedient to have a double management of the estate, if it is competent to place the whole in the same hands. Now, Mr. Whiffin has been appointed administrator of the estate in England by the mutual consent of two out of the three parties claiming right to the estate. If he is appointed executor here, he must find caution, and he offers it, to the full amount of the Scotch estate. As executor he will be bound by law to make the fund forthcoming to the party who may be found entitled to it, and to nobody else, so that the fund will be perfectly safe in his hands. It is true that the office will be temporary, but only in the sense in which every executor's office is temporary,—when it is finally decided by the Court who is entitled to the fund, he must hand it over. Thus the position which he would hold as executor-dative here is substantially the same as the position he now occupies as administrator in England, and the two offices would expire at the same time.

I understand your Lordship to hold that, if Mr. Whiffin had really been appointed administrator in England, he might have been appointed executor here. Now, if anything turns upon that, I cannot help thinking that we should have had an inquiry as to the law and practice of England in regard to such appointments. No information was given on that subject at the bar, and I do not consider myself entitled to hold that Mr. Whiffin is not really administrator of the estate in England, as the decree bears he is. If he is not so, I am unable to see what position he holds. I cannot help observing that his appointment is one in the very terms of the statute 20 & 21 Vict. c. 77. Section 2 of that statute defines what administration is, and declares that "'Administration' shall comprehend all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special, or limited purposes"; and in section 70 it is enacted, that pending any suit touching the validity of the will of any deceased person, &c., "the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate." It appears to me that the appointment of Mr. Whiffin by the Court of Probate is an appointment expressly under the authority of that enactment. I understand also that, apart from that statute altogether, it is quite common in [802] England to grant letters of administration for temporary purposes, as, for example, in the case of absentees, or pupils.

I cannot doubt, therefore, that Mr. Whiffin must be held to be an administrator duly appointed in England, and, consequently, as having a valid legal title to come and ask the office of executor here. If that be so, why should not his title be recognised? The office of executor is not irrevocable here any more than that of administrator is in England, and a different executor could be appointed at any time if that were found necessary. I do not know that it has been the practice in Scotland to appoint an executor for a limited purpose, but I am not prepared to say that there is any incompetency in so doing. The appointment of a judicial factor as executor may be cited as an illustration in favour of the competency. I am unable to understand where the objection to this appointment lies, seeing that, from the nature of the case, the appointment would last only as long as the office of administrator lasts. I agree entirely with the Commissary.

LORD ARDMILLAN.—This is a delicate matter, but I think it important to observe at the outset that the English appointment would not have been made, so far as I understand, but for the existence of debts in that country due to the deceased. The deceased died with a foreign domicile, and his death fixed the domicile for the administration of his estate. If there had been no debts due in England there would have been no call for the intervention of the English law. Thus the jurisdiction of the English Courts was not created by the domicile of the deceased, but is the more limited jurisdiction called into existence by the circumstance of there being debts in England. Now, in exercising that jurisdiction, the Court of Probate appointed an administrator to these funds pending the suit. I think it must be assumed that it is competent in England to appoint administrators for limited purposes, and if the purpose is limited the scope of the administration must be qualified by the terms of the appointment. Thus it appears to me that it was the obvious intention of this appointment to limit the administration to the English debts, pending this suit.

The funds in Scotland may be reached in other ways than by appointing an

executor. A judicial factor may be appointed, and the very fact that it is said that the appellant has an interest to keep back the fund in Scotland would facilitate such an appointment.

I am not aware that there ever has been a case of a Scottish Court appointing an executor with limited powers. An executor is, with us, always appointed to the whole executory estate; and to appoint an executor, for the first time, with limited powers, would certainly be a great innovation. I am of opinion that this administrator holds only a temporary appointment, and is not administrator in the sense in which an executor is administrator according to our law and practice. His duty is here, according to the measure of his appointment, limited both in time and extent, and there is no call to give effect to that appointment beyond its limits. I therefore agree with your Lordship that the interlocutor of the Commissary should be recalled.

LORD KINLOCH.—By the judgment under appeal the Commissary "decerns the petitioner, George Whiffin, executor-dative to the defender, *qua* administrator of the estate and effects of the said defunct, conform to letters of administration from the principal Registry of Her Majesty's Court of Probate in England, produced." I am of opinion that, in the circumstances, this was an erroneous appointment.

The petitioner, George Whiffin, had no other title to be decerned executor-dative to the deceased President Lopez than what was given him by certain proceedings in the English Court of Probate. More than one party were there applying for letters of administration to the estate of the deceased; and by arrangement Mr. Whiffin was appointed administrator, but without power of distribution, until the suit which thus arose was terminated. He was so appointed by decree of the Court of Probate on 11th July 1871, being thereby in express terms appointed administrator, "pending the said suit, of the personal estate and effects of Francisco Solano Lopez, the deceased." On 6th September [803] thereafter, it appears that letters of administration were granted in his favour "pending the said suit." Thus, although formally in the usual right of an administrator, his right to act lasted only during the dependence of the suit in the Court of Probate, and was only to the extent of ingathering, not of distributing, the effects.

I am of opinion that this gave Mr. Whiffin no right to be appointed, generally and unlimitedly, executor-dative of President Lopez in Scotland. Such an appointment went far beyond any title vested in Mr. Whiffin. Executor, generally, of President Lopez he had no title whatever to be. And if it be answered, as I think it fairly is, that the appointment must be held limited and restrained in terms of the appointment in the English Court of Probate, the immediate reply is that such a limited appointment to the office of executor-dative is unknown to the law and practice of the Scottish Courts. An appointment to the office of executor-dative during the pendence of a suit, and to no further extent, is, I believe, unprecedented and unheard of. There appears to be such flexibility in the administration issued by the English Court of Probate as to admit of such an appointment; but I consider it altogether inadmissible in our Courts. It is true that the office of executor is sometimes conferred on a party having a limited title, as a curator, a judicial factor, a trustee. But the appointment is in all these cases general and unlimited; it is given to a party having a general right to administer; and no reason exists in the nature of the case why the entire administration may not be completed, and the executry estate wound up by the party appointed. There is no sanction given by this to the appointment of an executor to administer, without power of distribution, only during the pendence of a particular law-suit. I consider the appointment incompetent. My grounds are these two, already suggested:—1st, Because Mr. Whiffin possesses no title on which to be appointed, generally and indefinitely, executor of the deceased; 2d, Because, supposing the appointment to be held restrained to administration during the pendence of the suit in England, I consider such an appointment to be inadmissible, according to the law and practice of our Courts.

I consider the case to be unaffected by the provisions of the 21st & 22d Vict. c. 56. By the 14th section of that Act it is declared that in the case of anyone dying domiciled in England or Ireland, where letters of administration have been granted in either of these countries, the production of these letters shall entitle to a concurring power of administration issued from the Commissary Court of Scotland. This provision is inapplicable in the present case, because President Lopez did not die domiciled in England, and the case does not therefore come under the statutory enactment,

which is confined to administrations issuing within the domicile. Besides, I think the provision only applies to the case where a general right of administration is granted in England, not to that of a limited power of management during the dependence of a suit, which is all that here was conferred. This, although presenting the formal aspect of letters of administration, is in reality nothing more than a factorial power, or the creation of the office of receiver for a temporary period. Even had the deceased been domiciled in England, I should demur to the granting of a Scottish confirmation on the production of such a limited English title. But the case not being one of a party domiciled in England, the provision of the statute has manifestly no sort of application.

I am therefore of opinion that the interlocutor of the Commissary should be recalled, and the petition of Mr. Whiffin refused. This will not deprive the parties interested of the power of having any effects in Scotland belonging to the deceased placed in secure custody. There are well-known means of effecting this object. But the only question before us now is, whether the appointment of Mr. Whiffin to be executor-dative of President Lopez is sustainable. And I am clearly of opinion in the negative.

THE COURT accordingly recalled the judgment appealed from, and remitted to the Commissary to refuse the prayer of the petition, with expenses.

WILLIAM MASON, S.S.C.—FYFE, MILLER, & FYFE, S.S.C.—Agents.

No. 142. X. MACPHERSON, 804. 15 June 1872. 2d Div.—Lord Mure, I.

JOHN GRANT (Macpherson's Trustee), Pursuer.—*Sol.-Gen. Clark—Mackintosh.*
WILLIAM ROBERTSON AND OTHERS (Macpherson's Marriage-Contract Trustees), Defenders.—*Millar—Burnet.*

Marriage-Contract—Bankruptcy—Succession—Liferent and Fee.—By an antenuptial contract of marriage the husband bound himself to pay to trustees, *inter alia*, a sum of £1200, to be held or applied for behoof of the spouses in such manner as they should instruct, declaring that in the event of the wife predeceasing, any part thereof remaining and in the hands of the trustees should be at the absolute disposal of the husband, and in the event of the husband's predecease, any part so remaining should "form part of his estate hereinafter assigned and conveyed." This was followed by a conveyance of the husband's whole estate to the wife in life-rent and the children in fee. The husband having become bankrupt, *held* that the wife's interest was a mere right of succession, which could not compete with the husband's creditors.

By antenuptial contract of marriage, dated 21st July 1864, between Donald Macpherson, farmer, and Miss Mary Fraser, he obliged himself to pay the sums of £1000 and £1200 to trustees; and it was provided that the said sum of £1000 should be invested by them, and the interest paid to Mary Fraser personally, exclusive of the *jus mariti*; and in the event of her predeceasing him, that the interest should be paid to him. Upon the death of the survivor, the principal sum of £1000 was to be paid to the child or children of the marriage; and in the event of there being no child of the marriage, nor issue of any child, then surviving, the trustees were directed, upon the death of Donald Macpherson, to pay £1000 to Mary Fraser, for her own absolute behoof, in the event of her being the survivor; and in the event of her having predeceased her husband, to such person or persons as she should have appointed by deed of settlement, and failing such appointment by her, then to her nearest of kin.

The eighth purpose of the trust was: "With regard to the said sum of £1200, it being the intention of the parties hereto that the same, or a portion thereof, should be applied in stocking a farm, if a suitable farm should be procured by the said Donald Macpherson, the said trustees are hereby directed to hold or apply the same, and the interest and profits thereof, for behoof of the said Donald Macpherson and Mary

Fraser, in such manner as they, the said Donald Macpherson and Mary Fraser, shall instruct; declaring, that in the event of the said Mary Fraser predeceasing the said Donald Macpherson while the said sum of £1200, or any part thereof, is in the hands or invested in name of the trustees, the same shall be at the absolute disposal of the said Donald Macpherson; and at his death, such part thereof as shall remain shall form part of his estate hereinafter assigned and conveyed: And further, the said Donald Macpherson gives, grants, assigns, dispones, and makes over to and in favour of the said Mary Fraser, in case she shall survive him, in liferent, for her liferent use allenarly in the event of a child or children of the marriage, and to such child or children in fee, in such proportions as shall be appointed by their father and mother, and failing such joint apportionment, then to the children, if more than one, equally, share and share alike, . . . and failing a child or children of the marriage, then to the said Mary Fraser, and her heirs, executors, and successors whomsoever, in absolute fee," his whole moveable and personal means and estate that should belong to him at the time of his death. Mr. Macpherson also renounced his *jus mariti* and right of administration in the heritable or moveable estate belonging or that might belong to the said Mary Fraser; and she accepted the pro-[805]-visions in the marriage-contract in full satisfaction of terce, *jus relictæ*, and all her legal rights in case of her surviving her intended husband.

In implement of his obligations Donald Macpherson lodged in bank in the names of the trustees the two sums of £1000 and £1200, and shortly thereafter the £1200 was employed in a speculation in sheep, which proved unsuccessful, and reduced it to £1000.

By minute of agreement dated in 1868, entered into between the marriage-contract trustees and Mr. and Mrs. Macpherson, it was agreed on the narrative of the marriage-contract,—"And seeing that the parties hereto have agreed that, in the meantime, it is not advisable to invest the said sum, or any part thereof, in stocking a farm, and that it is desirable that the same be forthwith invested on heritable or other security, so as to produce an income for the said Donald Macpherson and Mary Fraser or Macpherson, therefore, the said parties hereto agree that the said sum of £1200 sterling, or such part thereof as is now in their hands, or may again come into their hands, shall forthwith be invested, from time to time, as investments may be procured, on good heritable or other security, to the satisfaction of and in name of the said first parties, and that for a period of not less than three years, and that the interest thereof shall, while the money is so invested, be payable to the said Donald Macpherson." The £1000 as the balance of the £1200 was invested by the trustees under this agreement.

On 20th September 1870 the estates of Donald Macpherson were sequestrated, and the trustee, John Grant, brought this action to have it declared that the sum of £1000, the balance of the £1200, with interest since Martinmas 1870, belonged to him.

The pursuer pleaded;—(1) Upon a sound construction of the marriage-contract, the sum of £1000, part of the sum of £1200 mentioned in the contract, was the property of the bankrupt, and fell under the sequestration of his estates.

The defenders pleaded;—(1) Upon a sound construction of the contract of marriage in question, the right to the sum of £1000 referred to in the summons did not pass to the pursuer on the husband's sequestration.

The Lord Ordinary (Mure) pronounced this interlocutor:—"Finds that, under the provisions of the antenuptial contract of marriage founded upon, the £1000 claimed by the pursuer under the present action did not belong to the bankrupt, and was not carried to the pursuer as trustee upon the sequestrated estate; but finds that the interest of the said sum, which, under the minute of agreement of 1st of February 1868, is appointed to be paid over to the bankrupt, fell under the sequestration: Therefore, sustains the 1st plea in law for the defenders, and assoilzies them from the conclusions of the action in so far as these apply to the fee or capital of the £1000 in question, and decerns: Finds the pursuer liable in expenses" *

* "NOTE.— . . . (1) The first of these sums is, by the fifth, sixth, and seventh purposes of the trust, directed to be invested in name of the trustees, and the interest paid over to the wife, for her own absolute behoof, exclusive of the *jus mariti* of her husband. In the event, again, of her predecease, the interest is to go to the husband during his life; but on the death of the survivor the principal sum is to be made

[806] The pursuer reclaimed.

He argued;—By the marriage-contract the £1200 was declared to form part of the husband's estate. The wife's right was a mere right of succession, which could not compete with creditors.

The defenders argued;—The stipulation was made in an antenuptial contract of marriage, which is an onerous deed. The £1200, as well as the £1000, was declared to form part of the husband's estate "hereinafter assigned and conveyed," and the wife was entitled to have her interest in it protected.

LORD JUSTICE-CLERK.—(After stating the provisions of the marriage-contract)—It

---

over to the children of the marriage, and should there be no children alive at the dissolution of the marriage, to the wife, for her absolute use, or, in the event of her predecease, to such person or persons as she may appoint, and, failing such appointment, to her next of kin. By these provisions this sum appears to the Lord Ordinary to have been effectually secured for the benefit of Mrs. Macpherson and her family; and with reference to it no question has, as he understands, been raised between the parties.

[806] "(2) But the £1200, of which the sum sued for in the present action forms a part, is somewhat differently dealt with under the eighth purpose of the trust; and although this sum may not, in every event, have been placed beyond the reach of the bankrupt and his creditors, it appears to the Lord Ordinary that, in the event which has happened, it has been effectually so placed; for, by the eighth purpose of the marriage-contract trust, power is given to the trustees either to apply this fund in stocking a farm, or to hold and apply it for behoof of Mr. and Mrs. Macpherson, in such manner as they may direct. The fund has, however, not been applied in purchasing stocking for a farm, so that the eighth purpose of the trust has, to that extent, been departed from. Because, by a minute of agreement entered into between the trustees and Mr. and Mrs. Macpherson in 1868, at a period when it is not alleged that the husband was insolvent, and which proceeds upon the narrative that it is not advisable to lay out the money, or any part thereof, in stocking a farm, the other alternative was adopted; and it was resolved that this money should be invested in name of the trustees, on good security, and the interest paid over to the bankrupt, while it was at the same time specially declared that, except in so far as they were thereby affected, the provisions of the marriage-contract were to remain in full force. The fund has, accordingly, been so invested, and is still held by the trustees; while the interest, as the Lord Ordinary understands, has, up to the date of the bankruptcy, been applied in terms of the agreement.

"Now, with reference to money so set apart, and held by the trustees, the marriage-contract declares that it shall be at the absolute disposal of the husband in the event only of his being predeceased by his wife; and the object of this appears to be to secure a further provision for the wife, upon the husband's death, out of any part of the fund which may at that time be held by the trustees. For the contract goes on in effect to provide that, upon the husband's death, any sum so held in trust is to go to the widow for her liferent use, and to the children in fee. To hold, therefore, in the circumstances which have occurred, that the fund in question was the property of the bankrupt at the date of the sequestration, would, as the Lord Ordinary conceives, tend to defeat the provisions of the marriage-contract in the above respects, and is a construction which he does not consider that he would be warranted in adopting. The claim is of a nature which, had there been no sequestration, the husband could not, in the opinion of the Lord Ordinary, have enforced against the defenders; and as a trustee in bankruptcy is understood to take the estate *tantum et tale* only as it stood in the person of the bankrupt, the pursuer has not, it is thought, any better claim to the absolute property of the fund, which is what he substantially seeks to have declared and carried out under the conclusions of the present action.

"(3) But, while the Lord Ordinary has, on these grounds, sustained the defence applicable to the capital of the sum sued for, it appears to him that the trustee has a good claim to the interest payable to the bankrupt under the terms of the agreement, for which decree is also sought in this action; and he has accordingly pronounced a finding to that effect. He has not, however, given any decree for the amount, because he understood, from what passed at the bar, that the parties would be able to adjust this part of the claim on a finding relative to their respective rights."

must be observed that the trust constituted by the eighth purpose was in no [807] event to last beyond the subsistence of the marriage, but terminated at the death of either of the spouses. The fund, which came from the husband, returned to him or his estate in either event, and any right which the wife could take after the dissolution of the marriage was a right of succession only, although protected against gratuitous alienation, and not a right which she could take under the conveyance to the trustees. The question therefore relates to the interest which the wife took under the trust-conveyance. The interest or annual proceeds have been made the subject of a separate agreement between the spouses, under which the Lord Ordinary has found that the annual income passed to the husband, and from him to his trustee. The question which is raised under the reclaiming note relates to the principal sum. It is claimed by the trustee as being the property of the husband. This is resisted by the wife, who claims the right of concurring or refusing to concur in the application of the fee.

I am of opinion that the trustee must prevail. The wife certainly took under the trust neither a right of liferent not one of fee. The property therefore remained with the husband. The trust was for his behoof, and indeed the primary purpose of the trust was the application of the whole or part of the fee in stocking a farm to be taken by the husband, and the stock so purchased would unquestionably have belonged to the husband. What is claimed for the wife is a right of joint administration along with the husband of a fund belonging to the husband. I cannot adopt the view of the Lord Ordinary on that matter. A right of conjunct or joint administration conferred on two spouses in relation to funds belonging to the husband is, in my opinion, entirely ineffectual to exclude the husband's creditors. Even a conjunct right of property in the same circumstances would not have had that effect, as has been well established. But the attempt to give a wife a right of joint administration over the husband's funds, apart from any right of property, is a novelty, and appears to me quite unavailing against creditors. I do not say such a right might not be conferred and made effectual, if sufficient machinery were provided in the trust-deed to exclude the husband's right. But without such exclusion, a joint right of administration in the spouses imports in law nothing but a right in the husband when the funds are his. I am therefore of opinion that the Lord Ordinary's interlocutor must be altered, and the trustee preferred.

LORD COWAN.—This contract of marriage is an antenuptial deed, and as such is an onerous deed, and to be dealt with as such in every question affecting the rights or obligations under it of the spouses and children. It is, however, peculiar in this respect, that its main object is to provide, for behoof of the spouses and their issue, two sums, £1000 and £1200, to be paid by the husband to trustees for the special purposes declared in the deed. There is no conveyance of the wife's property to the trustees. On the contrary, the deed contains an express renunciation by the husband of "his *jus mariti*, right of administration, courtesy of Scotland, or any other title whatever which he might otherwise have to the heritable or moveable estate, now belonging to the said Mary Fraser (his intended wife), or which shall pertain and belong to her, or to which she may succeed during the subsistence of the marriage." Her property is left entirely with herself, and subject to her sole control. The two sums provided by the husband were the subject of distinct provisions, and are differently destined. The 5th, 6th, and 7th purposes relate to the sum of £1000, and the 8th purpose to the other sum of £1200.

As regards the £1000, the trustees are to lend or invest the amount on good and sufficient security, in their names as trustees, for the purposes of the trust. These are, first, that the interest of the sum shall be paid to the wife for her own behoof, exclusive of the *jus mariti*, and in the event of her predecease to be paid to her husband during all the days of his life; and second, upon the death of the survivor of the spouses, the principal sum shall be paid to the children of the marriage in such shares as may be appointed by their parents, or failing thereof, to the children equally, share and share alike; and third, that in the event of the dissolution of the marriage without children the principal sum, upon the death of the husband, shall be paid to the surviving wife for her own [808] absolute behoof, and in the event of her predeceasing her husband, then, at his death, the said sum to be paid as the wife shall appoint by deed of settlement, or failing thereof, to her nearest of kin. The effect of these several provisions as regards this first sum of £1000 is not disputed to be that, with the exception of the contingent liferent provided to the husband in the event of his wife's predecease,

he is divested of all right and interest in this sum; and accordingly the present action does not relate to it to any effect.

As regards the second sum of £1200, the directions to the trustees are entirely different—(1) on the narrative of its being the intention of the parties that the sum, or a portion of it, should be applied in stocking a farm, should the husband take one (which, however, he did not do), they are to hold or apply the amount and the interest or annual proceeds thereof for behoof of the spouses in such manner as they might instruct; (2) in the event of the wife predeceasing while the sum or any part thereof is in the hands of the trustees, it is declared that "the same shall be at the absolute disposal" of the husband; (3) it is declared that "at his death such part thereof as shall remain shall form part of his estate hereinafter assigned and conveyed,"—a provision which I apprehend has in contemplation the event of his death survived by his wife; and accordingly, the husband dispones and makes over in favour of his wife, in the event of her survivance, in liferent for her liferent use allenarly, and to their child or children in fee, in such shares as should be appointed by the parents, or failing this, to them equally, share and share alike, and failing children of the marriage, then to the wife and her heirs, executors, and successors whomsoever, in absolute fee, —all lands and heritages of every description, and the whole moveable and personal estate, "that shall belong to him at the time of his death," and she is appointed his sole executrix and intromitter with the same.

The question that arises under these provisions is, whether the husband has so divested himself of all right and interest in this sum of £1200 as to prevent it being attached for payment of his debts, or whether the wife is vested with any right to or interest in the said sum, either as regards principal or annual proceeds, which she can vindicate against a claim by her husband's creditors. The estate of the husband was sequestrated in November 1870, and the pursuer, as trustee on his estate, brings this action to have it declared that the sum of £1000, as the balance of the £1200, was, at the date of the sequestration, the property of the husband, and, as such, formed part of the sequestrated estate.

As regards the annual proceeds of the sum, it has to be kept in view that the spouses in January or February 1868 entered into an agreement that the principal sum should be invested in good heritable or other security, and that the interest thereof should be payable to the husband; and, acting under this agreement the sum was invested by the trustees. It is contended by the pursuer that this agreement being admittedly valid, the interest must be paid over to the bankrupt's trustee, and the Lord Ordinary has so found. I see no ground for impugning this finding. What effect any revocation by the wife might have had upon the interest of parties, were such revocation competent to her, it is not necessary to inquire, no such revocation having been executed.

Then, with reference to the principal sum, the several provisions of the eighth purpose of the trust must be carefully noticed. During the subsistence of the marriage this sum is placed under the joint administration of the husband and wife, to the effect that the trustees were to apply the sum as they should direct; but this provision certainly can have no effect by itself either to divest the husband of right to the sum or to confer any right thereto on the wife. Then, by the second part of this purpose of the deed, the absolute fee of the principal sum is appointed to belong to the husband in the event of his wife's predecease, so that, even if the wife had any right secured to her, this contingent interest would be within the sequestration, and some means might be required to secure to the creditors, in one way or other, their ultimate right to the sum. Thus the inquiry resolves into the character and extent of the right and interest conferred by the third or remaining part of the deed upon the wife. For unless it can be held that some irrevocable present or contingent interest in the principal sum has been indefeasibly given to her, the creditors of the husband will be entitled to attach [809] the fee as truly his property at the date of the sequestration. But as regards this part of the case I have been unable to arrive at any other result than that the character of the right given to the wife, or intended to be conferred by the contract, is merely a right of succession to the whole estate, heritable and moveable (including the £1000 remaining of the £1200), which should belong to the husband at the time of his death.

The express provision of the deed, in the event of the husband's predecease, is that the sum in question, or such part thereof as shall remain, "shall form part of

his (the husband's) estate, hereinafter assigned and conveyed," *i.e.* of his estate, the succession to which is regulated by the subsequent part of the deed. There is no special provision in reference to this specific sum, while there is an assignation, to take effect at his death, to and in favour of his wife, in case of her survivance, in liferent and to the children in fee, and failing children, to her, her heirs and executors, in absolute fee, of his whole estate of every description, real and personal. It is in the character of the husband's disponee and executrix to his general estate existing at his death that any right or interest is given to the wife. There is absolutely no right or interest conferred on the wife, excepting one of succession. But such a right can be of no avail in a question with onerous creditors. It cannot be held to divest the husband of any part of his property. The whole estate remains vested in him until his death, and there is no principle or authority for holding that in that state of matters the rights of creditors have been excluded. It may be that because of the onerosity of the deed in which this settlement of his estate *mortis causa* occurs, the husband could not at his own will and pleasure disappoint his wife and children by executing a new settlement of his affairs, to take effect at his death, in favour of another. But whether it is revocable or not, the exclusive character of this provision is that of succession,—a kind of provision which has no effect on the husband's right during his lifetime, and powerless to exclude his property from the diligence of his creditors.

LORD BENHOLME.—There is some difficulty on the last point referred to by Lord Cowan.

At first sight I was inclined to think that as this provision in favour of the widow is contained in the body of an onerous contract of marriage it was intended to form part of the stipulations of that contract. I am rather of opinion that the husband, of his own free will, could not have altered the testamentary provision, and probably might have been restrained from doing so. But that does not exhaust the case in a question with his creditors. A man may come under an obligation not to alter his settlement, or to revoke a legacy. What is thus left to the beneficiaries is still a succession, although a protected succession, as against the party obliging himself, but it is quite ineffectual against creditors. The widow's liferent here depends on a settlement. The contract is in the form of a settlement. It is after the husband's death that she is to be entitled to the liferent. Consequently I agree with Lord Cowan, that while this testamentary arrangement may have created a protected succession, it was still a succession, and subject to the burden of debts.

LORD NEAVES.—I am of the same opinion. This is an unsuccessful attempt to make the lady a fiar. The parties knew quite well how this might be done effectually, because they did it effectually with regard to the £1000. Had the £1200 been invested in a farm, as was originally intended, the stocking might have been attached by the husband's creditors. The husband cannot be left with the ostensible fee of the funds without being liable for debts. It is quite established that a person may bind himself to leave a legacy, but such an obligation will never compete with onerous creditors. Here I think the wife took her chance of getting more than the £1200, if her husband should die a rich man.

The following interlocutor was pronounced:—"Adhere to the Lord Ordinary's interlocutor, so far as it relates to the interest on the [810] sum of £1000 claimed in the present action; *quoad ultra* alter the said interlocutor: Find that the said sum of £1000 belonged absolutely to the bankrupt, and is now vested in the pursuer as his trustee, and decern; *quoad ultra* continue the cause: Find neither party entitled to expenses."

CHARLES S. TAYLOR, S.S.C.—ADAM & SANG, W.S.—Agents.

[*Principle applied*, Moor's Trs. *v.* Lord Advocate, 1874, 1 R. 345.]

No. 143. X. MACPHERSON, 810. 18 June 1872. 1st Div.—Lord Jerviswoode, B.

CHARLES LIZARS DOBBIE, Pursuer.—*Shand—Lorimer.*
JOHN DUNCANSON, Defender.—*Balfour—Lees.*

Sale—Fraud—Reparation—Actio quanti minoris.—Question, Whether, when a sale is induced by the fraud of the vendor, it is in the purchaser's option either to rescind the contract and return the subject sold, or to retain it and claim damages.

Expenses—Arrestment—Inhibition—Recall.—In a petition for recall of arrestments and inhibition used on the dependence of an action, *held* that an interlocutor recalling the diligence, and allowing extract, without disposing of or reserving the question of expenses, exhausts the cause, and it is thereafter incompetent to move for expenses either in the petition or in the relative action.

By missives dated 28th October 1870 Charles L. Dobbie purchased from John Duncanson, a builder in Glasgow, a tenement of shops and houses in Garscube Road, Glasgow, at the price of £16,000.

In March 1871 Dobbie brought this action concluding for £996, as damages sustained by him in respect of the defender having by fraudulent misrepresentation and concealment of material facts in reference to the rental of the property in question induced the pursuer to purchase it

The pursuer alleged that the sale was brought about through Archibald MacLean Morrison, a property agent, as agent for the defender. He further alleged that in the course of the negotiations previous to the sale he had asked Morrison for a rent-roll, and Morrison got one (rent-roll A), from the defender, in which the total rental was stated at £1220, 18s.; and that the sale was effected in reliance upon the accuracy of this rent-roll, and on a valuation by a Mr. Thomson, also furnished by the defender, in which the rental was stated at £1201, 18s.; that on 9th December 1870 the pursuer discovered from a statement then handed to him by the defender that the taxes and insurances on the property were payable on a rental of £1159, 18s.; and that on his applying to the defender in January 1871 for a detailed rental for the current year he received from his clerk a rent-roll marked B, stating the total rental at £1159, 18s.

He averred that the total excess of rent-roll A above the true rent was £76; that he was led by the pursuer's fraudulent misrepresentation and concealment to believe that the property was let at the rents stated in rent-roll A, or, at least, at the rental stated in Thomson's valuation; that he would not have purchased the subjects at £16,000 had he known the true rental; and that he had suffered loss and damage thereby to the amount concluded for.

He completed his title after he became aware of the alleged fraud. He did not propose to return the property, or rescind the sale.

The pursuer pleaded;—1. The defender having, by fraudulent misrepresentation and concealment of material facts in reference to the rental of the property in question induced the pursuer to purchase the same, he is liable to the pursuer in damages, as concluded for, with expenses. 2. The defender having, by fraudulently representing the rental of the property as greater than its true amount, as above set forth, induced the pursuer to purchase the property at a higher sum than he would have paid therefor, the pursuer is entitled to damages as concluded for. [811] 4. The pursuer is entitled to maintain the action, and to damages as concluded for while retaining the property, in respect (1) the pursuer's claim of damages is founded on the fraud of the defender; and (2) that the pursuer became unable to make restitution of the property in the condition in which he had got the same.

The defender denied that Morrison ever acted as his agent, and that the offer was made with reference to any given rental; he averred that the only rent-roll given by him was one marked C, which had been returned on October 27, the day before the sale, and which stated the total rental at £1201, 18s.; that he and his clerk Davidson had gone over the rental C with pursuer, and explained the discrepancies between it and the real rent, the rent-roll C having been prepared for the

defender's own use in letting the property and not with a view to a sale of the property; and that the property was really worth more than £16,000.

The defender pleaded;—1. The pursuer's statements are not relevant or sufficient in law to support the conclusions of the summons. 2. The pursuer being entitled to examine, and having examined the property before purchasing it, is barred from quarrelling the price. 3. In any event the defender is entitled to absolvitor, in respect (1) the sale took place for a slump sum, and not upon any rental, or at any rate upon a valuation made for the pursuer himself; (2) the subjects are of greater value than the price paid; (3) the pursuer having elected to abide by his purchase, and, after discovery of the alleged deficiency in value, having deliberately proceeded to complete his title, and having retained possession of the property, is barred from making the present claim; and (4) the defender is not responsible for any misrepresentations the pursuer may have received from Mr. Morrison, or for any act of defender's clerk *ultra vires* of his duty, and unauthorised by the defender. 4. The action being based on a plea of fraud, and no substantial averment thereof being set forth against the defender, he is entitled to absolvitor.

The Lord Ordinary found (2d November 1871) that the pursuer had "not set forth on record facts relevant to support the conclusions of the libel," and assoilzied the defender.*

[812] The pursuer reclaimed, and argued;—Where a sale has been impetrated by fraud the purchaser may either rescind the contract, or maintain it and claim damages; and, in the latter case, he is not bound to return the subject of the sale.† In cases of fraud the law of Scotland recognises a remedy similar to the *actio quanti minoris*.‡

---

* "NOTE.—The view on which, after anxious deliberation, the Lord Ordinary here proceeds, is one which is probably best explained by the terms of the interlocutor itself, and by the averments to which it bears reference.

"The sum of £996, for which the summons concludes, is expressly stated on the record (condescendence 12) to be the amount of damages which the pursuer has sustained through the fraudulent misrepresentation and concealment on the part of the defender, as specially alleged on the record. But this misrepresentation and concealment has, at the same time, direct relation to the transaction of sale and purchase of the property out of which this question has arisen; and consequently, if there be truth at all in the averments of the pursuer, these strike directly against the validity of the sale, and might probably entitle him to set aside the transaction, assuming that they are capable of being established in evidence. But the pursuer, for reasons no doubt sufficient and satisfactory as respects his own interests, resolves to hold by the transaction in so far as it is favourable to himself, and to claim damages on a footing which, as the Lord Ordinary thinks, cannot be allowed, and which cannot be relevantly or competently stated by the pursuer while he is retaining, and intends to retain, the whole of the subjects of his purchase as his own. No one can estimate the value of these to the pursuer with such precision as he can. He must be held as being committed to the fact that the purchase was not disadvantageous; and if he were to succeed in his present demand he would reap at once the full benefit of the transaction, and at the same time take from the defender the sum of £996, without the possibility of the latter having any opportunity of deriv-[812]-ing benefit from the probable or possible rise in the value of the subjects. The Lord Ordinary is, however, of opinion that the transaction out of which this action has arisen must stand or fall in its entirety on its own merits, as one of sale and purchase, and that, as there is no attempt to set it aside as such, the present action cannot lie against the defender, and ought not to be sustained."

† Stair, i. 9, 14; Graham *v.* Western Bank, March 8, 1865, *ante*, vol. iii. p. 617, *per* Lord Curriehill, p. 628, *per* Lord Colonsay, p. 644; Amaan *v.* Handyside and Henderson, Feb. 11, 1865, *ante*, vol. iii. p. 526; L. 13, pr. et secs. 2, 4, sq., *D. de act. empti et vend.* (19, 1); L. i. pr. et sec. 2, *D. de aed. ed.* (21, 1); Gray *v.* Hamilton, 1800, M. App. Sale, 2.

‡ Wilson *v.* Campbell, 1764, M. 13,330; Menzies *v.* M'Harg, 1760, M. 14,165; Balmer *v.* Hogarth, March 11, 1830, 8 S. 715—H. L. 10 S. 862; Reddie *v.* Syme, Feb. 10, 1831, 9 S. 413,—aff. Aug. 11, 1832, 6 W. & S. 188; Davidsons *v.* Tulloch, Feb. 23, 1860, 3 Macq. 783.

The defender argued;—The *actio quanti minoris* is not admitted in the law of Scotland. If in any case a deduction from the price of a subject sold has been allowed the cases are not authoritative, having been overruled; and the only cases which lend a colourable support to the pursuer's argument on this point are those in which either the purchaser has not received the full quantity of the thing sold, but a separable portion, and sues on the warrandice, on the ground of eviction *ex defectu juris*, or where before the discovery of the defect restitution has become impossible, because *res non sunt integrae*. Here the purchaser got all he contemplated in his bargain, and completed his title in the full knowledge of the deficiency which he alleges. Here there is no ground for alleging fraud, because on the face of the allegations and productions it appears that the sale was not by rental, but for a slump sum.

The defender referred to the undernoted authorities.*

At the close of the debate the Court, in the circumstances, allowed a proof before answer.

Proof was led before Lord Ardmillan, the import of which is given in the opinion of the Lord President.

LORD ARDMILLAN.—I am not surprised that this case has been fully and earnestly argued, for it presents features of considerable difficulty; but, at the same time, I have a very clear opinion on the facts, and I think they are sufficient for its decision. There are two points which must be especially borne in mind, (1) that the transaction of purchase and sale was completed by certain missives of sale, which were followed by an ordinary disposition. But neither in the missives nor in the disposition is there reference to any rental whatever. The bargain was for a slump sum. No doubt, it is open to suggest that in the negotiations reference was made to a rental, and to allege that a false rental and false representation was unfair dealing, amounting to fraud. But that must be clearly proved. We must see whether any such fraud has been instructed. (2) The value of the property in the eyes of both parties was obviously of a specula-[813]-tive character. Both were resident in the neighbourhood, and had ample means of ascertaining the value, and there is no reason for saying that the property was either sold or purchased with special reference to the then present rental.

I would further remark, at the outset, that we may approach the present case without the necessity of deciding whether, when fraud is alleged, there is room in our law and practice for an *actio quanti minoris* at the instance of a purchaser retaining the subjects of sale, or for an action for pecuniary damages in such circumstances. I do not enter upon that question at all. I assume that the remedy is, in such a case, not excluded, and more than that the pursuer cannot ask. But this I do venture to say, that, when the action is of such a kind, nothing but the clearest proof of fraud can sustain it. Now, taking the question in this light, I proceed to examine the evidence in the case.

The case of the pursuer is distinctly put on record as a case of fraudulent misrepresentation, through Mr. Morrison as agent of the defender. The importance of this was apparent to him when he prepared his record. For if Morrison was the defender's agent in effecting the sale, then Morrison's statements were those of the defender; whereas, if Morrison was the pursuer's own agent, then the defender's statements and explanations to Morrison were statements and explanations to the pursuer; and no statement by Morrison himself, not directed or sanctioned by the defender, could in any way bind the defender. It is true, we have Morrison swearing, though not very distinctly, that he was acting for the defender, and Mr. Dobbie gave evidence that he dealt with him on that footing. But looking to the evidence of the defender himself, and of Thomson the valuator, and of Mr. Bruce, I can have no doubt at all, in point of fact, that Morrison was probably acting in his own interest, and thrusting himself in between these parties as an adventurous agent, without any direct or specific employment from either of them. But he certainly assumed

* Menzies on Conveyancing, 154 (3d ed.); Brown on Sale, secs. 415, 463; Bankton, i. 19, 2, vol. i. p. 408; Stair, i. 9, 3, 4, 9, 14; Watt *v.* Glen, Feb. 6, 1829, 7 S. 372; Chapman *v.* Couston, Thomson, and Co., March 10, 1871, *ante*, vol. ix. p. 675; Ransan *v.* Mitchell, June 3, 1845, 7 D. 813; Lloyd *v.* Paterson's Creditors, 1782, M. 13,334, Hailes, 897; Couts *v.* Creditors of Halgreen, 1725, M. 13,328; Reddie *v.* Syme, *supra*; Davidson *v.* Tulloch, *supra*; Oliver *v.* Suttie, Feb. 1, 1840, 2 D. 514.

the position of agent for Dobbie, the pursuer, and as such he went to Mr. Duncanson and commenced the negotiations. When we come to Mr. Bruce's evidence we find the same thing, Morrison acting for Dobbie and negotiating a loan over the property. I have, therefore, no doubt at all that Morrison acted and was known to be acting for the pursuer, the purchaser. If, as such, he received the rental of £1201, and upon that rental transacted the purchase, then I think there is no ground for the action on the head of fraud on the part of the defender. That rental on the face of it presented the fact that there was a gradual rise in the shop rents, and if you give effect to that prospective rise by way of deduction you reduce the rental to £1160, which, I understand, is just about the actual rental. Mr. Dobbie knew, and must have known from the document itself, that the rental of £1201 was stated at a maximum, the lower rents also appearing, and therefore, even if the purchase were proved to be made upon the faith of that rental, there can be no foundation for the charge of fraud in this action. That was, so far as I can see, the only rental that is proved to have passed from Duncanson to Dobbie, though, as I have said, the purchase was not made upon a rental at all. Now, I wish here to state that I see no reason for doubting the truth or credibility either of Dobbie or Duncanson. I think their evidence and their actings were quite straightforward. But I do not think the evidence of Morrison is quite unexceptionable. I do not mean to say that the man was dishonest, but when I am called upon to weigh his evidence against that of Mr. Duncanson I must say I believe Mr. Duncanson, who swears with great distinctness and deliberation that the £1201 rental was the only one which he gave to Morrison, and if that be true, as I believe it to be, then there is an end to the pursuer's case, for in that rental there is really no fraud.

But even supposing that the rental of £1220 did come into Dobbie's hands, the case is not made out as a fraud by the defender. There may be sufficient to explain the difference between the three without imputing fraud. The rental of £1220 was a purely speculative one of the nature of an estimate, bringing out what the rental might shortly be expected to rise to. The rental of £1201 was not a statement of the rents of shops then exigible. The rise of rents in three successive years was plainly brought out and easily understood. It was not a deceptive document, for the progressive rise of rent appeared, and it gave the [814] rental at what it would be when the existing rents reached their maximum. The rental of £1159 was the actual existing rental for the purpose of present collection, taking the shop rents at their lowest figure. All this was known to the purchaser quite as well as to the seller. The purchaser expected a rise, and he bought for a rise, for, as I have said, it was purchase at a slump price, and a speculation from the beginning. Accordingly, I am of opinion that the pursuer has totally failed to establish fraud on the part of the defender, and he must therefore necessarily fail in this action. I come to this conclusion apart from the question whether the action be competent or not.

LORD DEAS.—The purchase of this property by the pursuer, from the defender, took place in October 1870, and in March 1871 this action of damages was brought, at the instance of the purchaser, upon the ground of misrepresentation on the part of the seller. The pursuer states that he would not have given £16,000 for the property had it not been for the false rental which was shewn to him. But, as was observed by Lord Ardmillan, it is of great importance to keep in view that there is no allusion to any rental in the missives of sale. It is a sale, at a slump price, of an heritable subject of a particular class,—that is to say, of a tenement divided into numerous possessions, many of them so small that, without constant periodical collections, the rents might not be recoverable at all. That being so, unless there is clear proof of fraud no claim of damages can be listened to. It is not everything that is said by a seller, even if incorrect, which will void a completed bargain. The rule is *caveat emptor*, and there are many things which a purchaser must look into for himself, and not take upon a mere verbal representation. In this case the purchaser could easily have ascertained what was the true rental and the fair market value of these subjects. He had only to ask the tenants for the one, and consult a man of skill as to the other. Not only is that so, but among the documents handed to him at the time of the sale there were some which would have given him the information, if he had only looked at them. The very way in which he professes to have ultimately discovered that the rents were lower than he expected was by examining these papers, which he could just as well have done at first. He says, "I was looking over the

papers and over a statement of taxes which I got at settlement from defender. I found that the police tax was charged on a rental of £1159, but I could not see how that could be. I then went to Morrison's house. . . . He then said I should go to the tenants and get them to tell me their rents. I did so, and found the actual rental was £1144, 18s." Upon getting this information he proceeds to challenge the bargain. It would require a very strong case of that kind to enable a man to get over such a bargain as this.

Again, what is the extent of the injury which he complains of? The rent he receives is £1144, 18s., as against £1201, 18s. which he says he expected; being £57 of difference. It does not appear to be usual in Glasgow, any more than elsewhere, to sell property of this description by rental, especially new tenements newly tenanted, which have not yet settled into the position of having fixed rents. Valuators accordingly do not go by the rental; they look at it, no doubt, but they consider the whole circumstances, and then say what they think the property is likely to be worth to a purchaser.

In this particular case that seems really to have been what was done, for though the document founded on may have been exhibited to the purchaser, as he alleges, to assist him in making up his mind, and perhaps in the hope of raising his opinion of the value, yet, certainly it was not so in the sense of warrandice.

As for the position of Morrison, it does not matter whose agent he was; that is of no importance if I am correct in my view of the case.

Over and above all this, it turns out that the bargain was an excellent one for the pursuer, and the property is valued at a much higher price than he paid for it. He is perfectly aware of that, and will not give up the bargain, although that is usually the only course a seller can take if there has been essential error. The case, as I have put it, raises no delicate question such as occurred in the cases of Gordon *v.* Hughes (June 15, 1815, F. C., rev. March 25, 1819, 1 Bligh, 287), and Reddie *v.* Syme, as to the extent of loss which would give right [815] to an *actio quanti minoris*. This is a very different case; the pursuer went into the bargain with his eyes open, and his complaint is really not of loss sustained, but that he has not got a still better bargain than he actually did. I have no difficulty whatever in assoilzieing the defender.

LORD KINLOCH.—This is a case of which fraud is the essential basis. The pursuer says he was induced to pay a much higher price for the property, in consequence of fraudulent misrepresentations on the part of the seller and his agent. He does not seek to get rid of the bargain, but only claims damages. I adhere to the opinion formerly expressed by me, that there is an optional remedy to a purchaser so situated. But fraud must be established, and that very clearly. The pursuer has failed in this. It is unnecessary for me to go into the evidence. I will only say that these very rentals themselves bore on the face of them that they were not statements of existing actual rental; and, according to the evidence of Mr. Duncanson, their meaning was fully explained.

Whether Mr. Morrison repeated all the defender's explanations I think is extremely doubtful; but even if he did not, Mr. Duncanson is in no way responsible. I think, therefore, that the pursuer has failed in the essential part of his case. But I think he has also failed in establishing damage. I can imagine a case where, parties agreeing to sell and purchase at so many years' rental, if one of them mis-state the rental, there may be a case for damages such as is here laid. But it is hopeless to bring the present case up to this. The pursuer might make his own calculations upon the rental he got; but the contract was for a slump sum, and there is no evidence that the defender could have taken one farthing less had it been offered. The damage I think not proved. But it would have been in vain to establish a case of damage without also making out fraud very clearly.

LORD PRESIDENT.—There are two points connected with the facts of this case which are of importance. The first point of fact appears to me to be, whether the document No. 7 of process (rent-roll A) was made up in order to induce the intending purchaser to decide upon the price which he would offer. The supposition that this was so rests upon the evidence of the witness Morrison. I believe it to be true that it was handed to the pursuer by Morrison, but I do not believe that Morrison obtained it from the defender with a view to its being handed to the purchaser, and with the statement that it was a correct rental. But even supposing that the document came into the hands of the purchaser in some such way, that is not of much importance, because he himself admits that he made his calculations upon No. 11 of process (rent-

roll C), which only shows a rental of £1201, 18s. Now, that rental, as well as the other one of £1220, ought to have suggested various doubts to the pursuer as an intending purchaser. They were evidently not to be relied on as representing the constant, or permanent, or even the then actually existing rental of the property. The nature of the property here requires to be considered. From a more detailed rental (rent-roll B), which brings out a rent of £1159 per annum, it appears that there are 67 different subjects included in the property. The value of such properties is never represented accurately by rentals. It is of their very nature that their rents should constantly vary, and it would be obviously absurd to put them in the same position as large landed estates. The pursuer was sufficiently careful of his own interests to be aware that such documents are not to be credited as perfectly accurate. The truth appears upon the face of both documents, that there were rents varying as between £45, £50, and £60, and £50, £60, and £65, and £40 and £50. Is it, then, to be taken off the hands of an intending purchaser that he believed the highest of these figures to be the true rent, merely because they were carried out in the statements? If he proceeded upon these rents as the actually existing rents of the property for the current year he did what he was not entitled to do. That, I think, puts an end to the case of fraud, because if these rentals were not set forth as accurate, then there was no fraud in the matter. They were more of the nature of estimated rentals, and as such, nothing can be urged against them. But it appears to me that the pur-[816]-suer really did not rely upon them. He had means of inspecting the property personally, and that with an experienced eye. These documents would assist him in valuing it from their nature, as giving a general sketch of the rents. In that view, the charge of fraud is at an end.

As to the claim of damages, I am desirous of expressing no opinion, except that in this case, even if the pursuer had made out his charge of fraud, it would have been very difficult for him to get damages. The ground upon which he lays claim to them is stated in his second plea in law—"The defender having, by fraudulently representing the rental of the property as greater than its true amount, as above set forth, induced the pursuer to purchase the property at a higher sum than he would have paid therefor, the pursuer is entitled to damages as concluded for? How can that be the measure of damages? He had no absolute right to become owner of the property with the question of price unsettled. He was only allowed to make an offer; and as the seller would take nothing under £16,000, if he had offered less he never would have become the owner of the property. This claim for damages seems to me a mere dream. It is, moreover, apparent that he has found out that he has got a good bargain, otherwise he would not be so anxious to retain the property.

The defender moved for the expenses of having the inhibition and arrestments used by the pursuer on the dependence of the action recalled by a petition before the Lord Ordinary. It had been necessary to obtain their recall, and he had got them recalled on caution. He had also been obliged to get the interlocutor extracted, in order to clear the record of the inhibition.

The pursuer objected, on the ground that expenses had neither been asked, refused, nor reserved in the petition for recall, which was a separate process.*

LORD PRESIDENT.—The practice in this Division, which is consistent with the enactments, is, in recalling diligence on caution, to reserve expenses and to allow interim extract. That does not preclude the petitioner, if he should be found right in the principal action, from coming back and asking to be found entitled to expenses. That is, or I think ought to be, the practice in the Outer-House also. There the petitioner, when he obtained the recall of the arrestments and inhibitions in the Outer-House, did not ask for a reservation of expenses, and the result was that the action was at an end, and the extract, if taken, behoved to be a final extract or none. The petitioner might have asked for a reservation, or the Lord Ordinary, if alive to the importance of the matter, might have done so. The consequence of this not having been done is, that the process is dead and gone, and it is impossible now to allow the petitioner expenses in a different process.

* The following authorities were cited :—6 Geo. IV. c. 120, secs. 17, 21; 1 & 2 Vict. c. 114, sec. 20; 13 & 14 Vict. c. 36, sec. 28; Manson *v.* M'Ara, Dec. 7, 1839, 1 D. 208; Clark *v.* Loos, Jan. 20, 1855, 17 D. 306; Steven *v.* M'Dowall's Trustees, March 19, 1867, 3 Sc. L. R. 320; Laing *v.* Muirhead, Jan. 28, 1868, *ante*, vol. vi. p. 282.

The other Judges concurred.

This interlocutor was pronounced :—" Find that the pursuer has failed to establish in evidence the allegations of fraud on which the action is founded ; therefore assoilzie the defender, and decern : Find the defender entitled to expenses, under deduction of £3, 3s. from the taxed amount, in respect of his unsuccessful motion for the expenses separately incurred in procuring the recall of the inhibition and arrestments formerly used against him : Allow an account," &c.

D. J. MACBRAIR, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

No. 144. X. MACPHERSON, 817. 18 June 1872. 1st Div.—Lord Neaves, presiding Judge.

COLIN CAMERON, Pursuer.—*Fraser—Strachan.*

JOHN MORTIMER AND ALEXANDER MORRISON, Defenders.—*Millar—J. A. Reid.*

Agent and Client—Mandate—Implied Authority—Jury Trial—Bill of Exception.—At a jury trial, in an action of damages for wrongful apprehension after an alleged agreement by the creditor to delay diligence, the pursuer's case came to depend upon his proving that A. M., a law-agent, had authority to delay diligence. The pursuer put in evidence an admission by the defender of the pursuer's statement on record that A. M. " is a solicitor, and acted as the agent of the defender in raising and enforcing the diligence." This was the only evidence of implied authority. The presiding Judge having directed the jury that they were the sole judges upon the evidence as to whether A. M. had express authority, but that in law A. M. had no implied authority to delay diligence in the circumstances stated by the pursuer on record, the pursuer excepted to the latter part of this direction, and asked the Judge to direct that the question whether A. M. had implied authority to grant the delay was one on the evidence for the jury. The Judge having refused to give this direction, the pursuer again excepted.

The Court disallowed both exceptions.

Opinions, that the question of implied authority was in most cases one of mixed fact and law, but never of fact for the jury only.

Supra, p. 461, 9th February 1872.

In this case, a new trial having been granted, the case was tried before Lord Neaves at Inverness, on 1st, 2d, and 3d May, under the following issue :—" Whether, on or about the 29th July 1871, the defender, John Mortimer, wrongfully apprehended and detained the pursuer, or caused him to be apprehended and detained, after having agreed to delay diligence till Monday, 31st July 1871, to the loss, injury, and damage of the pursuer ? Damages laid at £975."

Among the documents put in evidence for the pursuer were articles 2 to 5 of the condescendence, with the defender's answers. Article 2 was as follows :—" The defender, John Mortimer, resides at Applegrove, Forres, and is a traveller for Messrs. Usher and Company, brewers in Edinburgh. The defender, Alexander Morrison, is a solicitor in Elgin, and acted as the agent of the defender Mortimer, in raising and enforcing diligence—the diligence after-mentioned." Answer for defender Mortimer—" Admitted."

The jury found unanimously for the defender.

The case now came up on a bill of exceptions for the pursuer, which set forth, that " Lord Neaves charged the jury, and, among other things, directed them that they were the sole judges upon the evidence as to whether Morrison had express authority to grant delay, but that in law he had no implied authority to delay enforcing the diligence in the circumstances stated by the pursuer on record.

" Mr. Fraser excepted to this direction, and asked Lord Neaves to direct the jury that the question as to whether Morrison had implied authority to grant the delay was one on the evidence for the jury.

"Which direction Lord Neaves declined to give.

"Whereto Mr. Fraser excepted.

"Mr. Fraser further asked Lord Neaves to direct the jury, that if the jury are satisfied on the evidence that Morrison was agent of the defender Mortimer in raising and enforcing the diligence against the pursuer, and that Morrison, as such agent, did give delay to the pursuer, then any instructions by the defender not to give delay, not communicated to the pursuer, will not control the implied authority of the agent to give delay, [818] if the jury are satisfied that if there were no such instructions the agent, Morrison, had power to give delay.

"Which direction Lord Neaves declined to give.

"Whereto Mr. Fraser excepted."

Argued for the pursuer, in support of this bill of exceptions, that there was no allegation of express authority on record, but only of implied authority. Hence, if the presiding Judge was right in the direction first excepted to, he substantially withdrew the case from the jury. This was tantamount to saying, after two trials, that it should never have been put to a jury at all, and that there was no relevant case stated. It was contended that the presiding Judge should have left certain facts to be established to the satisfaction of the jury, and then given them a direction in point of law applicable to those facts.*

The defender argued, that though it was the province of the jury to find the facts, yet, when once the facts are found, it is the office of the Judge to decide the legal applicability and effect of those facts, and that this was precisely what the presiding Judge had done in the present case.†

At advising,—

LORD PRESIDENT.—The issue sent to be tried in this case was,—"Whether, on or about the 29th July 1871, the defender, John Mortimer, wrongfully apprehended and detained the pursuer, or caused him to be apprehended and detained, after having agreed to delay diligence till Monday, 31st July 1871, to the loss, injury, and damage of the pursuer. Damages laid at £975." The important question of fact was, whether the defender had agreed to delay diligence till Monday, 31st July 1871. It was not contended, either at the first trial or the second, that the defender had personally come under such an agreement. It was contended that he had done so through his agent, Mr. Alexander Morrison. The answer of the defender is that not only did Morrison not agree to give delay, but that if he had done so, it would have been without authority, either express or implied, from the defender. The pursuer, in addition to his other evidence, put in evidence certain admissions contained in the defender's answers to the condescendence for the pursuer, and, in particular, the second article of the condescendence, with relative answer. This, of course, was put in for the purpose of proving agency on the part of Morrison. The presiding Judge directed the jury, with reference to this part of the evidence, that they were the sole judges upon the evidence as to whether Morrison had express authority from the defender to grant delay, and no one doubts the soundness of that direction. But he gave them the further direction that in law Morrison had no implied authority to delay diligence in the circumstances stated by the pursuer on record, manifestly referring to article 2, because in the only other articles to which the jury's attention was called there is nothing bearing on the question of authority at all. The statement of the pursuer simply is, that Morrison is a solicitor in Elgin, and that he acted as the defender's agent. The question was, whether that was sufficient to give him authority to grant the delay alleged, and the Judge said it did not. Now, I do not think it necessary to say more than that I regard that as a good direction. It is represented as being an ambiguous direction, and as one taking the whole case out of the hands of the jury—in fact, directing them to find for the defender. I think that is quite a mistake. It has reference to those parts of the record put in evidence, and what the Judge does is, to direct the jury (1) that they are the sole judges whether there was [819] express authority; and (2) that the mere fact of Morrison being a solicitor in Elgin, and acting as the agent of the defender in raising and enforcing

* Mackenzie v. M'Lean, Jan. 14, 1830, 8 S. 306; Macara v. Phillips, Dec. 9, 1825, 4 S. 296; Sanderson v. Campbells, May 17, 1833, 11 S. 623; Anderson v. Ormiston and Lorain, Jan. 3, 1750, M. 13,949, and 13,955; Fraser v. Hill, Jan. 17, 1852, 14 D. 335, rev. H. of L. April 12, 1853, 1 M'Q. 392.

† Neilson v. Rodger, Feb. 17, 1854, 16 D. 603.

the diligence, was not sufficient in law to raise any implication of authority to grant delay. I think that is perfectly sound law, and that the first exception should be disallowed.

The counsel for the pursuer not only excepted to this direction, but asked the Judge to direct the jury that the question as to whether Morrison had implied authority to grant delay was one on the evidence for the jury. Now, there can be no doubt as to the meaning of the direction so asked, viz., that in judging whether there was any implied authority the jury had no occasion for assistance from the Court at all, but were masters of the question, and entitled to draw their own inference from the facts. Now, an inference from facts may be of a purely legal character, or it may be entirely an inference of fact—the mere establishment of a general fact necessarily resulting from certain external facts proved. The first is clearly for the Court; the second as clearly for the jury. There are, however, cases of extreme nicety, where the inference is partly of fact and partly of law. These require the most delicate handling by the presiding Judge. I do not think that any such delicate question is raised here. In the course of the evidence facts might be proved which would raise inference of facts, but it is not alleged that the presiding Judge did not leave such inference to the jury. But the ultimate inference in this case, viz., the implication of authority, was a legal inference. The object of the pursuer was to establish the legal liability of the defender for his agent. That is not matter of fact at all, but of law. To say that the question, whether Morrison had implied authority to grant delay, was one on the evidence for the jury, is plainly unsound; it would amount to saying that the jury were to decide for themselves whether the relation of the parties and the circumstances of the case were sufficient to raise an implication of authority. It was suggested at the discussion that the direction asked does not mean that the question was one for the jury only, but I cannot read it otherwise. If it is open to another interpretation, then it would be objectionable from ambiguity, the most fatal of all objections to a direction so asked.

The third exception has not been insisted on, and it is not necessary to notice it. I am therefore for disallowing the bill of exceptions.

LORD DEAS.—The general facts in this case are very simple. Mr. Mortimer resides in the neighbourhood of Forres, and he employed Mackenzie, a solicitor in Forres, to raise diligence against Captain Cameron. Mr. Mackenzie employed Morrison, an Elgin agent, to get the necessary warrant. Captain Cameron himself lived in Forres. So far the position of parties is not very favourable to Captain Cameron's contention.

Now, assuming this position of parties, I desire to make it clear, in the first place, that, in my opinion, an agent or a sub-agent, employed with a view to the execution of personal diligence, may have *implied* authority to grant delay; and second, that it may be a proper question for a jury whether there was such implied authority or not. Express authority is not essential. But, while this is the opinion I hold on these points, I certainly cannot hold that this first exception is well founded. By the expression "circumstances stated on record," I understand to be meant the statements in articles 2d to 5th of the condescendence, and relative admissions, and the pursuer's contention is that these statements, with the admissions of the defender regarding them, are sufficient to imply authority to grant delay. Now, I am of opinion that there is neither enough stated, nor enough admitted, to warrant any such implication. Substantially all that is stated is that "the defender, Alexander Morrison, is a solicitor in Elgin, and acted as the agent of the defender Mortimer in raising and enforcing the diligence after-mentioned." I cannot think that that amounts to a statement which, of itself, implies authority. I do not understand anything in the Judge's direction to mean that an agent must have express authority to grant delay, but merely that, there being no express authority, there was not enough stated and admitted to establish implied authority.

[820] The next question is one of more difficulty, but I read the direction asked as your Lordship does,—namely, that the presiding Judge was asked to direct the jury that the question of implied authority was one exclusively for them on the evidence. Now, while I cannot agree that the question of authority was purely one of law for the Court, neither can I affirm that it was purely one of fact for the jury. The direction asked was put as the direct counterpart of the direction excepted to, and although it aims at a direction which it might have been proper to give, I think it was asked

in terms too bare and unqualified to have been safely given. The third exception was not insisted in, and upon the whole I think we must refuse the bill.

LORD ARDMILLAN.—We have at this final stage of the case no duty to discharge but to dispose of the bill of exceptions.

There is no motion for a new trial on the ground that the verdict is contrary to evidence.

One passage only in the charge of the Judge is excepted to. Then Mr. Fraser, for the pursuer, requested the Judge to give a certain direction. That direction the Judge declined to give, and a second exception was accordingly taken.

I think it necessary to explain in the outset that a Judge's charge must be presumed to have been in all respects correct and complete, unless in so far as it has been excepted to.

The question whether Morrison had express authority from the defender to grant delay was distinctly left to the jury. Plainly there was no express authority. But, in the circumstances stated by the pursuer on record—that is, taking the pursuer's case as alleged by himself, in those parts of the record which he put in evidence,—the learned Judge stated to the jury that, in law, Morrison had no implied authority to give delay. The 2d article of the condescendence for the pursuer is what the Judge referred to. It seems to me that there has been some misapprehension in regard to this direction. Rightly understood, it is quite correct.

If the true meaning of this statement of law by the presiding Judge had been, that the implication or inference of authority from the whole facts and circumstances of the case as proved is exclusively matter of law for the Judge, and not to any extent within the province of the jury, I could not accept that as a correct statement. Where the inference or implication is to be reached by considering the facts proved with reference to such legal principle as the Judge thinks it right to explain, then I am of opinion that the duty of drawing the inference or implication ought not to be withdrawn from the jury. Assuming the jury to have ascertained the facts, and to have been, as I doubt not they were, rightly instructed in regard to the law, then the drawing of the inference or implication from the facts so ascertained, is, in my opinion, within their province—not so absolutely or exclusively theirs as to shut out judicial direction, but still so far within the power and duty of the jury that the withdrawing of the question from the jury could not be right.

But I am satisfied that the meaning of the passage excepted to in the charge is not what I now supposed. I understand that all that was really meant is, that the statements of the pursuer, as placed on record and put in evidence, do not sustain the legal implication of Morrison's authority, so that, under the circumstances stated and put in evidence by the pursuer, there is no implied authority.

Assuming, as I have already explained, that the remainder of the charge is not liable to objection, and that the jury were rightly told that they should judge of the evidence, I cannot say that this exception is well founded.

I am anxious to preserve intact the recognition of the right and duty of the jury to draw from the facts which they deem to be instructed by proof the inference or implication of authority, so far as that is an inference in point of fact.

I do not think that that right and duty was meant to be withdrawn from the jury in this case. I cannot assume that it was so withdrawn. The observation of the Judge related to the statements of the pursuer on record, and not to the [821] facts as appearing on the proof. Viewing the passage complained of in that limited aspect I am not prepared to sustain the first exception.

The 2d exception relates to the refusal to give a certain direction in certain absolute and unqualified terms. The direction asked by Mr. Fraser is very broad, and very absolute and unqualified. It is not there specified what evidence, or whether any evidence, was led before the jury, tending to instruct authority, or sustaining the implication of authority, and it is not now maintained that the verdict is against evidence.

I again repeat, that I could not concur in withdrawing from the jury entirely the right and duty of drawing the inference or implication of authority from the facts and circumstances proved. But I am not prepared to hold the rights and duty of the jury to be so absolute and paramount as to exclude judicial direction in a case of mingled fact and law. Accordingly, taking for granted that the credibility of witnesses, and the force and value of conflicting testimony and the value of the real

evidence arising from the facts and circumstances proved, were all left to the jury, I do not think that the refusal to give a special direction in the absolute terms demanded affords good ground for complaint. I therefore concur with your Lordships in refusing these exceptions.

I add no more. The defender's case, successfully maintained by him, is, that Morrison had no authority, and no discretion, because he was employed, not to recover the debt, but to raise and enforce the diligence, to put the debtor in prison. In other words, Morrison was employed not to procure payment, but to gratify revenge. As Lord Jeffrey once said, "I shall chastise the rising indignation within me," and say not one word of the motive and spirit in which these unfortunate proceedings plainly originated.

LORD KINLOCH.—I am of opinion that this bill of exceptions should be disallowed. The question raised was whether the defender had gone on with diligence against the pursuer's person, after having, through his agent, agreed to give delay for payment of the debt. The Judge was clearly right in laying down that express authority to the agent formed entirely a question for the jury. In proceeding to say that "in law he had no implied authority to delay enforcing the diligence in the circumstances stated by the pursuer on record," I think the Judge must be held to have referred to those articles of the condescendence which, with the answers admitting the statements, were put in evidence by the pursuer, for these were the only parts of the record within the cognisance of the jury. In this view, I think the direction was entirely right, for the matter proved by these articles and their answers simply brought out that Mr. Morrison was employed to raise and enforce diligence, which, without something else occurring, clearly implied no authority to grant delay. This undoubtedly did not conclude the case; for the authority might be implied from other circumstances. But these circumstances required to exist and be founded on. I cannot find them in the evidence; and the Judge being, I must presume, in the same predicament with myself, was not called on to give any additional direction on the subject. If the counsel for the pursuer conceived that such circumstances existed, it was his duty to bring them before the notice of the Judge, and to ask a special direction regarding them. In place of doing so, what the pursuer's counsel did was to ask the Judge to send the whole case on implied authority to the jury for their exclusive determination—for such I consider to be the meaning of the request for a direction "that the question as to whether Morrison had implied authority to grant the delay was one on the evidence for the jury." This request, I think, was wholly without warrant; for implied authority was a mixed question of law and fact, in which the proper course was to lay down the law for the guidance of the jury, and leave them to apply this law to the facts as they should find them. I am of opinion that the Judge rightly refused to leave the whole case to the jury, as requested. And if this be so, the whole matter raised by the bill of exceptions is exhausted.

LORD NEAVES.—I adhere to the opinion I gave at the trial, on the grounds stated by your Lordship.

[822] The following interlocutor was pronounced:—"Disallow the exceptions: Find the pursuer liable in the expenses of discussing the bill of exceptions; allow an account," &c.

W. R. SKINNER, S.S.C.—PHILIP, LAING, & MONRO, W.S.—Agents.

No. 145. X. MACPHERSON, 822. 19 June 1872. 1st Div.—Lord Ormidale, B.

ALLAN BOAK, Pursuer.—*Sol.-Gen. Clark—Keir.*
ADAM BEATTIE AND JOHN KERR (William Boak's Trustees), Defenders.—*Millar—Burnet.*

Possession—Judicial Factor—Process—Incidental Procedure.—In an action raised by a person who had managed a business originally for behoof of testamentary trustees, against the trustees for declarator that the business had been sold to him by them, the Lord Ordinary found that the alleged sale had not been proved. Before a reclaiming note for the pursuer was disposed of the trustees presented a note in the action praying the Court to ordain the pursuer to give access to the premises and books to an accountant, in order that he might inspect the same, and take such measures in regard thereto, and such supervision of the business as he might consider necessary for the protection of the interests of the trust-estate.

The Court *refused* the note, on the ground that the trustees had acquiesced in the management for a considerable time, and that no ground was alleged for interfering with the interim possession.

William Boak, tanner, West Port, Edinburgh, died in 1855. After his death his trustees carried on his business under the powers contained in his trust-disposition and settlement, the truster's son, Allan Boak, being the manager of the business.

On 2d August 1871 Allan Boak raised this action against his father's trustees, concluding for declarator that they had sold to him the whole stock in trade, office furniture, and book debts and current bills of the said business, as at 16th December 1870, and agreed to give him a lease of the business premises, &c.; and that they were bound to execute a minute of sale, and deliver a lease, in terms of the said sale and agreement.

The pursuer averred that in virtue of the alleged sale and agreement he had entered on the possession of the stock, debts, and premises, on December 16, 1870, with consent of the trustees, and had since conducted the business on his own account.

The defenders denied the pursuer's statements, and explained that the pursuer had the entire management of the business and its funds before as well as since 16th December 1870, and that his relation to the business since that date had been only that of manager, as it was before.

Proof was led, in the course of which it appeared that the pursuer had carried on the business since December 1870 with a new set of books; that he had intimated to the bank with which the trustees had their accounts, and to various customers, that the business was transferred to him. It also appeared that the trustees had refused to sign an advertisement of the sale of the business, and in various ways had declined to recognise the alleged sale and agreement.

The Lord Ordinary, on 11th June 1872, found that the pursuer had failed to prove the sale and agreement libelled by him, and assoilzied the defenders.

The pursuer reclaimed.

In the course of the summer session of 1872, while the reclaiming note was standing in the roll, the defenders presented a note, in which they [823] stated that, as some time would probably elapse before the reclaiming note could be disposed of, they could no longer permit their business to be carried on under the uncontrolled management of the pursuer; and that they had accordingly authorised an accountant (Mr. Carter) to take such supervision of the trust-affairs as he might think necessary, but that the pursuer had intimated his resolution to oppose any such arrangement. They, therefore, craved the Lord President "to move the Court to ordain the pursuer, Allan Boak, to give the said Frederick Hayne Carter, as acting for them, access to the premises in West Port, and to the stock and business books therein, for the purpose of enabling him to inspect the same, and to take such measures in regard thereto, and such supervision of the business, as he may consider necessary for the protection of the interests of the trust-estate."

Argued for defenders;—The power of the Court to make the order craved was

clear; * and the circumstances of this case, where the pursuer had been acting entirely for his own interest, and the Lord Ordinary has found that he is only entitled to act as manager for the defenders, shewed a necessity for some such supervision as was exercised by the trustees before the dispute arose, and as was contemplated by the truster.

Argued for pursuer;—The application was not only vague and uncertain in its terms, but it was too late, as the defenders had not applied for the appointment of a factor when they first became aware of the footing on which the pursuer was conducting the business. The pursuer had conducted the business as manager for himself and the other parties interested ever since his father's death, and since the alleged sale; and it was contrary to principle and practice for the Court to interfere where there was no allegation of insolvency or emerging inability.

At advising,—

LORD PRESIDENT.—I am not prepared to say that a motion in a depending process, asking the Court to regulate the possession of the subject of competition, is incompetent. With regard to this particular note I doubt whether we could grant its prayer in the precise terms in which it is put, because it is too wide and indefinite. With regard to the merits there is no doubt. The action is for declarator that there was a completed sale of a business by the trustees of Mr. Boak to the pursuer. Last summer Mr. Allan Boak, the pursuer, distinctly gave the trustees to understand that he would regard the business as his. The trustees were content to let the business remain in his hands until the decision by a competent Court of the questions between them, having confidence, it may be presumed, in Mr. Boak's honesty and ability. If they had not been content to do so, that was the time to take measures to regulate interim possession. They chose, however, to take the other course. No change of circumstances has taken place since that time, except the judgment of the Lord Ordinary in their favour which is under review. No reason at all has been alleged for the course which it is proposed that we should take, and I think that the motion must be refused.

LORD DEAS.—I have no doubt at all that during the dependence of an action of this kind, and on good cause shewn, a judicial factor might quite competently be appointed upon a petition presented in the usual form. Such factor, as a responsible officer of Court, might quite well superintend such a business as this, so as to protect the defenders' interests. But whether what we are asked to do under this note, and by a mere incidental motion, could competently be done, I do not wish to say. I certainly never heard of such a form of proceeding, and no precedent or authority for it has been quoted to us. If it be competent at all, a very strong case indeed would require to be made out.

[824] It is not pretended that there is any Act of Sederunt or statutory authority giving us power to do what is craved.

I have an impression that there are enactments as to regulating interim possession, which rather indicate that they were thought necessary to enable the Court to interfere in any such way.

I am quite sure, at all events, that the Court never could have entertained an application made in such terms as are prayed for in this note, viz., "to move the Court to ordain the pursuer, Allan Boak, to give the said Frederick Hayne Carter, as acting for them, access to the premises in West Port, and to the stock and business books therein, for the purpose of enabling him to inspect the same, and to take such measures in regard thereto, and such supervision of the business, as he may consider necessary for the protection of the interests of the trust-estate."

The whole affair is to be committed to Mr. Carter, who is not to be an officer of Court at all, and who is to act on behalf of the defenders. I am not prepared to listen to such a proposal for a moment. Assuming that an incidental application might competently be made for a judicial manager, it would still be out of the question to do what is here asked. On the whole, I am not for granting this application; and upon the merits of this case I concur in the judgment proposed.

LORD ARDMILLAN.—We have before us no application for the appointment of a judicial factor, and, while that would be a perfectly competent proceeding, we have nothing of the kind here.

---

* Crichton v. Lady Keith, March 11, 1857, 19 D. 713.

I do not say that it would be incompetent in a case of very great emergency to apply to the Court, during the dependence of a going process, for an order of the Court to effect an interim arrangement, and regulate possession and temporary administration. But the circumstances which would justify such a step must be peculiar, and very rare, and the reason for interference would require to be of a very strong nature. In the present case there is no approach to such a state of affairs as could support a motion of this sort; and it would be out of the question to grant the prayer of this note.

LORD KINLOCH.—I agree with your Lordship in the chair, both as to the competency and the merits. It is quite competent for the Court to take measures for the regulation of possession in the course of a depending process, and their power is not confined to the appointment of a judicial factor. But on the merits the trustees have no case, after Mr. Boak being allowed by them to continue in possession of the business and premises, and no cause being now shewn for any change. The trustees do not ask a judicial factor. The application, as it was at last stated at the bar, came to be one for the appointment of a sort of judicial spy, the result of which would be no appreciable benefit, and only constant quarrels between him and the pursuer.

This interlocutor was pronounced:—"Having heard counsel on the note for the defenders, No. 562 of process, refuse the prayer thereof: Find the defender liable to the pursuer in the expenses occasioned by the said note," &c.

HENRY & SHIRESS, S.S.C.—G. & H. CAIRNS, W.S.—Agents.

No. 146. X. MACPHERSON, 824. 20 June 1872. 1st Div.—Lord Jerviswoode, B.

WILLIAM DUNCAN (Clerk to the City of Edinburgh Road Trust), Pursuer.—*Sol.-Gen. Clark—Shand.*

GEORGE COUSIN AND OTHERS, Defenders.—*Millar—Jameson.*

WILLIAM DUNCAN, Pursuer.—*Sol.-Gen. Clark—Shand.*

THE RIGHT HONOURABLE CHARLES HENRY ROLLE HEPBURN STUART FORBES TREFUSIS, BARON CLINTON AND SAYE, Defender.—*Watson—Lee.*

Assessment—Road—Edinburgh Roads and Streets Act, 1862 (25 *Vict. c.* 53, *secs.* 33, 34).—By the Edinburgh Roads and Streets Act the expense of making up, constructing, and causewaying private streets is laid upon "the owners [825] of lands and heritages, according and in proportion to the lineal frontage of the same," the proportion so leviable from the owners of buildings being assessed "on them as among themselves, according and in proportion to the annual rent or value of such buildings." *Held* that the owners of lands and heritages on one side of a street, which consisted of a single row of villas, the other side not being available for building purposes, were liable for the whole expense of making up, constructing, and causewaying such street.

This action was brought by William Duncan, clerk to the City of Edinburgh Road Trustees, suing under sec. 15 of the Edinburgh Roads and Streets Act, 1862 (25 Vict. c. 53, sec. 15), against George Cousin, Henry Graham Lawson, and the trustees of the deceased Andrew Jameson, who were proprietors of lands and heritages on the south side of Bruntsfield Terrace, Edinburgh, concluding against them respectively for the sums of £100, 11s. 4d., £45, 18s., and £45, 18s., with interest, as their proportions of the expense of making up and constructing the carriage-way of that street.

Bruntsfield Terrace was in 1866 a private street within the city of Edinburgh district of roads. In April 1866 it was not under the management of the road trustees, and it had not been made up and constructed by them, although it had been in use as an access to feus in Greenhill Gardens. The ground on the south side of it had all been feued out, and villas had been erected by the feuars, Mr. Cousin, Mr. Lawson,

Mr. Jameson, and Mrs. Cameron. Bruntsfield Links lay on the north side of Bruntsfield Terrace.

It is enacted by section 33 of the said Act that "in the case of such private streets as are or may be within the district, and as are not specified in scheldule (C) (annexed to the Act), where the carriage-way shall not have been made up and constructed, nothing herein contained shall be held or construed to confer any right on the trustees to compel the making up, constructing, and causewaying of any such street, until they have received intimation in writing from the superior that the said street is an open thoroughfare for public use, or until three-fourths of the intended houses in such street shall either have been erected or are in course of being erected, or the areas for such intended houses shall have been feued under an obligation to erect houses, or until the Sheriff, on an application by the trustees or any three or more persons assessed in virtue of this Act, setting forth the circumstances of the case, shall determine that it would be for the public advantage that any such street should be made up, constructed, and causewayed, but in any of these cases it shall be lawful for the trustees, and they shall be bound to require the owners of lands and heritages in any such streets to make up, construct, and causeway the same to the satisfaction of the surveyor or other officer of the trustees for the time being, by leaving within the dwelling-houses or other premises of such owners respectively a copy of a notice to that effect, which shall be deemed sufficient intimation to such owners; and if such owners shall fail or neglect within three months from and after the date of such notice to make up, construct, and causeway any such street as aforesaid, it shall be lawful for the trustees, and they shall be bound to make up, construct, and causeway such street in such way as to them may seem proper or necessary, and they shall levy the expense as the same shall be ascertained by an account under the hand of their surveyor, or other officer for the time, from such owners failing or neglecting as aforesaid, and shall recover the same in like manner as the assessment hereby authorised is appointed to be recovered, or otherwise according to law."

By section 34 of the Act it is enacted that "the expenses which may [826] be incurred by the trustees under the provisions of this Act, in making up, constructing, and causewaying the carriage-way of any private street within the district, or in executing repairs on the same, shall be assessed by the trustees on the owners of lands and heritages according and in proportion to the lineal frontage of the same, subject to this provision, that the proportion leviable, according to frontage, from the owners of such lands and heritages as consist of buildings, shall be assessed on them, as among themselves, according and in proportion to the annual rent or value of such buildings, and the trustees shall recover the amount of such expenses from such owners in the same manner as the assessment under this Act is authorised to be recovered, or otherwise according to law: Provided always that where such owners may not be the persons liable in the maintenance of the street, they shall be entitled to be relieved by the persons liable in the same from payment of such assessed expenses."

The interpretation clause of the statute defines owner to include "fiar, liferenter, feuar, or other person in the actual possession or receipt of the rents of lands and heritages, and the factor, agent, or commissioner of such person who draws the rents."

"Lands and heritages" are declared to bear the construction attached to them in the Valuation of Lands Act (17 & 18 Vict. c. 91).

In consequence of a requisition presented to them, the Road Trust served a statutory notice, dated 31st May 1866, on the said owners of lands and heritages in Bruntsfield Terrace, requiring them to make up and construct the carriage-way to the satisfaction of their surveyor, and intimating that the trustees would do so in terms of the statute if they should fail to make up and construct the carriage-way as aforesaid within three months. The defenders not having made up the road-way, that was done by the trustees, who assessed the expense upon the owners of lands and heritages in the street. Mrs. Cameron paid the amount assessed on her; but the defenders having refused to pay the sums allocated to them, this action was raised.

The defenders, who raised no question as to the amount of the expenses incurred, explained that they held villa feus under feu-contracts between the late Sir John Stuart Forbes and them or their authors, in which their feus were declared to be "bounded on the north by Bruntsfield Terrace," and in which they were taken bound to maintain a gravel footpath on the front or north side of their pieces of ground, and "to keep up and maintain one-half of the breadth of the public road along the

said front, except in so far as the same may hereafter be turnpike." This obligation they fulfilled till the date of the proceedings in 1866. the other half of the carriage-way until that date being maintained by Sir John S. Forbes and his successors. They averred further "that there are lands and heritages on the north side of Bruntsfield Terrace in which the defenders have no right of property, and the owners or owner of which have not been assessed along with the defenders for the expense of making up and constructing said carriage-way. The expense of making up the whole breadth of the carriage-way has been assessed as on the owners of the south side thereof alone, in contravention of the terms and intention of the statute libelled."

It appeared from statements and admissions on record that the street was separated from Bruntsfield Links, which is the property of the corporation of Edinburgh, on the north by a wall, the boundary of and built upon Sir John S. Forbes's property. This wall was removed in 1865 by the feuars in Bruntsfield Terrace, with the consent of the town council, and the site of it was thrown into the footpath on the north side, the kerbstone and hornized pavement now on the site of the wall having been [827] laid down by the defenders in April 1869. When the road was constructed there was a footpath on both sides. The contention of the defenders was that Sir John S. Forbes's representatives were owners of lands and heritages, and liable to assessment for the expense of making the street, in respect of the strip of land they were alleged to possess on the north side.

The pursuers pleaded;—The defenders, the said George Cousin and Henry Graham Lawson for themselves, and the defenders Neil Colquhoun Campbell, Richard James Hotchkis, and Andrew Jameson, trustees foresaid, and representing the deceased Andrew Jameson, the owners of said lands and heritages, being as such owners under the said statute, and in respect of the acts and proceedings above set forth, justly indebted in the sums sued for, the pursuer is entitled to decree in terms of the conclusions of the libel.

The defenders pleaded;—(1) The allocation of the assessment made by the road trustees for the expense of making up and constructing the carriage-way in Bruntsfield Terrace being unjust, and not having been made in conformity with the provisions of the Act, the defenders are not liable in the amounts sued for. (2) The defenders having all along been willing to pay the shares justly due by them respectively of the expense of making up and constructing the said carriage-way, and they not being indebted in the sums sued for, this action should be dismissed, and the defenders found entitled to expenses.

The Lord Ordinary pronounced this interlocutor:—"Finds that the defenders are proprietors, under their titles set forth on the record, of lands and heritages which are situated exclusively on the south side of the street called Bruntsfield Terrace, and are not proprietors either of the site of the wall which, as set forth in article 6 of the condescendence for the pursuer, formerly existed, and which ran immediately along the north side of a footpath constructed on the north side of the carriage-way of the said street (and which site now forms part of the said footpath); or of the lands situated immediately to the north of the site of said wall, which lands form part of Bruntsfield Links, the property of the corporation of Edinburgh: And, with reference to the foregoing finding, finds in point of law that the defenders are not liable in payment to the pursuer of more than their respective portions of one-half of the expense incurred by the City of Edinburgh Road Trust in making up and constructing the carriage-way of the said street, and allocated on the defenders, as set forth in the 7th article of said condescendence, or otherwise, in payment to the pursuer, as stated in answer 7 for the defenders, of more than 'such other sums as, under a computation, including all the lands and heritages in Bruntsfield Terrace, may be found to be assessable on them, in terms of the Edinburgh Roads and Streets Act, 1862': Therefore, and in respect that the defenders appear to have been all along ready and willing to pay such half, or such other sums as may be found to be assessable on them as aforesaid, dismisses the action, and decerns: Finds the pursuer liable to the defenders in expenses, of which allows an account," &c.

The pursuer reclaimed, and argued;—Bruntsfield Terrace had always been intended to consist of a row of houses on the south side only. No houses could be built on the north side in consequence of the public rights in the Links. Hence the feuars on the south side must be the only owners of lands and heritages in the street in the sense of the statute. Frontage was the test of liability for the expense

of constructing the carriage-way, and the only intelligible and reasonable meaning of that term was frontage available for building purposes. Assuming the feudal title of a strip of ground on the north side of the street to be in Sir John S. [828] Forbes and his representatives, the bare possession of such a strip, which could never be built on or have any pecuniary value, was not such ownership as to bring them within the scope of the statute.

The defenders argued;—A street must have two sides, and the land on the north side of Bruntsfield Terrace must be owned by some one. Nothing in the Act confined the meaning of the words "lands and heritages" to land built upon, or to land of a certain breadth. The lineal frontage of the land, apart from all questions as to its depth or character, was the simple and only practicable rule. A corner proprietor, for example, such as the defender Mr. Cousin was, had to pay his share of constructing two streets, according to his frontage in each. It was not the case that the owners of the strip on the north side could take no possible benefit from their property in it; for if the corporation should obtain an Act of Parliament enabling them to build on Bruntsfield Links, they would have a valuable right of frontage to Bruntsfield Place. If Sir John S. Forbes's representatives were not owners of the piece of ground in question, then the corporation of Edinburgh, proprietors of the Links, were owners of lands and heritages on the north side of the street, and as such liable in a share of the assessment. It was absurd to maintain that by possession of this narrow strip of ground Sir John Stuart Forbes's representatives were at once to be exempt from assessment themselves, and to relieve the corporation from liability, so as to throw the whole burden on the feuars on the south side.

On 22d February 1872, the Court (the Lord President being absent), before farther answer, allowed the pursuer, if so advised, to call the representatives of the late Sir John Stuart Forbes of Pitsligo, Baronet, as parties to the action, and with that view superseded other and further procedure, &c.

The pursuer accordingly raised an action against Lord Clinton and Saye, the husband and representative of the deceased Lady Clinton, only daughter of Sir John S. Forbes, who had succeeded to the property of Greenhill on 28th May 1866 and died on 4th July 1869. This action concluded that it should be conjoined with the former action, and that, in the event of the pursuer failing to obtain decree in the former action, Lord Clinton should be decerned to make payment to him of £96, 3s. 8d. being one-half of the sums concluded for against the defenders in that action.

Lord Clinton lodged defences, in which he pleaded, *inter alia*;—(1) The pursuer is not entitled to recover any part of the alleged expenses from the defender, in respect that Lady Clinton was not assessed or assessable by the trustees in any proportion thereof, and that the same were incurred without any notice to her. (2) The pursuer is not entitled to recover any part of the alleged expenses from the defender, in respect that he is not, within the meaning of the statute libelled, owner or representative of an owner of lands and heritages having frontage to the street in question, and assessable in proportion to such frontage.

The Lord Ordinary reported this action to the First Division, and the debate was resumed.

At advising,—

LORD PRESIDENT.—It is not disputed that Bruntsfield Terrace is a private street in the sense of the Edinburgh Roads and Streets Act, and that it is within the Edinburgh district of roads. The carriage-way was not made when the proceedings of the pursuers commenced, but the whole properties on the south side of it were feued and built on. These lots were owned by four parties, three of whom were defenders in the original action, the other not being called because she did not resist the pursuer's claim. It appears to me that Bruntsfield Terrace was feued and built on the footing that it was to be a one-sided street,—in other [829] words, not a street but a terrace. The ground on the other side of the roadway is Bruntsfield Links, which is the property of the corporation of Edinburgh, subject to certain public uses, and which presumably cannot be built on. That presumption is strengthened by the grounds of judgment stated in the case of the Magistrates of Edinburgh *v.* Warrender, 5th June 1863, 1 Macph. 887. But it is said that between the Links and the carriage-way there intervenes, first of all, a wall originally built by Sir John Stuart Forbes, the superior from whom the defenders hold their feus, on the verge of his ground, and within that a footpath on the side of the carriage-way; and that the site of the old wall,

which is now pulled down, and the footpath, are still the property of Sir John S. Forbes's representatives; because the feus of the defenders are bounded on the north by Bruntsfield Terrace. It is said that the feuars are not concerned with the footpath, and are not entitled to insist on its being maintained. It is not very easy for them to maintain this, seeing that they themselves perfected this footpath, supplying it with a kerbstone. In this state of circumstances a requisition was presented to the road trustees in 1866 by the owners of feus in the neighbourhood calling on them to require the owners of lands and heritages in Bruntsfield Terrace to make up the street in terms of section 33 of the Act. The trustees proceeded to act on this notice, and did give intimation to the three defenders and to Mrs. Cameron, as being the only owners of lands and heritages in Bruntsfield Terrace within the meaning of the Act. Mrs. Cameron paid the sum allocated on her, but the others resisted, on the ground that they are not the only owners within the street, but that there is another owner on the other side.

Such was the nature of the question in the original action. The defenders only averred generally that there was another owner—they did not say who he was, nor give any satisfactory account of the property on the other side of the street. The consequence was that, after some discussion, the Court ordered the representatives of the late Sir John Stuart Forbes to be called.

We have, in the first place, to consider whether the original defenders and Mrs. Cameron are or are not the only owners in the street within the meaning of section 33. I am of opinion that they are. The 33d section itself provides that, in the case of private streets, with certain exceptions, where the carriage-way shall not have been made up, the trustees are not to be entitled to compel the making up of such street, until certain things have occurred, viz., "until they have received intimation in writing from the superior that the said street is an open thoroughfare for public use, or until three-fourths of the intended houses in such street shall either have been erected or are in course of being erected, or the area for such intended houses shall have been feued under an obligation to erect houses," or the Sheriff on application shall determine that such street ought to be made. But when any of these events occurs, "it shall be lawful for the said trustees, and they shall be bound to require the owners of lands and heritages in any such streets to make up, construct, and causeway the same to the satisfaction of the surveyor of the trustees," &c., and "if such owners shall fail or neglect, within three months after notice, to make up, construct, and causeway any such street as aforesaid," the trustees are to do so at the expense of the owners failing or neglecting as aforesaid. Then the 34th section provides that the expenses so incurred shall be assessed on the owners of lands and heritages according to the lineal frontage of the same, subject to a certain provision.

I think that the question turns very much on the construction of these two clauses, and it appears to me that "the owners of lands and heritages" does not mean substantially owners of building stances in the street. I do not mean by "building stances" stances built upon, or which necessarily will be built upon, but stances fitted for building purposes, and therefore forming part of the street. The definition of the word "owner" by the interpretation clause of the Roads and Streets Act is, that it "shall include fiar, liferenter, feuar, or other person in the actual possession or receipt of the rents of tenements, lands, and heritages, and the factor, agent, or commissioner of such person who shall draw the rents." And the words "lands and heritages," it is said, "shall bear the construction attached to them in the Act of 17 & 18 Vict., 'for the valuation of lands and heritages in Scotland.'" With regard to the construction of the Valuation Act, [830] we are quite familiar with it, and know that the lands and heritages dealt with throughout that Act are subjects which are capable of bearing an annual value, and that it is the owners of subjects that are capable of bearing an annual value that are owners in the sense of that Act. Are there any persons who are owners in this sense in the present case except the defenders and Mrs. Cameron? Yes, say the defenders, the owners of the site of the old wall are so. Now, is it possible to say that the owner of the site of this old wall is the owner of a subject which is capable of bearing an annual value? Surely it is not a tenable proposition that a person who, by an accident of conveyancing, happens to have the site of such an old wall left vested in him is an owner in this sense. I am of opinion that the expense of making the street must fall on the proprietors on the south side of the street, and the result will be that the pursuer must

have decree in terms of the conclusions of the first action, and that Lord Clinton must be assoilzied in the second action.

But another question remains, viz., whether the pursuers ought not to be relieved by the defenders of the expenses which they will have to pay to Lord Clinton. I have no doubt that they must be so relieved, because it was in consequence of the untenable defence set up by the defenders that it became necessary to call Lord Clinton.

LORD DEAS.—This action was brought for the behoof of the road trustees, to recover from these defenders their alleged proportions of the expense of forming the carriage-way in front of Bruntsfield Terrace, and it is laid substantially on the 34th section of the Act 25 Vict. c. 53. That section provides, that the expense incurred by the trustees in forming the carriage-way of any private street "shall be assessed by the trustees on the owners of lands and heritages, according and in proportion to the lineal frontage of the same." The terrace, as your Lordship has explained, consists of houses built by the defenders upon one side of the street only. The whole defence maintained against the action is that the present defenders are not the only parties liable, there being owners or an owner on the north side liable in a proportion of these expenses. This defence is embodied in the answer to article 6th of the condescendence, which is as follows:—"Explained further, that there are lands and heritages on the north side of Bruntsfield Terrace, in which the defenders have no right of property, and the owners or owner of which have not been assessed along with the defenders for the expense of making up and constructing said carriage-way. The expense of making up the whole breadth of the carriage-way has been assessed as on the owners of the south side thereof alone, in contravention of the terms and intention of the statute libelled. Admitted that there are footpaths on each side of the carriage-way. Explained that before the wall mentioned was removed there was access to the carriage-way in Bruntsfield Terrace from the Links through a slap in the wall at the east end thereof. Explained that the said wall was removed by the defenders, with leave asked and obtained from the town council, and that it was so removed as being a nuisance to the neighbourhood. Not known to whom the site of said wall belongs." That is the whole defence. I am not prepared to say that nothing could be said in support of that defence; a great deal has been said for it both in the Outer-House and here, and it was successful before the Lord Ordinary, who decided on that ground alone.

When the original case came here, it was apparent, on the opening speech, that the whole question came to be whether the representatives of Sir John Stuart Forbes were liable for a share of the expense. It thus became pretty evident that the party who was said to be liable along with the defenders, and whose liability was being discussed, was not before the Court; and so the interlocutor of 22d February 1872 was pronounced, allowing the pursuer, if so advised, to call the representatives of Sir John Stuart Forbes. They were the only other parties truly interested, and they alone could explain to us how the matter stood upon the state of the titles. We have now accordingly had the whole matter discussed. The result I come to is different from that arrived at by the Lord Ordinary, and agrees with that expressed by your Lordship.

Although the place here in dispute is called a terrace, there can be no doubt [831] that it is truly a street in the sense of the statute. It is quite true, as has been said, that a street must have two sides,—every piece of ground must have two sides,—but it does not follow that there must be a row of houses on each side. Princes Street of Edinburgh is not an unimportant street, and it is only built upon on one side. That this is a street in the sense of the statute I have no doubt, and the true question is, who are owners of lands and heritages in this street? I am not disposed to rest much upon the definition in the Valuation Act of lands and heritages, as if it were necessary that they should yield annual fruits to the proprietor. But it is conclusive to my mind that the parties are to be liable in proportion to their lineal frontage. What is lineal frontage? In this city, lineal frontage means frontage of houses built or intended to be built in a particular line. In that sense it is familiarly used in fixing feu-duties, &c., at the rate of so much per foot of lineal frontage. It is plain to my mind that that is the sense in which "lineal frontage" is used here, and that brings me to the conclusion that the only parties liable for this expense are the defenders in the original action.

With regard to the expenses of bringing Lord Clinton into the field, I am of opinion with your Lordship that the trustees ought to be relieved of these expenses, which were caused entirely by the nature of the defence set up. I think those who caused that expense should be held liable for it.

LORD ARDMILLAN.—I was much impressed by the argument for the defenders when this case was first before us. The manner in which the question was raised on this record, and by both parties, made it necessary and right that the representatives of Sir John Stuart Forbes should be brought into Court as being the only parties able to give information as to the state and extent of the strip of ground lying between the roadway and the Links.

It is plain that when Bruntsfield Terrace was first planned and designed it was not intended to have houses upon the opposite side of the street; the Links were on the opposite side, and were public property, or dedicated to public uses. I think your Lordship most correctly says that it must now be held that the outstanding intention of parties was that no house should be built on the Links. In that case I think that, in the true meaning of the statute, owners of lands and heritages in the street must mean owners of houses built in the street, and owners of stances laid out for building houses, and thirdly, owners of lands fitted for building purposes, or, at all events, owners of lands which might legitimately, and in accordance with the plan and design, be so used for building purposes. I think the only owners of lands and heritages in the street, in the sense of any one of these categories, are the original defenders here. It seems to me that the use of the expression "lineal frontage" in the statute, as pointed out by Lord Deas, is very important. It is not necessary that the houses should be built, but it must be possible for them to be built.

The wording of the 34th section supports this view. The expression there is strong enough to extend the obligation for these expenses to the owners of land, without existing buildings on account of the lineal frontage of such land, but it cannot be said that all land is within this section, even though it be land on which houses are not built or meant to be built, or on which it was not lawful or possible to build houses. It cannot at present be said of any other lands and heritages in this street than those of these defenders that they are built on, or meant to be built on, or on which building is possible. It can certainly not be said of the narrow piece of ground belonging to Lord Clinton, nor of the Links.

I am of opinion that the interlocutor of the Lord Ordinary should be altered as is now proposed. Upon the point as to the expenses of bringing Lord Clinton here, I must hold that it was necessary to call him, in respect of the nature of the statements and pleas in defence which these defenders maintained; and therefore they must be liable to relieve the pursuer of that expense.

LORD KINLOCH.—I have arrived at the same conclusion. The question substantially in issue is, whether the defenders, Cousin and others, feuars on the south side of Bruntsfield Terrace, are alone, in the sense of the statute, the owners [832] of lands and heritages along and having frontage to the street, or whether these also comprehended the representatives of Sir John Stuart Forbes, as holding that character on the other or north side. Admittedly, these have no property on the north side except the site of an old wall and the ground devoted to form a footway on that side of the street. On a reasonable construction of the statute, I conceive these not to fall within the category of owners liable in the expense of forming the street. Their ground is neither occupied by buildings nor in a position to be so. It is a mere nominal stripe. They cannot have such use of the street as the statute contemplated in the case of owners along its line. I think the reason of the statute is altogether against their being made liable for the expense of the street. Nor does this operate any injustice against the feuars in the existing circumstances. The effect of the wall (or its maintained site) and the interjected footway is to prevent the proprietor behind them to the north from claiming the right of frontage to the street, and so substantially to give the street the character of being built on upon one side only,—in other words, the character of a terrace,—and to preserve to the feuars on the south side the resulting advantages of better air and pleasanter view. I perceive no sufficient ground on which the feuars on the south side can escape the entire liability for the expense for forming the street.

I concur with your Lordship in the chair as to the mode in which the case should be disposed of, and also on the subject of expenses.

This interlocutor was pronounced :—" The Lords having resumed consideration of the reclaiming note for the pursuer against Lord Jerviswoode's interlocutor of date 23d November 1871, and heard counsel on the closed record and productions, and also on the closed record in the supplementary action at the instance of the pursuer William Duncan, as clerk to the City of Edinburgh Road Trust, against Lord Clinton, conjoin with this action the said supplementary action : Recall the interlocutor of the Lord Ordinary reclaimed against : Decern against the defenders in the original action in terms of the conclusions of the libel : Assoilzie the defender Lord Clinton, and decern : Find the pursuer liable in expenses to the defender Lord Clinton : Find the defenders in the original action liable to the pursuer in expenses in the said original and supplementary actions and in the conjoined actions, and also liable to relieve the pursuer of the expenses in which he has been found liable to the defender Lord Clinton : Allow accounts," &c.

WILLIAM ARCHIBALD, S.S.C.—JOHN AULD, W.S.—MACKENZIE & KERMACK, W.S.—Agents.

No. 147. X. MACPHERSON, 832. 21 June 1872. 1st Div.—Sheriff of Aberdeenshire, M.

GEORGE LIGERTWOOD, Pursuer.—*Scott.*
JOHN BROWN, Defender.—*Jameson.*

Prescription, Triennial—Act 1579, *c.* 83—*Aliment—Parent and Child.*—The triennial prescription applies to a claim against a father for aliment afforded to his child under an implied contract.

George Ligertwood brought this action in the Sheriff-court of Aberdeenshire against John Brown for £26, " being the amount of aliment due to the pursuer by the defender, after deducting payments to account, for aliment and maintenance of a female child of which the defender was the father, from 19th September 1851 to 24th June 1860, when the child arrived at the age of ten years," together with interest on the arrears of aliment. An account was annexed to the summons shewing that payments had been made to account by the defender at various dates from November 2, 1852 to July 11, 1858.

[833] The defender, *inter alia*, pleaded the triennial prescription.

In a minute of defence, the defender stated " that the defence was a denial of being due the sums sued for, and prescription. That the defender never contracted with the pursuer to keep the child in question, and never agreed to pay him for doing so, but, on the contrary, arranged, in manner after mentioned, to keep the child himself after it should have attained the age of seven years, and that after the child had attained that age the defender was prevented from getting the custody of the child through the pursuer and his wife refusing to give it up, in consequence of having contracted an affection for the child. That the pursuer, even although the alleged claim should not be prescribed, having allowed eleven years to elapse without any intimation of his claim, or demanding payment of it, is now barred by *mora* from pursuing it, and more especially from interest on it. Explained that shortly after the birth of the child, Ann Lewas, its mother, applied to the deceased George Melvin, then inspector of poor of the parish of Tarves, who made an application to the defender for aliment of the child. That in consequence of the defender having at the time two other illegitimate children to support, and being then in poor circumstances, Mr. Melvin agreed with him that he should pay for the child at the rate of £2 sterling per annum till it should attain seven years, and then take the child and maintain it himself. That in terms of said agreement the defender did pay either to the mother of the child, or to those authorised by her, to the extent of £14, and on the expiry of the seven years repeatedly expressed his willingness to receive and maintain the child, but that the pursuer and his wife always declined to part with the child. That from the time the child attained seven years till Whitsunday 1871, being a period

of nearly fifteen years or so, the defender never received any intimation of any claim beyond the original period agreed on, and it is entirely an afterthought on the part of the pursuers, with whom the defender has nothing to do."

The Sheriff-substitute (Dove Wilson) sustained the plea of prescription, and assoilzied the defender.*

The Sheriff (Guthrie Smith) dismissed an appeal, and affirmed the Sheriff-substitute's interlocutor.†

The pursuer appealed to the Court of Session, and argued;—The child was left with the pursuer and his wife in circumstances in which they had no option but to aliment it; and that being so, the triennial prescription did not apply. This was not a claim arising from contract, for it was the defender's own case that there was no contract, but merely a claim arising from the fact of the pursuer's having alimented the child, [834] of which he was the father.‡ It was settled that claims by the mother against the father of a bastard child for arrears of its aliment do not fall under the statutory prescription.§ So also it was decided with regard to the aliment of a minor.‖ The case of MacDowall *v.* M'Lurg, February 19, 1807, F. C., and Mor. "Prescription," App. 6, in which it was held that the triennial prescription did not exclude a claim for aliment advanced by the maternal grandfather of a bastard with whom it had been left, was exactly similar to the present case.

The defender referred to the undernoted authorities.¶

At advising,—

LORD ARDMILLAN.—The question raised here in regard to the application of the triennial prescription or limitation of action is one of some interest, and not without difficulty. I had occasion to consider this same question in the case of Taylor *v.* Allardyce, January 16, 1858, 20 D. p. 401; and having now heard it again fully argued, I am confirmed in the opinion which I then expressed.

This action is brought in the Sheriff-court of Aberdeenshire for payment to the pursuer of sums advanced by him for aliment and maintenance of an illegitimate child, said to be, and not denied to be, a child of the defender. The defender maintains the plea of triennial prescription, in respect that the period during which the advances are said to have been made is stated in the summons as from 19th September 1851 to 24th June 1860.

The first question to be disposed of in dealing with the plea of prescription is, on what footing is it alleged that these advances were made? The application of the statute must depend on the pursuer's averments.

The pursuer was under no natural obligation to support the child. The advances

---

* "NOTE.—The claim founded on is, in a question between the pursuer and the defender, merely an ordinary claim for board. Whatever may be the case in a question between the pursuer and the minor, or between the minor's mother and the defender, the pursuer has no claim against the defender, except what he could maintain on contract, express or implied. The case therefore falls under the triennial prescription—Taylor *v.* Allardyce, January 16, 1858, 20 D. 401."

† "NOTE.—When the aliment is furnished to a minor by a stranger, without paction—for instance, a foundling, or a child deserted by its parents—the case does not fall under the triennial prescription, it being of the nature of a *negotiorum gestio*, for which a claim lies whenever the true debtor can be found; but in this case the child was apparently taken charge of by the pursuer under an arrangement to which one or other of the parents was a party, for the summons gives credit for periodical payments made to account of aliment for a long series of years. The case founded on by the Sheriff-substitute therefore applies, and the plea of prescription has been properly sustained."

‡ Matheson, December 23, 1831, 4 Jur. 212 (10 S. 183).

§ Thom *v.* Jardine, June 24, 1836, 14 S. 1004 (*per* Lord Fullerton), and cases in Dickson on Evid. sec. 480.

‖ Davidson *v.* Watson, M. 1107.

¶ L. Ludquharn *v.* L. Gight, 1695, M. 11,425; Barclay *v.* Bervy, 1700, 4 B. Sup. 491; MacDowall *v.* M'Lurg, *cit.*; Davidson *v.* Watson, *cit.*; Arbuthnot *v.* Symon, May 15, 1834, 15 S. 590; Thom *v.* Jardine, *cit.*; Butchart *v.* Scott, June 28, 1839, 1 D. 1128; Thomson *v.* Westwood, February 26, 1842, 4 D. 833; Taylor *v.* Allardyce, January 16, 1858, 20 D. 401.

were not made *ex debito naturali*, nor were the advances made as a donation, or out of mere charity. Then it is stated in the summons that payments were made by the defender to account, and the action is brought for the amount of advance under deduction of such payments. Looking to these circumstances appearing on the face of the summons, it appears to me clear that the obligation on the part of the defender, which the pursuer alleges, and is seeking to enforce, must be viewed as arising *ex contractu*, if arising at all. It is in this that we perceive the distinction between an action for aliment of an illegitimate child brought by the mother against the alleged father, and such an action as the present, brought by a party who alleges that he made advances to support the child. The action at the mother's instance is for rateable or proportional contribution, and against such an action the plea of triennial prescription cannot be urged. This is settled. Then the advance of aliment to a child, where the father is not known, may be of the nature of *negotiorum gestio*. But this action can have no other foundation than contract, express or implied.

I think it is quite settled that the triennial prescription introduced by the Act 1579, cap. 83, is applicable to an action for repayment of aliment, whether the aliment be advanced to the defender, or to the defender's child or other relative, if only it has been advanced on contract, express (but not written) or implied, with the defender. This was my opinion in the case of Taylor *v.* Allardyce, and I adhere to that opinion, and need not again repeat the citation of authorities which I then made, and which I have reconsidered. If this pursuer did not make these advances on any contract, express or implied, with the [835] defender, he can have no action against the defender; for he has alleged no other foundation for his action than an arrangement, or, in other words, a contract. If he did make the advances under contract (not written), express or implied, with the defender, then the limitation of the statute applies. The claim by the mother is clearly distinguishable. There is not here, as the Sheriff points out, a *negotiorum gestio*. There is here no charitable advance for a deserted child, when the father was unknown, and is subsequently discovered. The case here is plainly stated as one of arrangement or contract creating consensual liability. After the lapse of ten years from the last date of the alleged advances it seems to me impossible to exclude the application of the triennial prescription.

The effect of the statute is just to limit the mode of proof, and the pursuer, having no other ground of action but contract, must be limited to that mode of proof which the statute permits.

I think that the Sheriff has rightly disposed of the case, and on the right ground.

Lord Deas concurred.

Lord Kinloch.—The present action has been brought for payment of a sum of £26, alleged to be due, with interest, to the pursuer by the defender, for aliment supplied from 19th September 1851 to a natural child of whom the defender is father. The amount is concluded for against the defender, as the summons expressly bears, "after giving deduction for the payments made by him to account." In the account annexed to the summons these payments to account are set forth, and they run over a period of years from 1851 to 1858. One payment was made in 1852, two in 1853, two in 1854, one in 1855, one in 1856, two in 1858.

It is thus shewn by the pursuer's own summons that the aliment was afforded to the defender's child on full communication with the defender, and with his acquiescence and consent. The alimentary debt, if due at all, must be held due on implied contract with the defender. For if a man knows that another is supplying aliment to his natural child, sanctions his doing so, and makes payments from time to time to account, he must be held, by implication, to have contracted to pay the amount agreed on, or, if no amount has been agreed on, a fair and reasonable sum for aliment.

The question now arises whether the triennial prescription of the Act 1579, c. 83, is applicable to this claim.

The statute, by its express terms, makes the prescription applicable to "men's ordinars, and other the like debts, that are not founded on written obligations." It has been determined by a series of decisions that under this description are comprehended alimentary debts generally, at least such as arise out of contract, express or implied. The terms employed in the statute would seem to point primarily at tavern bills, and the like. But the reason of the case extended the doctrine to the case of all aliment, however or by whomsoever supplied. The debt thus incurred

is just such as may be reasonably presumed settled periodically as incurred, and as to which formal vouchers of payment might often not be taken. It was thus just one of the debts which the statute had especially in view. Without referring to more ancient cases, I may instance that of Thomson *v.* Lord Duncan, December 13, 1808, Hume, p. 466, where the prescription was applied to a claim by the master of an academy for the board of a son of Lord Duncan, placed by his father in his charge, and where, as here, Lord Duncan had made partial payments from time to time, leaving an alleged balance due at his death. In the case mentioned by the Sheriff, of Taylor *v.* Allardyce, January 16, 1858, 20 D. 401, Lord Ardmillan, applying, and I think rightly applying, the previous decisions, found the prescription applicable where the claim was by a teacher of an industrial school for the aliment of a daughter placed in the school by her father. It is scarcely necessary to say that if the prescription applies to aliment furnished to a man's self, it must equally apply to aliment furnished to his child on his contract, express or implied. So these decisions found.

This consideration appears to me to be sufficient for the decision of the present [836] case, for the aliment, as I view it, was supplied to the defender's child, on his implied contract with the defender, and so was an alimentary debt due by the defender on contract. If the aliment had been supplied to the defender himself I cannot doubt of the claim being exposed to the operation of the triennial prescription. But that it was supplied to the defender's child makes no difference in principle.

This conclusion is not affected by the circumstance that various cases appear in the books, in which the claims by the mother of a natural child against the father have been found not affectable by the triennial prescription. It was so decided in, amongst other cases, Thom *v.* Jardine, June 24, 1836, 14 S. 1004, and Thomson *v.* Westwood, February 26, 1842, 4 D. 833. But in such cases the claim is not properly a claim by a creditor in an alimentary debt. It is a claim of relief by one against another of two parties, both of whom are liable to aliment their common child. The mother, as much as the father, is liable for such aliment; and in her action against him she concludes for the excess beyond her proper share. The debt, therefore, does not come within the category of an alimentary debt, but within the wholly different category of a claim of relief from payment of what is another party's debt. To such a claim the triennial prescription does not apply. None of the reasons on which the triennial prescription rests are applicable to the case. Suppose that a third party pays to the mother the father's share of aliment, and then sues the father for relief of the sum so paid, it is admitted that in such a case the triennial prescription could not be set up against the claim. But it is as little applicable to the claim of relief insisted in by the mother herself.

Another class of cases appears on the books, which is perhaps open to more controversy. One of these is the case of MacDowall *v.* M'Lurg, February 19, 1807, M. App., "Prescription," No. 6, in which aliment was afforded, without contract, to a natural child whose father had left the country and gone to Jamaica, and the plea of the triennial prescription was repelled. Another is a prior case of Davidson *v.* Watson, November 16, 1739, Mor. 11,077, in which a stepfather had alimented a child of his wife's by her previous husband; and although the plea of the triennial prescription stated by her heir was sustained by this Court, the judgment was reversed on appeal. A third, of a somewhat similar character, though involved in specialties, is Butchart *v.* Scott, June 28, 1839, 1 D. 1128. From these cases some have been disposed to draw the general conclusion that wherever no contract, express or implied, has intervened, but aliment is pursued for as arising *ex debito naturali*, and as supplied in the character of *negotiorum gestor*, the triennial prescription is inapplicable. I do not think the Court now called on absolutely to decide the question. It appears very consistent with equity that prescription should not hold good where the debtor is out of the country, or is a child; but I am not aware that any limitation on that account has been sanctioned by the law. There are many reasons why, if the father be well known, and within reach, a claim *ex debito naturali* should be prosecuted as expeditiously as where it lies on contract, and the same prescription should apply. But the present is different from all such cases. The claim lies, as I think, on clearly implied contract. And, whatever may be held in these other cases, I think the law in the present case applies the triennial prescription.

I am therefore of opinion that the judgment of the Sheriff is right, and ought

to be affirmed. But he is perhaps precipitate in *de plano* pronouncing judgment of absolvitor. The prescription only operated *quoad modum probandi*, and to exclude parole evidence, and the pursuer should have the opportunity of making good his claim by writ or oath.

The LORD PRESIDENT concurred.

THE COURT refused the appeal, and remitted to the Sheriff to sustain a reference to oath if tendered.

WM. SCOTT STUART, S.S.C.—JOHN AULD, W.S.—Agents.

No. 148. X. MACPHERSON, 837. 21 June 1872. 1st Div.—Lord Ormidale, B.

JANE ANN FRASER, Pursuer.—*Sol.-Gen. Clark—Balfour.*
WILLIAM WALKER, Defender.—*Macdonald—Lancaster.*

Husband and Wife—Dissolution of Marriage—Decree of Divorce—Goods in Communion.—In conjoined actions of divorce on the ground of adultery decree was pronounced finding both husband and wife guilty of adultery, and divorcing each from the other, with a reservation of the effect of the decree upon the patrimonial rights of the parties. Thereafter the divorced wife, who had no separate estate, sued her former husband for "one-half of the goods in communion" as at the date of the decree of divorce. *Held* that this claim was untenable, the spouses having mutually forfeited all rights arising out of the marriage.

Question how far the law now recognises a communion of goods between husband and wife.

In conjoined actions of divorce on the ground of adultery at the instance of William Walker, manufacturer, residing at Murrayfield, against Jane Ann Fraser or Walker, his wife, and at her instance against him, the Court, on 23d June 1871, pronounced decree * finding both parties guilty of adultery, and divorcing each from the other, but "reserving in the meantime the effect of the above findings and decrees on the patrimonial rights of the parties respectively," and remitting to the Lord Ordinary to dispose of the remaining conclusions of the action at Mrs. Walker's instance against her husband, the object of which was to enforce implement of the provisions in her favour contained in a postnuptial contract of marriage between the parties. In place of insisting in this claim, however, she raised a supplementary action against Walker, concluding to have it found that in the event of her not establishing her claim to her conventional provisions under the postnuptial contract, she should be found entitled to terce, and also to her *jus relictæ*, as at the date when the marriage was dissolved by the decree of divorce. The claim for *jus relictæ* was subsequently altered by substituting the words "one-half of the goods in communion" between the parties at the dissolution of the marriage.

The pursuer averred (Cond. art. 12) that "the defender, at the date of the said decree of divorce, was proprietor of and infeft in heritable property of the value of £3500, the annual value of which, after deduction of all burdens, is not less than £250, the third part of which will fall to the pursuer as her interest in the heritage belonging to the defender, in the event of her not obtaining decree affirming her right to her conventional provisions under the said postnuptial contract of 4th August 1853, as concluded for in the said action at her instance. The defender was further, at the date of the said decree of divorce, possessed of moveable estate to the extent of £10,000, one-half whereof, or £5000, will in the like event be payable to the pursuer as her share of the goods in communion."

The pursuer pleaded;—(2) The pursuer having obtained decree of divorce against the defender is entitled to her legal rights out of his estate, in the same way as if he were naturally dead, failing her obtaining decree for the conventional provisions secured to her in the said postnuptial contract. (4) In respect that the society con-

---

* *Ante*, vol. ix. p. 1091.

stituted by the marriage between the pursuer and defender has been dissolved, the pursuer is entitled to a half of the goods which were in communion between her and the defender during the marriage.

The defender pleaded;—(1) The pursuer has no title to sue. (2) The pursuer's averments are irrelevant, and insufficient to support the conclu-[838]-sions of the action. (3) The pursuer, having been divorced from the defender on the ground of her adultery, has no claim against him either legal or conventional. (8) The pursuer having had no estate of her own at the date of the marriage, and not having brought anything to the common purse by acquisition or otherwise during the subsistence of the marriage, has no valid claim against the defender, either for terce, *jus relictæ*, or otherwise.

The Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having considered the argument and proceedings in the action at the instance of Mrs. Jane Ann Fraser against her late husband, William Walker, and in the conjoined counter actions of divorce between these parties, conjoins the first-mentioned action with said conjoined actions of divorce: Assoilzies the defender, William Walker, from the conclusions of the summons against him in said conjoined actions of divorce, so far as not formerly disposed of; also assoilzies Mr. Walker, the defender, in the first-mentioned action at Mrs. Fraser's instance, from the whole conclusions thereof, and decerns: And in regard to the summons of divorce at the instance of Mr. Walker against Mrs. Fraser (being one of the said conjoined actions of divorce), in respect that the whole conclusions thereof were disposed of by interlocutor of the First Division of 23d June 1871, finds that no further decree can be pronounced therein: Finds neither party entitled to expenses, the one against the other, in any of said actions, so far as not already found due." *

---

* "NOTE.—In the counter actions referred to the parties—husband as well as wife—were, by interlocutor of the First Division of the Court, of date the 23d of June last, found guilty of adultery, and on that ground divorced, under a reservation of the effect of such divorces 'on the patrimonial rights of the parties respectively'; and, by the same interlocutor, the conjoined counter actions of divorce were remitted to the Lord Ordinary 'to dispose of the remaining conclusions of the summons' at the instance of Mrs. Fraser against Mr. Walker—there having been no conclusion, except for divorce, in the summons at the instance of Mr. Walker.

"The remaining conclusions in the summons of divorce at the instance of Mrs. Fraser have for their object to enforce implement against Mr. Walker, her late husband, of the conventional provisions constituted in her favour by a postnuptial contract of marriage; and, in her other action, now conjoined with the actions of divorce, Mrs. Fraser concludes against Mr. Walker that, in the event of her not being found entitled to implement of her conventional provisions, she should be found entitled to payment and satisfaction of her legal rights of terce and *jus relictæ*, or one-half of the goods in communion between her and the defender at the date of the divorce. The defender, Mr. Walker, pleads in defence to these conclusions, that the pursuer, having been divorced from him on the ground of her adultery, has no claim against him either legal or conventional; and he pleads specially, in defence to the pursuer's conclusions for implement of her conventional provisions, that the postnuptial contract on which she founds her right to these provisions having been revoked by him during the subsistence of the marriage, her claim in respect thereof is without any foundation or warrant.

"At the debate the pursuer, Mrs. Fraser's, counsel did not attempt to support her claim to the alleged conventional provisions, but, on the contrary, stated that she did not insist for these provisions, explaining that the conclusion for them had been inserted in the summons merely to meet the contingency of the defender pleading, which he had not done, that her claim to her legal provisions was excluded by her conventional ones.

"In this state of matters the controversy has turned entirely on the question whether the pursuer has, in the circumstances, any maintainable claim to her legal right of terce and *jus relictæ*, or whether that claim is not barred and excluded by the decree of divorce which has been pronounced against her on the [839] ground of her adultery? That this is a new question, and not hitherto the subject of judicial determination, except by Lord Mure in the case of Donald v. Fraser and Others, as

[839] The pursuer reclaimed, and, in support of her claim for one-half of the "goods in communion," maintained the argument and cited the authori-[840]-ties founded

afterwards noticed, was admitted on both sides; and that it is one of considerable difficulty cannot, the Lord Ordinary thinks, be well disputed.

"Where a marriage has been dissolved by divorce, in respect of the adultery of one of the parties, the rule of law, generally stated, is well established, to the effect that the innocent party has the benefit of all rights accruing through the marriage, whether conventional or legal, just as if the other party were naturally dead; while the latter, that is, the offending party, forfeits all benefit accruing through the marriage. It is only just and reasonable that this should be so,—that is to say, that the party by whose delict the marriage was dissolved should alone suffer in regard to patrimonial rights, and that the innocent party should be saved and protected as far as possible from pecuniary loss, occasioned by no fault of that party. This rule, however, is difficult of application in such a case as the present, where the contract has been broken, and the marriage dissolved, through the misconduct equally of both parties. To hold, in such a case, that an exact count and reckoning should take place, so that each of the guilty parties may be dealt with as they stood when the marriage was entered into, is plainly an inadmissible course, incapable of extrication, and inconsistent alike with authority and principle. Accordingly, it was not maintained by either party that any such course could be adopted. Neither was it maintained on either side that the question could be held to turn, in any respect, on the priority in guilt of the parties, it being assumed by both, in conformity with established law, that the date of the dissolution of the marriage can alone be considered.

"After full consideration the Lord Ordinary has come to the conclusion that the only sound rule that can be adopted in such a case as the present, where both parties have been equally guilty, is that the aid of the law as regards their patrimonial rights, consequent on the dissolution of the marriage, ought not to be given to either; and that they should be allowed to sustain the loss accruing to them respectively in respect of their patrimonial rights as they stood at the date of the dissolution of the marriage,—a dissolution brought about by the fault of both. Nor can it be well objected to this rule that it is calculated to operate unfairly or unequally between the parties; for under it there will not, in the general case, be any hardship or advantage on one side without a corresponding hardship or advantage on the other. Thus, while on the one hand the husband will forfeit or lose, from the date of the divorce, all the benefit which might have accrued to him if there had been no dissolution of the marriage, from his *jus mariti* and right of courtesy, the wife will, on the other hand, lose and forfeit, from the date of the divorce, all the benefit that might have accrued to her if the marriage had continued to subsist till its natural termination, from her terce and *jus relictæ*. And so in regard to conventional provisions. Neither does the Lord Ordinary think it of any consequence to say that, in the present, or any other particular case, of mutual divorce, it may happen that, according to the rule now suggested, its operation would result very unequally, inasmuch as here the wife, having no heritable or moveable estate, and perhaps no prospect of acquiring either, while the husband is possessed of both to a considerable extent, the former must be left in a state of destitution, and the latter will retain and continue in the exclusive enjoyment of the goods in communion, and of the whole of his heritable estate, freed alike from terce and *jus relictæ*. That may, no doubt, be the result in the present, as it might be the result in other particular cases; but it might also as well have happened in the present, as it might happen in many other cases, that the condition of the parties would just be the reverse,—that is to say, that the husband might be left with nothing, there being no goods in communion, and no heritable property belonging to him, while the wife might have right to large heritable estate, and also the all [840] but certain prospect of acquiring, by succession and otherwise, large moveable means, all of which would be left to her exclusive enjoyment, free from her husband's courtesy and *jus mariti*. All these are accidental results which cannot be provided for by any general rule, and ought not, the Lord Ordinary thinks, be allowed to affect, far less to control, the general rule. It is better, and will be a less departure from principle, that there should occasionally be an inequality adverse to the wife, than that she should suffer no forfeiture and no hardship whatever, for that would be substantially the result in the present case, if the claims maintained

upon by the pursuer in the case of Thomson *v.* Donald's Executor *et al.* 1871, *ante*, vol. ix. p. 1069, which Lord Mure decided in favour of the pursuer.

---

for her behalf were sustained. The Lord Ordinary is unable to see that it would be agreeable to law or equity to hold that a guilty wife is to be treated as if she were innocent, merely because her husband has also been guilty. And, again, the Lord Ordinary has to observe that, although the rule he has adopted may, in the particular circumstances which occur in the present case, result more unfavourably for the wife than for the husband, that is matter of accident, and the reverse might as well have happened, while, in regard to either contingency, it may be remarked, *potior est conditio possidentis*.

"It was, however, very ably argued, on the part of the wife, in the present case, that the one-half of the goods in communion to which she now lays claim must be held, on the footing that she and her husband were copartners as regards these goods, to have been, at the date of the dissolution of the marriage, as much hers, as one of the *socii*, as the other half was his, although he may have had the power of administering the whole; and this view was supported by an appeal to various authorities. The Lord Ordinary is disposed to think that the weight of authority, as well as sound principle, is against any such view, and in favour of the doctrine that till the dissolution of a marriage the husband must, where there is nothing of the nature of fraud, be held to be the *dominus bonorum*,—the absolute proprietor and uncontrolled possessor of what are called the goods in communion. The point is elaborately treated and the authorities bearing on it are noticed in detail by Mr. Fraser (Domestic Relations, vol. i. p. 322 *et seq.*), who also states his own opinion in terms strongly adverse to the views maintained for the pursuer, and in favour of that which the Lord Ordinary has taken to be the correct one. The Lord Ordinary does not, indeed, see how any other view could be taken, consistently with the case of Shearer or Kirby *v.* Christie and Others (18th November 1842, 5 D. 132), which was determined by the whole Court. In that case, a widow possessed of certain household furniture bequeathed to her by the will of her deceased husband, by whom she had three children, married without an antenuptial contract a second husband, who had no property. This party contracted a debt, and a postnuptial contract was subsequently executed, whereby he renounced, in favour of his wife, his *jus mariti* over the furniture, declaring it to belong to her. It was held, in a question with the husband's creditors, who poinded the furniture for the debt, that the renunciation of the *jus mariti* was to be regarded as a *donatio inter virum et uxorem*, and consequently revocable at the pleasure of the husband, and thus that the wife could not effectually take the furniture from the creditors of the husband, but that they were entitled to have the matter regarded as if he had revoked. The opinion of the whole Court was taken, when judgment to the effect now stated was concurred in by nine Judges. In delivering their opinions the doctrine of communion was referred to, and was thus dealt with—'We do not think that the writing founded on was sufficient to vest in the wife the property of the furniture, and exclude the right of the husband therein. The wife's original property in it had been extinguished by the marriage, by which it became the property of the husband, just as much as his own moveable property was. Both, no doubt, fell under the name of *communio bonorum*. But we cannot regard that as giving to the wife any real right of property during the subsistence of the marriage. The absolute power of use [841] and disposal being in the husband, we must consider the goods nominally in communion as truly his, and not at all the wife's property.' And, in addition to this and various other authorities referred to by Mr. Fraser, there are the more recent cases of Wight *v.* Brown, 27th January 1849 (11 D. 459), and Muirhead *v.* Muirhead's Factor (6th December 1867, 6 Macph. 95), in which opinions appear to have fallen from the Court to the same effect. In the latter case, Lord Curriehill said (p. 99),—'We must guard against being misled by the manner in which the expression *communio bonorum* is occasionally made use of, from which an idea appears to have arisen that these words denote a fund forming a kind of partnership capital, of which the husband is merely the administrator for behoof of his wife and children, as well as himself. Unquestionably the wife and children have ultimate interests of very great importance in the effects belonging to the head of the family, but during the marriage he is absolute proprietor of the whole moveable estate, with unlimited powers of admini-

[841] Argued for the defender;—The phrase "communion of goods" is of comparatively recent origin, and was not in use before the time of Lord Stair, the first reported case in which it occurs being that of Thomson *v.* [842] Thin's Creditors, 1675, Dict. 5939 and 5941. The doctrine of a community of goods during the marriage was introduced to account for two rights—(1) the *jus relictæ*, which is now held to be nothing more than a claim of debt against the deceased husband's free executry; and (2) the right of the next of kin of a wife predeceasing her husband to one-half of the moveable estate, which in 1855 was abolished by the Intestate Succession Act, 18 Vict. cap. 23, sec. 6. The doctrine of a *communio bonorum* subsisting during marriage, and receiving effect after its dissolution, is now completely exploded,* and the pursuer's claim for one-half of her husband's personal property, she never having possessed any of her own, cannot be sustained.

At advising,—

LORD PRESIDENT.—In the conjoined actions of divorce—the first at the instance of the husband against the wife, and the second at the instance of the wife against the husband—we pronounced judgment on 23d June 1871, decerning in terms of the conclusions of both actions, and at the same time reserving the effect of the two decrees of divorce on the patrimonial rights of the parties respectively. The summons of divorce at the instance of the wife contained conclusions following upon the conclusions for divorce, by which she demanded certain conventional provisions

---

stration. It is not till his death that any division of the property takes place, and that which then forms the subject of division is his executory estate, one-third of which belongs to the widow *jure relictæ*.'

"If, therefore, the Lord Ordinary be right in holding that till the dissolution of a marriage the whole moveable estate, or what are called the goods in communion, belong to the husband, the decision of Lord Mure in the case of Thomson *v.* Donald's Executors, 1871, 9 Macph. p. 1069, as well as the main argument employed for the wife in the present case, which proceed on the opposite assumption, must be erroneous. And it also follows that the opinions of Mr. Fergusson in his work on 'Consistorial Law' (p. 194), and of Mr. Fraser ('Domestic Relations,' vol. i. p. 73), founded on by Lord Mure in support of his judgment, to the effect that, in cases of mutual divorce, neither party can claim any right or interest in the estate of the other that would have been competent to him or her, had divorce been obtained on one side only, in place of being adverse, is favourable to the rule which has been adopted and given effect to by the Lord Ordinary in the present case. And the Lord Ordinary observes that the opinion of Professor Moir, as given in a foot-note by Mr. Guthrie in his recent edition of 'Erskine's Principles,' in these words: 'The effect of mutual guilt is not to bar the right of divorce, but to give a right to mutual divorces, the consequences of which would seem to be that neither of the spouses can claim any right or interest in the estate of the other,' is in accordance with the principle of his decision in this case.

"But even supposing that the true nature of the *communio bonorum* was such as the wife in the present case maintains it to be, the Lord Ordinary does not see that it would follow that her claim to one-half of her late husband's moveable estate is well founded. She has been divorced in respect of her adultery, and supposing that no guilt had attached to her husband, it is unquestionable that she would have had no claim on the goods in communion, on the ground that one-half of them had all along been hers; but if so, can it make any difference, not that she is innocent, but that her husband is also guilty. The Lord Ordinary thinks that both having been guilty, and the marriage-contract and relation between the parties having been broken and brought to an end by their mutual misconduct, the claims of neither, as against the other, ought to be sustained. He has been unable to satisfy himself that Mrs. Fraser, who is neither wife nor widow, nor yet the innocent party in an action of divorce, but, on the contrary, is one who has herself been divorced in respect of her adultery, should be treated as if no guilt had attached to her, and as if the marriage had been dissolved by the actual death of her husband.

"Although the Lord Ordinary has decided against Mrs. Fraser, he thinks that, in the very peculiar and special circumstances of the case, neither party ought to be found entitled to expenses."

* Fraser, Pers. and Dom. Rel., vol. i. pp. 322 *et seq.*, and authorities *ibi cit.*

settled upon her by a postnuptial contract, in the same manner as if the marriage had been dissolved by her husband's death. Since our judgment was pronounced she has brought an additional action, concluding alternatively, in the event of her not being found entitled to the conventional provisions, for what may be called her legal provisions, viz., terce and *jus relictæ*. So the summons stood when the record was made up. It has since then been slightly altered by an amendment, in which, instead of claiming her *jus relictæ*, she now claims that, in respect that the society constituted by the marriage between her and her husband has been dissolved, she is entitled to a half of the goods which were in communion between her and her husband during the marriage. The claim for terce is not withdrawn, but the argument has been pretty much confined to the other claim in its new form, I suppose chiefly because it is the most valuable part of the claim, the husband not possessing heritable property to any great extent.

The question which is thus raised is one of some novelty. In the previous case of Donald, Lord Mure pronounced in favour of such a claim. In this case Lord Ormidale has taken the opposite view. We are called upon to consider the question for the first time. The difficulty of course lies in the nature of the divorce which has taken place, the decrees of divorce against both spouses having been simultaneously pronounced in one judgment, and the marriage dissolved because of the adultery of both spouses. Where the marriage is dissolved by reason of adultery or desertion at the instance of one spouse the rule is well settled. It is stated by Stair, i. 4, 20, in these words—"Marriage dissolved by divorce, either upon wilful non-adherence (or wilful desertion), or adultery, the party injurer loseth all benefit accruing through the marriage (as is expressly provided by the foresaid Act of Parliament, 1573, c. 55, concerning non-adherence), but the party injured hath the same benefit as by the other's natural death." The injured party is dealt with as the surviving spouse, and if the wife be the injured party, she is entitled either to her conventional provisions, or, in the absence of any such, to her legal provisions of terce and *jus relictæ*. But that is, of course, only when she is an innocent party, who has obtained decree of divorce against her guilty spouse. On the other hand, the guilty party can take no benefit through the marriage or through the dissolution of the marriage.

Now, the question comes to be, whether a guilty party can take any benefit through the marriage or the dissolution of the marriage, because the other spouse is guilty also. It is not easy to see how that can be held, consistently with the [843] rule which I have stated as fixed in the case where one party is guilty and the other innocent. The logical consequence of that rule is, that where both parties are guilty neither can take any benefit through the marriage or the dissolution of the marriage. The reclaimer's counsel seemed much impressed with that consideration, and not inclined to press strongly the conventional or the legal claims, but a different claim, which seemed to proceed on the theory that as the marriage was dissolved, and neither party can take benefit from the conventional or legal provisions, the result is that the estate, which was held in law to belong to the spouses during the marriage, must suffer a bipartite division (there being no children). They argued that, because the society was dissolved, the goods of the copartnery must be divided among the former partners. This argument is founded on what is called the doctrine of the *communio bonorum*. I do not think it necessary, in giving judgment in this case, to trace with any minute and jealous accuracy the extent to which that doctrine has been adopted in our law. I shall only say that, in regard to its practical results, all we know of the *communio bonorum* is, that when the husband predeceases the wife, the wife is entitled, *jure relictæ*, to one-third or one-half of that husband's moveable estate, or of his free executry; and, until the law was altered by a recent statute, that when the wife predeceased the husband and left no children, the executors or next of kin of the wife were entitled to claim one-half of that moveable estate, or, as it was called, the goods in communion. That right of the executors of the wife has been abolished by statute, whether she dies testate or intestate, and therefore the only practical result of the *communio bonorum*, if indeed it be a result of that at all, is the *jus relictæ*.

But, setting these questions aside, the question which I put is this: If this lady is entitled to one-half of the goods in communion in consequence of the dissolution of the marriage, is she or is she not thereby taking any benefit through the marriage or its dissolution? The goods in communion, as she calls them, are nothing more or less than the personal estate of her late husband. It is not said that she had any

property of her own. As to whether that would make any difference I give no opinion. In the absence of any allegation to that effect what she calls goods in communion is simply the moveable estate of her late husband. If, then, she is entitled to claim one-half of that moveable estate, it must be because she was his wife, and is so no longer—in other words, she is claiming benefit from the marriage and its dissolution, which, as a guilty party in an action of divorce, I am of opinion that she is not entitled to do. I therefore think that the Lord Ordinary is right.

LORD DEAS.—I arrive at the same result, and I agree with your Lordship that it is of little moment in the present question what is the precise nature of the *communio bonorum*. The rule of law laid down by Stair has been always acknowledged and acted upon, that, in a divorce, the guilty party loses all benefit by the marriage, while the injured party takes the same benefit which he or she would have taken had the marriage been dissolved by the death of the other spouse. That is the case where one party only has been found guilty. It has long been settled that recrimination is, by our law, no bar to an action of divorce. It necessarily follows that when there is guilt on both sides, the parties must be entitled to mutual decrees, otherwise the most unjust consequences would be produced, viz. that one of the guilty parties would be reaping advantages from the dissolution of the marriage, and the other would be losing such advantages. There is no other way to prevent these unjust consequences except to pronounce mutual decrees of divorce. That was done in the case of M'Intyre, 8th December 1821, 1 S. 199. Both parties being guilty, neither is entitled to any benefit through the marriage. The question comes to be, can this lady claim the benefit which would have resulted from the death of her husband? It necessarily follows that she cannot. The mere fact that it is only by death that she could be entitled to anything is of itself conclusive against the claim. To entitle her to any benefit she must be in the position either of the surviving or of the innocent party. If decree of divorce is equivalent to death both spouses here must be held to have died at the same time. It seems admitted on both sides that no attention is to be paid to the question who first committed adultery. [844] Neither party asked a finding on that point. The decree of divorce is the only thing to be looked at. The marriage was dissolved by one and the same judgment, and the rights of parties are to be dealt with as if both had gone to the bottom of the sea in one ship. There is no room, even on the most technical grounds, for this claim.

LORD ARDMILLAN.—A very serious and difficult question has been raised in this case in regard to the doctrine of *communio bonorum inter virum et uxorem* in our Scottish law. The investigation of this question is very interesting, and from a wide field of Scottish and foreign jurisprudence we have had an ample citation of authorities. The dissertation by Mr. Fraser on the point in the first volume of his work on the law of Personal Relations has been particularly referred to, and is extremely able; and no one can apply to the study of the subject without deriving the greatest benefit from that dissertation. It is not, however, advisable to enter on so large a field of abstract inquiry, if the case immediately before us can be disposed of on grounds simpler and less open to controversy.

In the present case I do not think it necessary to deal with the question of *communio bonorum*. I think the case may be decided on simpler grounds. I agree with your Lordship in the chair that the effect of a decree of divorce for adultery is, that the party divorced in respect of adultery cannot claim any right or benefit arising out of the relation of marriage so terminated by divorce. This, I think, has been conclusively settled by authority, and is well understood in the law and practice of Scotland. I need not refer to the decisions on this point. They are quite conclusive.

It appears that prior to her marriage with Mr. Walker, this lady, Jane Ann Fraser, had no fortune, or at least no fortune of any considerable amount. Her claim now is for her share of the property and funds said to belong to both spouses during the marriage, but not said to have been previously her own, or to have been brought by her into the mutual stock. This claim resolves into a demand for some right and interest arising to her as a wife in respect of the marriage. Such a claim on the part of a wife divorced for adultery is not well founded.

If there had been here only one decree of divorce, and that decree pronounced against the wife, I should have had no difficulty in refusing this claim, and refusing it without entering on the interesting speculation in regard to the origin, nature, and extent of the *communio bonorum*.

But there has in this case been guilt on the part of both spouses, and there have been simultaneous decrees of divorce against each of the spouses. If that decree, proceeding on the proved guilt of both spouses, is well founded as a dissolution of the marriage tie, each spouse being divorced, and each guilty, then, in disposing of this claim made by the divorced wife, I cannot do otherwise than concur with your Lordship in the opinion which you have expressed. If there can be simultaneous decree of divorce, the result must be that neither party can take benefit from the marriage.

But, to my mind, there are the gravest objections to simultaneous decree of divorce for adultery, where both spouses have been guilty.

I still retain the opinion, which I have more than once expressed, on the subject of divorce at the instance of a party who is himself or herself guilty of adultery; or, in other words, on the subject of simultaneous divorce when both parties are guilty. I think that such a divorce is contrary to sound principle, both legal and moral. I am aware that in recent times it has been otherwise decided; but no decision on the point has yet had the authority of the House of Lords; and the old Scottish law was in accordance with the opinion which I have now expressed.

Marriage is the most important, the most solemn, and the most abiding of human contracts. The mutual marriage vows of adherence and fidelity are binding till death part. Marriage, therefore, cannot be dissolved by mutual consent, nor by mutual guilt.

It is a mistake to say that marriage is *ipso facto* dissolved by the act of [845] adultery. It is not so. The act of adultery is a fact which must be proved as ground for action at the instance of the spouse who has been wronged, concluding for decree of divorce against the spouse who has done the wrong. The action rests on the marriage, and can only be prosecuted at the instance of the spouse. The marriage must be proved by the pursuer of the action of divorce; and in that action the pursuer must assume and maintain, as the basis of the action, the abiding force and sacredness of the marriage vows. The pursuer of the action must allege the contract, and the breach of the contract which is to him a wrong; and that wrong must be proved, and must consist in the defender's violation of marriage vows. The action of divorce is, in my opinion, the recognised mode of approaching the Court in seeking remedy for a wrong. The decree of divorce is the remedy which, on proof of the wrong, the law grants to an injured spouse.

In dealing with other bipartite contracts we are in the habit of saying that one party who has wilfully violated the contract cannot claim the interposition of the law to enforce it against the other party. Both must be bound, or neither; and the more serious and solemn the contract, the more important and appropriate is this rule. If one of the spouses has broken the solemn vow of fidelity till death, which was taken at marriage, and, after doing so, brings into Court an action of divorce, pleading the marriage, and concluding for decree of divorce against the other spouse, is not the pursuer of that action approbating and reprobating the contract, breaking it and seeking to enforce it, and claiming redress as for a wrong in the violation of vows already trampled on?

Put the case, by way of illustration, of two married couples living in the same street. Suppose that the husband in each home commits adultery with the wife in the other home; in other words, assume all four parties to be guilty of adultery; suppose them criminally to change partners. In such a case, shall the law interpose at the instance of both of these guilty parties, and by a decree of simultaneous divorce, recognise and sustain the arrangement, and liberate all four from the restraint and obligations of marriage in respect of their common guilt? Shall the guilt of both spouses set both free from the restraints of marriage? Each spouse has solemnly vowed to be faithful till death. Their vows are mutual—counterparts of each other. If one of the spouses commits adultery the law gives to the other spouse, being the injured spouse, the remedy of divorce. But if both spouses commit adultery neither of them can honestly plead the contract which both have broken, or complain of the guilt which both have incurred; and really I can scarcely understand the principle on which the law of a Christian country, rightly estimating the sanctity of marriage, can release both spouses from their mutual vows, in respect of their common guilt.

In our older Scottish authorities recrimination was sustained as a good defence against an action of divorce for adultery. This is the opinion of Balfour ("Marriage," p. 99, and M. 339), and of Bankton (i. 5, 6), and the opinion is in accordance with

the authorities in the Roman law. In the case of Jardine *v.* De la Motte, 9th March 1787 (M. 338), the Court, dealing with the question as one of pleading, and not doubting the relevancy of the defence, if competently pleaded, directed a counter action at the defender's instance. In the subsequent case of Lockhart *v.* Henderson, 7th December 1799 (M., *voce* "Adultery," App. 1), it was found that recrimination is not a bar to divorce, and could not be pleaded as a defence in the action of divorce; but must be stated in a counter action. This has been followed by subsequent decisions, and I do not mean to doubt that, in the action of divorce, recrimination cannot, as matter of pleading, be stated as a bar to divorce.

But the point of pleading is quite distinct from the effect of mutual guilt when proved; and simultaneous divorce is not necessarily or legitimately the result of the decisions on the point of pleading. Lord Stair expressly says that "adultery and desertion do not annul the marriage, but are just occasions upon which the persons injured may annul it, and be free" (Stair i. 4, 7); and in another place he says, speaking of divorce for adultery, "the party injurer loseth all benefits accruing from the marriage, but the party injured hath the same benefit as by the other's natural death" (Stair, i. 4, 20). Mr. Erskine [846] says, in very similar terms, that "adultery or desertion do not necessarily dissolve marriage; but are occasions or handles which may be laid hold of towards obtaining a divorce," if "the injured party desire it" (Ersk. i. 6, 43). In another place Mr. Erskine says that for parties "to disengage themselves from the sacred tie of marriage by their own consent," would be "contrary to the first law of marriage" (Ersk. i. 6, 45). Both Lord Stair and Mr. Erskine represent marriage as a very solemn and enduring contract, not dissolved by the act of adultery, but dissolved only by decree of divorce, and both represent that decree of divorce as a remedy to an injured spouse. Professor Bell, after stating, on the authority of the case of Lockhart, that "recrimination is no bar to divorce (though admitted as such in the Roman, Canon, and English laws,") adds, "but it may entitle the party first injured to have divorce preferably to the other, with all the benefits thence accruing" (Bell's Prin. par. 1535). This is entirely in accordance with the view which I now present. It accepts the rule on the point of pleading, but gives no sanction to decree of simultaneous divorce for mutual guilt, and the learned author suggests that the party first offending may be divorced at the instance of the party first injured, for it is assumed that at the date of that first wrong the spouse who was injured had not been guilty—at that time there was no mutual guilt.

I understand that, according to the law of England, it is settled that a party guilty of adultery cannot obtain decree of dissolution of marriage in respect of the adultery of the other spouse,—certainly not when the plaintiff's adultery was the earliest in date—(See cases of Clark *v.* Clark, 34 Law Journal, p. 94; Joseph *v.* Joseph, 34 Law Journal, p. 96; Brown on the Law of Divorce, p. 95).

To my mind there is no principle of Scottish law, and no principle of Christian morals, which can sustain the dissolution of the marriage tie in respect of mutual guilt. Against a simultaneous decree of divorce, where both spouses have been proved guilty of adultery, I humbly repeat the protest which I have on other occasions stated. When there is a decision on the point by the House of Lords that must be conclusive. Till then, I think I am entitled and bound to state that I adhere to the old law of Scotland on the subject.

LORD KINLOCH.—The fact out of which the present question arises is, that on 23d June 1871 this Court pronounced a judgment finding that both Mrs. Walker and her husband had committed adultery, and on this ground granting to each a divorce against the other. This mutual divorce was granted on a principle long settled in our law, and I think wisely settled, though I consider it would be entirely out of place to bring the matter into present discussion.

Mrs. Walker has raised the present action to enforce a claim of terce, and alleged right to one-half of his moveable estate against her late husband. She does not say that she had herself any separate estate unaffected by the *jus mariti*. But she says that at the date of the divorce Mr. Walker was proprietor infeft in heritable property of the value of £3500, yielding a free return of £250 per annum, and of moveable estate to the amount of £10,000. From the one she claims terce; of the other the one-half, as her alleged share of moveables.

The claim of terce was, as I understood, not pressed before us, and it is plainly untenable. This cannot in any view be set forward as a claim for what is her own;

it is, in the most exclusive sense, a claim against her husband's estate. As a divorced wife she clearly cannot urge this claim. That he has been equally guilty with her cannot vary the matter. His guilt may prevent him from claiming anything from her estate if she has one; it cannot give to her guilt any other than its proper legal result in regard to his.

There remains the question as to the moveable estate; and it appears to me that the Lord Ordinary takes at once a simple and sound mode of solving the question, by saying that the mutual guilt of the parties infers that neither can make a claim against the other, in respect of provisions, conventional or legal, arising out of the marriage. If either has a separate estate, held independently of the marriage, the result may be different. But in regard to provisions arising out of the marriage, conventional or legal, the mutual guilt destroys all claim on either hand. If one is guilty, the other innocent, the admitted result is that the [847] guilty party forfeits all rights arising from the marriage, and the innocent enters on these rights in the same way as if the guilty party was dead. If both are guilty the same forfeiture of rights equally affects both. I confess that this presents to my mind the short and simple view of the whole matter, beyond which it is scarcely necessary to go.

But we have had presented to us an elaborate and ingenious argument in support of the claim to one-half of the moveables, to the effect that in urging this claim Mrs. Walker is only suing for her own property. It is said that during the existence of the marriage the whole moveables belonging to the spouses constitute a society or partnership stock, to which the law has given the name of *communio bonorum*; and in which, where no children exist, the husband and wife are equally interested, each to the extent of one-half. When the marriage is dissolved in any way, the wife's half, it is said, is claimable by her or her representatives as properly her own. In the event of dissolution by the predecease of the wife, this half is, or was till a recent statute, transmitted by the wife to her representatives, on no other footing than that of its being her own. In the event of dissolution by the predecease of the husband, this same one-half, still her own, goes to herself directly, under the name of *jus relictæ*. When the dissolution is by divorce on the ground of adultery by both parties the wife is equally, as in these other cases, entitled to claim her own one-half. The case of mutual guilt is the same in its result as that of mutual innocence, that is to say, it prevents either party from claiming any advantage over the other. The dissolution of the marriage works its natural effect; in other words, each party takes his and her own proper share of the goods in communion. Such is the argument of the pursuer, of which I think I am called on to make a special disposal.

In so far as the mere phrase is concerned, there can be no doubt that a *communio bonorum* is recognised by our law as existing between husband and wife, in regard to their mutual moveable property. The phrase is used by our institutional writers in very many passages, and has been frequently employed by the Court in determining the mutual rights of married persons. But in the present argument we must not be led astray by a mere phrase, but must carefully inquire into what the phrase has truly signified. Pursuing this investigation, it becomes obvious that no such thing has ever been denoted by the expression as a proper partnership or society between the spouses during the subsistence of the marriage. Emphatically the reverse has been again and again held. During the subsistence of the marriage the husband is not merely administrator, he is the *dominus* or absolute proprietor of all the moveable estate belonging to both parties. Whatever is the wife's passes to him by an implied legal assignation, and becomes his as much as what is primarily his own. He can dispose of it at pleasure without any accountability. It is all liable for his debts to the very last farthing. The wife has no right of disposal to the extent of one shilling, nor can she withdraw any part from her husband's power, nor in any way interfere with his absolute proprietary right. All this is *triti juris*. It is in vain, therefore, to say that during the subsistence of the marriage a society or partnership, or anything resembling it, exists between the spouses. The wife is destitute of any right. The whole belongs to the husband. To call any part of the effects the wife's own during the subsistence of the marriage is a legal solecism.

But so soon as the marriage is dissolved by the death of either party there arises, at least arose until the recent statute, a right to both to share in the moveable estate which previously was exclusively the husband's. When the wife predeceases without children existing, she had, till the recent statute, a right to transmit one-half to

her legal representatives. When the husband predeceases she had, and still has, a right to one-half as *jus relictæ*. These two rights include the whole of any participation in the moveable estate ever competent to the spouses by our law. It is to the effect of comprehending these rights, and to no other effect whatever, that the phrase *communio bonorum* can ever be legitimately employed. If indicating anything more, the phrase has been illegitimately used. It has been reasonably suggested that the phrase came to be employed as a supposed philosophic exponent of the rights arising at dissolution, and that, so far from a *communio bonorum* giving rise to the rights emerging at [848] dissolution, it was the existence of these rights which brought the phrase *communio bonorum* into use. At all events, nothing else was ever legally comprehended under that name except the two rights referred to. *Communio bonorum* in the law of Scotland means these two rights, and nothing else.

What, then, can the pursuer claim in respect of either of these two rights, in the circumstances of the present case?

In regard to the right competent to a wife on the dissolution of the marriage by her own predecease to transmit one-half of the moveables to her representatives, the right was finally abrogated and taken away by the Act 18 Vict. cap. 23. By the 6th section of that statute it was enacted,—"When a wife shall predecease her husband, the next of kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion, nor shall any legacy, or bequest, or testamentary disposition thereof by such wife affect or attach to the said goods or any portion thereof." It is now out of the question to refer to this right on the part of a wife as arising out of the so-called *communio bonorum*, or to rest any claims on its assumed existence. No such claim now exists. This, one of the only two rights ever held by a wife under the name of *communio bonorum*, has been unknown to the law since the date of the statute on 25th May 1855.

The result is that no right is capable of being claimed on the ground of the so-called *communio bonorum*, except the other of these two rights, viz., the *jus relictæ*. When the case is thus reduced to its legal points I think it clear that all the claim by the pursuer at once falls to the ground. I cannot regard the *jus relictæ* as anything else than the right held by a widow over a certain part of her deceased husband's estate. It is the widow's provision out of that estate. The pursuer cannot claim this provision. She is not Mr. Walker's widow. In place of surviving him she is constructively dead, and his own guilt does not revivify her, but only makes him partner in her decease. The claim, at anyrate, is one arising out of the marriage against the husband's estate. It is forfeited by her adultery. Her husband's adultery may forfeit any claim made by him, but it cannot rehabilitate her.

I think the argument of the pursuer, founded on the alleged *communio bonorum*, fails thus at all points. It is at best an argument founded on mere words, and is only successful on a *petitio principii*. The pursuer takes the words *communio bonorum*, and assumes that they imply a true and real partnership existing during the subsistence of the marriage, and she thence infers that the dissolution of the marriage, however or whensoever brought about, gives the wife one-half of the effects as her own. The law contains no such doctrine, nor any in the least supporting the claim by the pursuer. No such thing is known to our law as a division of the moveable estate of the two spouses when both are alive, which is what the pursuer demands. The law once gave a right against the husband's estate to the representatives of a predeceasing wife. It gives that right no longer. And besides this, the present claim is not by the representatives of a predeceasing wife, but by a living wife herself, a claim which never was known to the law. It still gives a surviving widow her *jus relictæ*. But the pursuer is not a surviving widow. She is a simultaneous adulteress, claiming during her life a right of participation in her husband's estate. And this, again, is a right such as the law never knew.

I have thought it necessary to go so far into this subject, because we have two Lords Ordinary expressing opinions directly opposed to each other in regard to this very matter of the *communio bonorum*, considered in its application to the present case. I think it right to state the special grounds on which I think the one of these Lords Ordinary right and the other wrong. But I revert in the close to what I said in the opening, that it is enough to dispose of the pursuer's claim that it is a claim for something which arose to her out of the marriage, and for nothing else, and this her adultery has forfeited.

I am of opinion that the Lord Ordinary's interlocutor ought to be affirmed.

THE COURT adhered to the Lord Ordinary's interlocutor.

J. B. DOUGLAS & SMITH, W.S.—W. G. ROY, S.S.C.—Agents.

No. 149. X. MACPHERSON, 849. 21 June 1872. 2d Div.—Lord Gifford, Teind-Clerk.

JOHN ANSTRUTHER THOMSON, Objector.—*Watson—Orphoot.*

THE LORD ADVOCATE, on behalf of her Majesty and the Commissioners of Woods and Forests, Respondent.—*Lord-Adv. Young—Kinnear.*

Process—Res Judicata—Teinds—Crown.—An interlocutor was pronounced in a locality finding that certain teinds were college teinds. The Crown held bishops' teinds in the parish, and was a party to the process, but did not object to the finding. *Held* in a subsequent locality that the judgment, being on a point fairly contested in the locality, and having a practical bearing on its being worked out, was *res judicata* against the Crown.

In the interim scheme of locality of the parish of Cameron the teinds of Mr. Thomson of Charleton's lands of Lambieletham and Carngours were stated to be bishops' teinds, and allocated upon *pari passu* with other bishops' teinds in the parish in the hands of the Crown.

Mr. Thomson objected that they were not bishops' teinds, but college teinds, and as such not liable to be allocated upon till the bishops' teinds were exhausted. He alleged that they belonged to the College of St. Leonard's, at St. Andrews, and that he was perpetual tacksman for an annual payment of £20 Scots.

The Lord Advocate denied that they were college teinds, and alleged that they were not even bishops' teinds, but teinds held on an heritable right.

Mr. Thomson pleaded;—(1) It is *res judicata* that the teinds of the lands of Lambielethan and Carngours are college teinds.

The facts upon which this plea was founded were thus stated by the Lord Ordinary:—"The judgment founded upon as *res judicata* is a judgment pronounced by Lerd Woodhouselee in conjoined localities of the parish depending in 1810. The judgment is dated 23rd January 1810, and relates to various questions. *Inter alia*, it contains the following finding:—'Finds that Mr. Thomson of Charleton has an heritable right to the teinds of his lands of Wilkieston, and that the teinds of his other lands belong to the College of St. Andrews.' It cannot be disputed that the 'other lands' here mentioned are the lands of Lambieletham and Carngours, and that by the College of St. Andrews is really meant the College of St. Leonard's, so that the judgment in question is a judgment *in terminis* in favour of the objector upon the very question now sought to be raised.

"This judgment was pronounced after a great deal of procedure, and after ample time had been allowed for investigation into the facts by all concerned. The question was distinctly raised by the objector's author, Mr. Thomson of Charleton, by a representation lodged 19th February 1798, in which he distinctly claimed that the teinds of Lambieletham and Carngours belonged to the Leonardine College of St. Andrews. He founded upon the gift by King James VI., and on the Acts of Parliament ratifying the same; and he offered to prove that he paid to the College annually for these teinds £20 Scots. The titles to these lands, he alleged, were in the hands of the College; but he offered to produce his receipts for the annual payments. On 4th July 1799 the Lord Ordinary, Lord Methven, appointed the heritors who alleged that their teinds were bishops' or college teinds to produce their receipts for teind-duty. This order was renewed on the 19th November 1801, and again on 20th May 1802; and in this last interlocutor the Officers of State were specially appointed to state their objections to the locality, and all concerned were allowed to answer Mr. Thomson's representation of 1798—that is, the representation in which he claimed that his teinds were college teinds.

"Answers to Mr. Thomson's representation were lodged for the common agent, in which the common agent contented himself with calling for [850] receipts for the teind-duty. The Officers of State did not object, although they were parties to the process, and although a representation by them, with answers by the common agent, was actually discussed along with Mr. Thomson's representation. On 23d December 1809 Lord Woodhouselee made avizandum to himself with the whole representations and answers, without prejudice to replies being given in, and productions made in the process; and on 23d January 1810 he advised the whole case, and pronounced, *inter alia*, the finding now founded on by the objector as a *res judicata*. This judgment was acquiesced in by all parties. It was given effect to in all the subsequent localities, and in the final localities ultimately adjusted; and the result is, that down to the present time the teinds of the objector's said lands have not been localled upon at all, effect being given to the plea that they are college teinds, and must be postponed in allocation."

The Lord Ordinary (Gifford) pronounced this interlocutor:—"Sustains the first plea in law stated for Mr. Thomson, the objector, and finds, in terms thereof, that it is *res judicata* that the teinds of the objector's lands of Lambieletham and Carngours were in 1810 college teinds: Finds, in accordance with the final interlocutor pronounced by Lord Woodhouselee on 23d January 1810, that the teinds of the objector's said lands then belonged to the College of St. Andrews, or rather to the College of St. Leonard's, one of the Colleges of the University of St. Andrews: Finds that it is not averred or offered to be shewn that since the date of that judgment the teinds of the objector's said lands have ceased to be college teinds, or have in any way changed their character or position; and finds that the said teinds are still college teinds, and entitled to all the privileges belonging to such teinds in allocation and otherwise: Therefore sustains the objections for the said John Anstruther Thomson, to the effect that the teinds of his lands of Lambieletham and Carngours must be postponed in the order of allocation for stipend, not only to teinds held upon heritable rights, but also to bishops' teinds in the hands of the Crown, and remits to the clerk to rectify the locality accordingly, and decerns: Finds the objector entitled to expenses." *

---

* "NOTE.—The question raised in the present record is very important, and the Lord Ordinary has found it to be attended with considerable difficulty. It relates to the order of allocation of the various classes of teinds in the parish of Cameron, and to the effect to be given to judgments pronounced in various processes of locality of the teinds of the said parish.

"The present process of locality commenced with a decree of augmentation and modification, dated 5th December 1866, and it begins with crop and year 1866. Until this last augmentation was granted the whole stipends have been paid from teinds either held upon heritable right, or to which no rights at all have been produced. Hitherto, that is, prior to 1866, it has not been found necessary to allocate any part of the stipend either upon bishops' teinds or upon college teinds, both of which exist in the parish.

"The augmentation of 1866, however, more than exhausts the teinds held without heritable rights—that is, teinds in the hands of the titular, not bishops' teinds, and the teinds held upon heritable rights; and it is now necessary to come upon the teinds entitled to a preference or postponement in allocation—that is, upon bishops' and college teinds.

"In the interim scheme of locality now objected to the teinds of the objector's lands of Lambieletham and Carngours are stated as bishops' teinds, and are allocated upon *pari passu* with the other bishops' teinds in the parish. To this mode of allocation Mr. Thomson objects, on the ground that the teinds of his said lands are not bishops' teinds at all, but college teinds, belonging to the College of St. Leonard's, St. Andrews, and that college teinds cannot be allocated [851] upon till bishops' teinds are exhausted. The Lord Advocate, as representing the Crown, the holder of the bishops' teinds in the parish, denies that the teinds of the objector's said lands are college teinds at all. He maintains that they are not even bishops' teinds, but are mere teinds held upon heritable right, and that instead of being entitled to a preference or postponement in allocation as in a question with the bishops' teinds, they ought to have been allocated upon long ago for the old stipends, and they must now be exhausted before the bishops' teinds can be touched. In reality, therefore, the Lord Advocate is an

[851] The Lord Advocate reclaimed, and argued;—The Crown had no interest in 1810 to inquire whether the objector's teinds were or were not college [852] teinds;

objector; and although no formal objections have been lodged for him it was intimated that he was prepared to lodge them, and the question is substantially raised under the present record.

"The question ultimately between the parties is a question of fact—Are the teinds of the objector's lands college teinds or not? It was not disputed in point of law that college teinds must be postponed in allocation to bishops' teinds—See Connell, vol. i. p. 508, and the series of cases there referred to.

"Now, the question of fact whether the teinds of Lambieletham and Carngours are or are not college teinds depends on the titles of these lands and teinds. The titles of these lands, at least the later titles, are in process, and shew no title whatever to the teinds. The objector's author's sasine of 1798 is No. 267 of process. The title to the teinds consists of a grant under the Privy Seal to Alexander Wood and the College of St. Leonard's, dated 24th September 1585, an Act of Parliament 1585, cap. 50, a royal ratification 22d December 1587, and a contract between St. Leonard's College and Alexander Wood 15th June 1597; and the question upon these titles is—whether the teinds are vested in the College—Wood and his successors being perpetual tacksmen—or whether Wood got right to the teinds under burden of a payment to the College? This question, however, was not argued before the Lord Ordinary, because a preliminary question arose whether it was not already *res judicata* that the tiends in question were college teinds. The Lord Ordinary, with considerable difficulty, has sustained the plea of *res judicata*."—(Here follows the narrative given above.)

"The Lord Ordinary has come to be of opinion that this judgment constituted *res judicata*, and that no sufficient cause has been shown why it should not be given effect to in the present process. No reduction thereof has been raised. It is not said that the judgment was obtained clandestinely or unfairly; and it is admitted that it has been acquiesced in and given effect to for sixty years. The Crown now maintains, however, that without any reduction the judgment of 1810 must be disregarded and ignored, and that the teinds in question must now be placed among teinds held on heritable right, although that was the very thing which the objector's author successfully resisted in 1810, upon which he got a judgment, and in virtue of which judgment he has been exempt ever since. The pleas urged by the Crown may be shortly noticed.

"(1) The judgment of 1810 was pronounced in a previous locality. This is true; but it is now finally fixed that a judgment in one locality pronounced *in foro contentioso* forms *res judicata* in subsequent localities of the same parish—See Blantyre *v.* The Earl of Wemyss, 22d May 1838, 16 S. 1009; Hopetoun *v.* Ramsay, 22d March 1846, H. L. 5 Bell's Appeals, 69; Duke of Buccleuch in Locality of Inveresk, 10th November 1868, 7 Macph. 95. The principle has been applied in this very locality, where a finding that teinds were bishops' teinds was held *res judicata*—Graham Bonar *v.* Lord Advocate, 3d November 1870, 9 Macph. 58.

"(2) It was said that the Crown was not a party to the judgment of 1810,—that is, the Crown did not answer Mr. Thomson's representation. But the Crown was a party to the process. Answers were ordered for the Crown, if the Crown had anything to say; and the Crown was actually a party to the discussion and to the judgment, for a representation by the Crown was actually disposed of and given effect to in the very same interlocutor. The Lord Ordinary thinks it must be held that the Crown was a party to the whole procedure.

[852] "(3) It was urged that the College of St. Leonard's was not a party to the judgment; but the answer is, that Mr. Thomson, as perpetual tacksman, really represented the College. He had an interest to plead, and was allowed to plead, that the teinds were college teinds, and the judgment which he obtained was a judgment in favour of the College as well as in favour of himself. The College are benefited by the judgment, and no doubt, if they have interest, would adopt it.

"(4) It was urged that the merits of the question were not discussed before Lord Woodhouselee, or decided by him. This may or may not be true. It is impossible to say what took place before Lord Woodhouselee, or what arguments or views were submitted, before he made avizandum on 23d December 1809. It would be very dangerous to assume that nothing passed which does not appear in the comparatively

they were no party to the judgment founded on, and did not answer Mr. Thomson's representation.* They could not suffer by the [853] negligence of their officers.† Lord Woodhouselee's interlocutor was wrong. The teinds were not college teinds.

The objector argued;—The Crown was a party to the process. It could have answered Mr. Thomson's representation if it had had anything to say. A representation by the Crown was actually discussed at the same time as Mr. Thomson's. It must be assumed that the merits of the case were discussed before Lord Woodhouselee. There is no proof that the Crown officers were negligent.

At advising,—

LORD COWAN.—I am of opinion that the interlocutor of the Lord Ordinary ought to be affirmed. The interlocutor of Lord Woodhouselee in 1810 formed part of the procedure which terminated in the locality of 1817, and was before the Court when that locality was approved of. By that locality Mr. Thomson's teinds of Lambieletham and Carngours were held to be college teinds, and entitled to exemption as such.

---

meagre records which have now been recovered, but which certainly raise the question by reference to the gifts and statutes which constitute the title of the teinds. It is safer to presume that everything was urged which could be urged, and that all parties were satisfied with the resulting judgment.

"(5) And this affords the answer to the plea founded upon the statute 1600, cap. 14, which enacts that the Crown is not to be prejudged by the sloth or negligence of its officers in pursuing or defending actions. There is no proof that there was either sloth or negligence. On the contrary, the Crown was there well and fully represented by competent counsel and agents, and the Lord Ordinary sees no ground for even suspecting that they did not fairly and completely do their duty. It was hardly maintained, and in the Lord Ordinary's view could not be maintained, that the statute of 1600 makes it impossible to have *res judicata* against the Crown.

"(6) It was urged that the Crown in 1810 had really no interest to inquire whether the teinds in question were college teinds or not. But this is not so. The direct interest might not immediately emerge, but the question as to the order of allocation was directly raised, and the Crown, as holding the bishops' teinds, had an interest to object to a claim of postponement in allocation to the whole of these teinds. No doubt it was not necessary to discuss whether bishops' teinds or college teinds came first in allocation, and the question is still open in point of law, if the Crown thinks fit to raise it; but it was surely fixed by the judgment of 1810 that the objector's teinds were not held on heritable right, and liable *primo loco* in the locality, and yet this is what the Crown now seeks shall be found.

"(7) The Crown admitted that the judgment of 1810 was binding in a question with the common agent and with all the other heritors whom he represented; but it was urged that the common agent did not represent the Crown. It is certainly true that a common agent does not necessarily represent the titular or titulars, at least when adverse interests arise. But a common agent really represents all having interest in the allocation, and he decides and reports upon the rights of all who have any interest in the teinds. So far as his proceedings are not objected to, he really represents all concerned. Heritors are only interested as titulars or tacksmen of the teinds of their own lands.

"(8) But if the judgment of 1810 be binding against the whole heritors (and the Crown admitted that it was so), it is difficult to hold that it should not be binding on the titular and on the holder of the bishops' teinds. It would be very anomalous, very awkward, and perhaps lead to inextricable confusion, to hold the objector's teinds college teinds in a question with heritors, and not college teinds in a question with the Crown,—that is, to hold a matter of fact [853] decided in the same process in two different and opposite ways. The only answer to this would be to hold everything wrong since 1810, and to open up everything as from that date. But this is impossible, and on the whole the Lord Ordinary feels compelled to give effect to a judgment which was certainly intended at the time to be a final judgment, and which has been acquiesced in and acted on as such for sixty years."

* Blantyre *v.* Wemyss, May 22, 1838, 16 S. 1009—H. L. April 22, 1844, 3 Bell's App., 34; Cheape *v.* Lord Advocate, Jan. 11, 1871, *ante*, vol. ix. 377; Graham *v.* Maxwell, May 20, 1814, 2 Dow, 314; Strathmore *v.* Strathmore's Trustees, May 24, 1833, 11 S. 644.

† 1600, c. 14; Lord Advocate *v.* Meiklam, July 13, 1816, 22 D. 1427.

Again, the interlocutor was pronounced *causa cognita*, the whole breadth and meaning of the contentions of parties being before Lord Woodhouselee when he pronounced it. There seems thus to exist in this case all the requisites of *res judicata*. A good deal of argument has been addressed to us on the title to the teinds, to the effect that the judgment by Lord Woodhouselee was wrong. With that we have not to deal, unless we are to disregard the plea of *res judicata*. But it is well to see that there were before his Lordship apparently good grounds for holding the teinds college teinds. From the time of the purchase of the lands by Mr. Thomson's ancestor to the present time there was no infeftment in these teinds. There were infeftments in the teinds of other lands held by the same proprietors, but none in the teinds of Lambieletham and Carngours. Then by what title did he hold them? The inference was as tacksman under the College of St. Leonard's. The college were the proprietors; but by contract, for payment of an annual duty, he became tacksman of the teinds, and entitled to perpetual renewals of his tack. Then as to all interested not being called, I am not satisfied that the common agent represented the Officers of State, but they were themselves parties to the process, and made a representation as to certain points.

I am therefore of opinion that the plea of *res judicata* ought to be sustained, and I do not think it necessary to go farther into the case. The reasoning of the Lord Ordinary on which he founds that plea appears to me to be exceedingly satisfactory, and, adopting his views, I feel myself enabled to pronounce judgment at once.

LORD BENHOLME.—We know what Lord Woodhouselee had before him when he decided that the teinds in question were college teinds. It is said that the Officers of State had no interest to contest the matter in that process. But wherever a point is fairly contested in a locality, and was necessarily involved, it will be *res judicata* in all future localities. If it is not necessarily involved, it will not be *res judicata*. I think that the Lord Ordinary was right in sustaining the first plea in law stated for the objector.

LORD NEAVES.—I concur in thinking that the plea of *res judicata* ought to be sustained, and I refrain from indicating any opinion on the merits. The use which I make of a reference to the original grants and titles is to see what points were before the Court in the locality of 1817, and it appears to me that [854] the question, whether these teinds belonged to the College of St. Andrews, or to Mr. Thomson's predecessor, was very clearly before it. It was decided that they belonged to the college, and that decision, as I hold, is *res judicata*.

I agree that it is not every deliverance in one locality which will be *res judicata* in another. That is a question of circumstances. If the point raised had no present bearing or practical effect in the process it would not be *res judicata*. But where the point had a practical bearing, and was fairly before the Court, it is for the benefit of all parties that there should be no renewal of strife. Now, the very point raised here was necessarily raised and decided in the locality of 1817. It was impossible to work out that locality without deciding whether the teinds here in dispute belonged to the College of St Leonard's or not. If they belonged to the college, then they were placed in one category, and were not to be localled on. If not, they were to be placed in another category, and were to be localled on, and the Crown had a direct interest to have the point decided, as it was for its direct benefit to enlarge, as far as possible, the class of parties liable.

Whether the common agent represented the titular in such a question or not it is unnecessary to decide, for the titular was a party to the litigation, and actually lodged a representation, which was disposed of in the very same interlocutor which is now pleaded as *res judicata*.

LORD JUSTICE-CLERK.—I concur entirely both with the Lord Ordinary and your Lordships. I am not prepared to say in what matters the common agent represented the Officers of State. But the question was raised *in foro contentioso*, and the parties to the cause were properly represented. It is clear that the Crown had an interest to maintain that the objector's ancestor held no heritable title to the teinds. A final judgment was pronounced in that locality, which is binding on the Crown.

This interlocutor was pronounced:—"Refuse the said reclaiming note, and adhere to the interlocutor of the Lord Ordinary reclaimed against, and find additional expenses due to Mr. Thomson since the date of the Lord Ordinary's interlocutor."

LEBURN, HENDERSON, & WILSON, S.S.C.—WARREN H. SANDS, W.S.—Agents.

[*Commented upon*, Dundas *v.* Waddell, 1878, 6 R. 345.]

No. 150. X. MACPHERSON, 854. 22 June 1872. 2d Div.—Lord Gifford, I.

ALEXANDER DAVID GRAY, Pursuer.—*Pattison—Balfour.*
JOHN GRAY AND MARY DICKSON GRAY, Defenders.—*Watson—Jameson.*

Deathbed—Reduction—Prior Debt.—In an action brought by an heir-at-law to reduce a deed of disposition and sale executed on deathbed, which bore to have been granted in consideration of £150 advanced and paid to or on behalf of the granter "at sundry times preceding the date of these presents,"—after a proof, the Lord Ordinary found that the cause of granting had been truly set forth in the deed, and that the deceased's whole estate, including the heritage, was insufficient to pay his debts, including the £150; and, therefore, that the pursuer had no interest to reduce the deed; and, further, that the pursuer did not offer to pay the deceased's debts, in so far as the moveable estate was not sufficient for the purpose.

The pursuer having reclaimed, *held* (1) that the deed having been executed on deathbed, the pursuer had a good title to reduce; and (2) that as the payment of the price was not *pars ejusdem negotii* with the granting of the conveyance, his right to reduce was not qualified with the condition of repayment of the price.

This was an action of reduction on the head of deathbed by Alexander David Gray, engineer in Glasgow, heir-at-law of the deceased David Gray, wright, Harthill, against John Gray, wright, Harthill, and Mary Dickson Gray, also residing at Harthill, for her interest. David Gray was the father of the pursuer and defenders. The deed sought to [855] be reduced was dated 1st May 1871, and was in these terms:—"I, David Gray, wright at Harthill, in consideration of the sum of one hundred and twenty-five pounds sterling advanced and paid to me and on my behalf, at sundry times preceding the date of these presents, by John Gray, wright at Harthill, my son, which sum is hereby held and declared to be the full and adequate price and value of the subjects hereinafter described and conveyed, and of which sum so paid to me as aforesaid I do hereby acknowledge the receipt, and discharge the said John Gray, have sold and disponed, as I do by these presents sell, alienate, and dispone from me, my heirs and successors, to and in favour of the said John Gray, his heirs and assignees whomsoever, heritably and irredeemably, All and Whole," &c. On 3d May 1871 the defender granted to the deceased a letter in these terms:—"Harthill, 3d May 1871.—Mr. David Gray, Harthill.—My dear father,—With reference to the disposition to the subjects in Harthill, granted by you in my favour upon the first day of May current (which subjects have been sold by you to me), it is hereby declared that it is the arrangement and understanding betwixt us, that I am to give and provide my sister, Mary Dickson Gray, residing in family with you, with a dwelling-house of not less than two apartments, in the village of Harthill, and which she is to occupy, rent free, during her lifetime after your decease, but that so long only as she shall remain unmarried thereafter, declaring hereby that all right to enjoy and possess such house shall cease and be at an end so soon as she shall be married, and that the same shall not again revive upon her widowhood. And I hereby bind and oblige myself, and my heirs and successors accordingly; I also hereby agree and bind myself and my foresaids to pay all the just and lawful debts which shall be due and owing by you at your decease, and also to pay and defray your sickbed and funeral charges and expenses, and to free and relieve my said sister, both individually and as your residuary legatee, of the whole of such debts and sickbed and funeral charges."

The defender pleaded;—(1) The disposition sought to be reduced, not having been executed by the said David Gray on deathbed, the defender is entitled to absolvitor. (2) The said disposition having been granted for the onerous cause therein mentioned, and for the further obligations undertaken by the defender in respect thereof, the pursuer is not entitled to decree of reduction as concluded for. (3) In any view, the pursuer, before he can have the said disposition reduced, is bound to repay to the defender the sum in consideration of which it was granted, and to relieve him of the obligations undertaken by him in respect of said disposition.

The Lord Ordinary (Gifford) allowed a proof, and thereupon pronounced this interlocutor:—"Finds that the disposition challenged, being the disposition No. 6 of

process, dated 1st May 1871, was executed when the granter, David Gray, was *in lecto*, but finds that the narrative of the said deed, the cause of granting thereof, and the acknowledgment by the granter therein contained, are true; and finds that at the date of the said deed the granter thereof, the said David Gray, was justly indebted and resting owing to the defender, John Gray, the sum of £125: Finds that the whole moveable estate of the said deceased David Gray, and the whole value of the heritable subjects contained in the said disposition, were insufficient to pay the debts of the said David Gray, including the said sum of £125; and finds that the pursuer as heir-at-law of the said David Gray is not prejudiced by the said disposition and conveyance, and has no interest to insist in the present action: Further, finds that the pursuer does not offer to pay the debts of the said David Gray, including [856] as above, so far as not provided for by his moveable estate: Therefore assoilzies the defender from the whole conclusions of the action, and decerns: Finds the defender entitled to expenses, and remits the account thereof, when lodged, to the Auditor of Court to tax the same, and to report."*

---

* "NOTE.—This case raises a question of some delicacy in the law of deathbed, and, so far as the Lord Ordinary observes, it is not precisely ruled by any of the decided cases. The statute 34 & 35 Vict. cap. 81 (16th August 1871), abolished all actions of reduction *ex capite lecti* in reference to deeds made by persons who shall die after the passing of the Act. As the late David Gray, however, died on 4th May 1871, the old law applies, although probably the present case is the last action of reduction on the ground of deathbed.

"The Lord Ordinary holds it to be established by the proof that the deed challenged,—namely, the disposition by the late David Gray to his son John, was executed on deathbed. The deed is dated 1st May 1871, and the granter died three days thereafter, having been long labouring under the disease of which he died—disease of the heart. Between the date of the deed and death the granter was not at kirk or market, and if the deed is to be supported it must be on other grounds than that the granter was not *in lecto*.

"The Lord Ordinary holds it to be further established that the deed was granted without any price actually paid at the time. No money passed at or about the date of the deed between the late David Gray and his son John. This was not disputed, and indeed is expressly set forth on the face of the deed itself, which bears to be granted 'in consideration of the sum of £125 sterling, advanced and paid to me and on my behalf at sundry times preceding the dates of these presents, by John Gray, wright, at Harthill, my son, which sum is hereby held and declared to be the full and adequate price or value of the subjects hereinafter described and conveyed, and of which sum so paid to me as aforesaid I do hereby acknowledge the receipt, and discharge the said John Gray.' Whatever be the effect of this declaration and acknowledgment in the deed it completely negatives the idea of the deed having been granted as for a price instantly paid at the time.

"The Lord Ordinary thinks it is further proved, and this almost exhausts the facts material to the case, that although no money was paid at the time by the defender John Gray, he had for a long series of years very largely contributed to the maintenance and support of his father, and had disbursed considerable sums on his father's behalf, and that the father, while *in liege poustie*, acknowledged himself debtor to his son John for these payments and advances, and proposed to sell the property in question in order that he might discharge his debt. The Lord Ordinary is disposed to hold also,—although this is a matter involved in considerable doubt and confusion,—that the payments and advances by John amounted to at least the sum of £125, being the sum acknowledged to be due by the father's deed. It may be quite true that apart from the deed and the acknowledgment it contains there is scarcely legal evidence instructing debt to the amount claimed, but it is thought there is such reasonable evidence as, taken in connection with the deceased's statements and admissions, and with the formal and most explicit acknowledgment in the deed,—which, although on deathbed, was intelligently and deliberately executed by the old man—to instruct that the acknowledgment in the deed was honest and true in point of fact.

"The counsel for the pursuer contended that the deed itself, and the acknowledgment it contains, could not be looked to at all, and that unless the defenders could instruct a debt by legal evidence, as at 1st May 1871, before the deed was executed, the deed

[857] The pursuer reclaimed. He argued;—The pursuer was entitled to reduction unless he was liable to an instant action of constitution and [858] adjudication.* Though

must be held gratuitous. The Lord Ordinary cannot assent to this doctrine. The deed, although a deathbed deed, is the proper act and deed of the deceased. It expresses his mind and intention, and contains his deliberate acknowledgment of a debt. Such an acknowledgment would be valid as against his moveable estate, for there never was any law of deathbed as to moveables, and whatever its legal effect on the heir, the Lord Ordinary [857] thinks it must be held that the late David Gray owed his son John £125, and supposing him to have left free executry this sum, if not to be paid by the heritable subjects, would be a good claim against the executry. In short, the Lord Ordinary thinks that the debt was honestly due, however this fact may tell on the law of the case. Not only the deceased himself, but all the other members of the family, except the pursuer, seem to be satisfied of the justice and honesty of John Gray's claim.

"The only other fact requiring notice is, that there seems to be a deficiency in the moveable estate left by the deceased to pay his debts, even apart from the debt of £125, which the Lord Ordinary thinks may be held to have been justly due to his son John. It is in evidence that David Gray left no moveables except his furniture, which is not worth much more than £10. The funeral expenses exceeded this sum, and the surgeon's account and some other claims are not yet paid.

"In these circumstances, the pursuer maintained in point of law that he was entitled to have the disposition of 1st May 1871 reduced and set aside *in integrum*, with everything contained in it, including every acknowledgment of indebtedness or of obligation, and that the pursuer was entitled to take up the heritable property as heir-at-law, and to defend as he best might all claims of debt which might be brought against him in other and independent actions. He maintained broadly that no writing executed on deathbed could be used againt him in any way, not even a bill or a personal bond for money borrowed, or for articles purchased, and that the creditors in such debts, if they could not operate against the executry, must forfeit their claims, however just and equitable.

"The Lord Ordinary thinks that this is much too broad a statement of the rights of the heir-at-law. It is succession to heritages,—that is, the right of an heir proper,—that were protected by the law of deathbed. It never operates in favour of the heir against just and lawful creditors. In the words of Professor Bell—'Settlements and dispositions *mortis causa* are the peculiar objects of this protecting law, and this is the class of deeds on which questions of deathbed most commonly arise.' It is no doubt true that whatever the form of the deed may be it will be struck at if the heir's right of succession is prejudiced thereby, and on this ground many *inter vivos* deeds have been cut down in whole or in part, conditionally or absolutely, so as to let the heir succeed just as he would otherwise have done. But still it is only to the effect of succession that the heir can insist. Free inheritance alone, after payment of all debts, is the subject of his claim. He never can compete, it is thought, with an onerous creditor, provided that onerous creditor instruct his debt in any competent form—See Erskine iii. 8, 97; see also Bell's Commentaries (7th edition), i. pp. 87–92, and the cases there quoted, which seem to embrace all the important cases affecting the point now at issue.

"The case nearest the present seems to be that of Lindsay *v.* Lindsay, 2d December 1819, Hume's Decisions, 156, where a disposition as for a price to the second son was reduced by the heir. But in that case is was proved that the statement as to the payment of price was false. The second son, the alleged purchaser, pretended that he had, after his father's death, expended the price in paying the old man's debts; but he utterly failed to prove this, the only evidence being a receipt for an alleged balance paid to the widow, which neither proved debt nor payment. The present case is strongly distinguished from this, if the Lord Ordinary is right in holding it sufficiently proved that the narrative of the disposition is true, and that at its date the old man was really owing his son John at least £125.

"On the principle that the heir, proposing a challenge on the ground of deathbed, cannot compete with onerous and *bona fide* creditors, it has been held that even when an heir has been entitled to set aside a sale as prejudicing the [858] succession, he must, as a condition precedent, repeat the price actually and in *bona fide* paid—1 Bell's Com-

* Ersk., iii. 9, 47.

a deed was onerous, yet if it was voluntary, and the granter was under no antecedent obligation to grant it, the heir-at-law was entitled to reduction.* The defender had failed to prove the consideration stated in the deed. The advances, if made by him, were so made *ex pietate*, and not as a debt.

The defender argued ;—There was no executry, and the advances made by him fell to be paid out of the heritage. He was willing to convey, on repayment of these advances, with interest.† The acknowledgment of the deceased, coupled with the other evidence, proved the advances. The acknowledgment dispensed with the exact evidence of the advances which would have been required in other circumstances.‡

At advising,—

LORD JUSTICE-CLERK.—I am unable to concur with the Lord Ordinary in his view of this case. It is probably, as he says, one of the last in which we may be called on to consider a plea of deathbed. But while the law remains, we must administer it according to principle, and the decided cases.

[859] It is admitted, or at least not disputed, that the deed under reduction was executed on deathbed. It bears to be a conveyance of the heritable property of the granter in consideration of a sum of £125 said in the narrative of the deed to have been advanced to the granter at various times by the disponee. To this extent it bears to be onerous ; but it is not said that the granter lay under any previous obligation to grant it, other than the obligation which rests on all to pay their debts. The effect of the deed was unquestionably to burden the heritage primarily to the amount of the alleged debt, which would otherwise have been payable primarily out of the personal estate of the granter. Even if the debt had been clearly established I think it un-

---

mentaries, 88, and cases. See, *inter alia*, Richardson *v.* Sinclair, 30th July 1635, Mor. 3210; Gillespie *v.* Gillespie, 18th June 1802, Hume's Decisions, 145. Accordingly, if in the present case it had been alleged that there was sufficient moveable estate to pay the deceased's debts, or that £125 was less than the true value of the property conveyed, or that in any other way whatever the pursuer's rights of succession to a free reversion of heritable estate was prejudiced, the Lord Ordinary would have given the pursuer his redress. He would have done so either by reducing conditionally on all debts ultimately affecting the heritage being paid, or by giving the heir an opportunity of paying the debts, and then taking up the succession. The Lord Ordinary would have done this in the present process, and he, without hesitation, would have allowed any amendment or further inquiry necessary. He feels himself bound, both under the words and under the spirit of the recent statute, to dispose in this action of the real questions in dispute between the parties, instead of remitting them to a new action as was suggested by the pursuer. The 29th section of the Court of Session Act of 1868 provides in imperative terms that all 'amendments necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be made.'

"No such course, however, was asked by the pursuer. It is admitted and was proved that £125 was the full value of the subject. It was admitted and is proved that David Gray's moveable estate could not nearly pay his debts, apart altogether from the £125 due to John, and the pursuer quite candidly admitted that his object was to take the heritage and cut out his brother John from all claim whatever. The pursuer, who has contributed nothing for his father's support or assistance, contended that notwithstanding the old man's admissions and statements made years before his death, John's advances must be utterly disregarded, and that however true the narrative in the deathbed deed may be, the whole heritage must be carried away without any obligation to pay what was acknowledged as a just and righteous debt. The Lord Ordinary humbly thinks that this contention is unjust and inequitable, and that the law recently abrogated did not, even in its strictest interpretation, lead to any such result. If the pursuer wishes to pay his father's whole debts, including that due to the defender, so far as the moveable estate proves deficient, he will be at once allowed to do so, and he may then take the heritage. But as this is not his position, and not his proposal, the Lord Ordinary has assoilzied the defenders from the conclusions of the action as laid."

* Bell's Com., 5th ed., vol. i. p. 92.

† Pollock *v.* Shaw, M. 3208 ; Gillespie, Hume's Dec. 145.

‡ Smith *v.* Shields, Feb. 18, 1830, 8 S. 553.

necessary to quote authority to prove that the deed would have been reducible by the heir-at-law.

Two grounds, however, are stated in defence, which are substantially adopted by the Lord Ordinary. It is said, in the first place, that the heir can only reduce the deed on the condition of paying the debt; and, in the second place, that, as the deceased left no personal funds, the heir has no interest to reduce, as the heritage may be attached for the debt.

I am not satisfied that, even on the assumption that the debt subsisted at the date of the conveyance, either of these defences are well founded. As to the first, it is true that when heritage is sold on deathbed for a price instantly paid the heir has been found entitled to reduce the sale only on repeating the price to the purchaser. In such cases the conveyance is the counterpart of the price, which was only paid in respect of it. But when the consideration for the conveyance is a personal debt already subsisting the case is different. The effect of the conveyance is only to burden the heritage with a debt which would otherwise have been payable in the first instance out of the executry; and no case has been quoted to us, and none, I believe, has been decided, in which, under such circumstances, this rule has been applied.

As to the second ground, I do not see how such a question can be tried in a reduction at the instance of the heir-at-law. The executors are no parties to the process, and in their absence no inquiry can effectually take place into the amount of the executry, or into the burdens on it. These seem to be considerations entirely foreign to the heir's right to reduce, whatever the effect of the reduction may be.

But while I have stated these views, they are not necessary to the opinion I have formed. I think the defender has entirely failed to prove the subsistence of his debt. It is said that the acknowledgment in the deathbed deed is of itself sufficient to constitute it, seeing the granter was in no respect disabled from the ordinary management of his affairs. But this must be taken with much qualification. The debt is discharged in the same sentence as that in which it is acknowledged. If we are satisfied that the end and object of the acknowledgment was to validate a deed which was otherwise beyond the power of the granter, I do not think that we are bound to accept it *pro veritate* to the prejudice of the heir-at-law. It that case it must be otherwise supported, although I do not say, if the subsistence of the debt was the main question, that the acknowledgment is to be altogether overlooked. Now, I am quite satisfied that such was the sole object of the acknowledgment contained in this deed; and when I come to consider the evidence adduced to establish it independently of the deed, I really entertain no doubt that the advances in question, even if they were vouched, which they are not, never were meant to be kept up as a debt against the deceased. They were, on the showing of the defender himself, payments made over a course of more than ten years by a son on account of his father *ex pietate*. No voucher of any kind was ever taken for them at the time, and I cannot assume it as established, so as to destroy the heir's right to reduce, that this debt subsisted at the date of the deed.

The case of Lindsay, reported by Mr. Hume, p. 156, has considerable analogy to the present. It is clear that in that case the statement in the deed was not held *pro veritate*. It is true that in that case the narrative of the deed, which set forth an instant advance of £100, was admitted to be erroneous. But it was alleged that the money had been employed in discharging debts due by the [860] granter, for which the heritage was liable. But the Court disregarded the plea, and reduced the deed.

Lord Cowan.—The Lord Ordinary has found that the disposition under challenge was executed by the deceased when on deathbed, but that a good defence had been stated to the reduction—in other words, that the pursuer, as heir-at-law, is not entitled to have the deed set aside, inasmuch as he "is not prejudiced by the said disposition and conveyance, and has no interest to insist in the present action."

The grounds on which the interlocutor proceeds are, that, by the narrative of the deed, the granter acknowledges that he is indebted to the defender, John Gray, his second son, in the sum of £125; that the value of the deceased's estate, heritable and moveable, is insufficient to pay the debts of the granter, including this said sum; and that the pursuer has not offered to pay the debts of the deceased, in so far as not provided for by his moveable estate. These grounds of defence are, in my opinion, irrelevant, and insufficient to support the conclusion at which the Lord Ordinary has arrived.

The law of deathbed entitles the heir-at-law to set aside all deeds executed to his

prejudice by the deceased *in lecto*; and I cannot doubt that the deed in question has the effect of injuring the heir's right of succession. There is an acknowledgment of indebtedness, to the extent of the alleged value of the heritable subjects, in sums "advanced and paid to me and on my behalf at sundry times preceding the date of these presents," but in evidence of which advances no specific vouchers are produced or alleged to exist. It is not the case of a sale of the subjects for a price paid at the time. Neither is it the case of a burden created for a present advance of money on loan. For anything that appears, these alleged advances may have been made with no view of creating debt, or on the footing of loan. And the main question thus is, whether on deathbed heritage can be effectually alienated to an alleged creditor, and the heir-at-law's right of succession defeated by means of such an acknowledgment of debt as occurs in this deed. I think this quite inconsistent with the heir's right. He is entitled to have the heritage of his ancestor free of all deeds executed to his prejudice on deathbed. It may be that from the ancestor's dying insolvent, or from his personal estate being insufficient to pay his debts, the heritable subjects may be liable to be attached by the diligence of creditors. That cannot affect the heir's right to have the heritage. When the creditors take measures to constitute their debts the heir may be able to state a good defence, or he may pay any just debts that are due to creditors of the ancestor, and thus prevent the heritage from adjudication. Such considerations are not *hujus loci*. The heritage of his ancestor descends to him, and no deathbed deed can be permitted to affect or injure his undoubted right of succession.

There were various views stated on which it is contended that this deed is not to the prejudice of the heir. It is first said that the acknowledgment by the deceased, of moneys received, is binding on the pursuer, and that his interest to have the heritage is thus destroyed. But it is manifest that to give such effect to the mere statement of advances having been made or debt incurred to the grantee would be to prevent the operation of the law of deathbed altogether. Whatever may be the effect of the acknowledgment in an action of constitution against the deceased's representatives, including the heir-at-law, it can be of no avail against his right to have the heritable subject, free of the injurious act, executed on deathbed. Until properly constituted, the debt set forth in the narrative of the deed cannot be held binding on the heir-at-law to the effect of debarring him from his right to challenge the deathbed conveyance.

But then it is said that there is no moveable estate sufficient to meet the debts due by the deceased, including the sum acknowledged to be due to the disponee, and that this has been established by the proof. The answer is, that this matter of deficiency of funds to meet the debts of the deceased is not for inquiry in this action. The heritable subjects may possibly be carried off from the heir-at-law by the diligence of creditors, but this eventuality is no legal bar to the heir's right of challenge. It is not matter relevant for inquiry under this [861] action of reduction. The heir may choose to have, and is entitled to have, the heritage, though the succession may be ever so deeply burdened with debt.

The same answer occurs to that part of the reasoning in support of the interlocutor which is based on the heir not offering to make payment of the debts due, including the sum acknowledged by the deed under challenge. No such offer has ever been required or made a condition of the heir's right of challenge in such circumstances as the present. Where indeed there has been a sale to a third party, and a price paid to the granter on deathbed, or where there has been a burden created over the heritage for an immediate advance in money on deathbed, it has been made a condition of the right of challenge that the heir should make restitution of the price, or of the advances; and there are other peculiar cases where such a condition has been imposed. But in such a case as the present there is no example of this course being followed. The creditors in personal debts will have their remedy, if the moveable estate is deficient, by legal diligence against the heritage.

For these reasons, I think the interlocutor under review must be recalled, and decree of reduction pronounced.

LORD BENHOLME concurred.

LORD NEAVES.—There are here two questions, 1st, whether this deed is reducible on deathbed; and 2d, on what conditions, if any, is it so reducible?

That it is reducible is clear. It affects the heritage, and was executed on deathbed. Every deed affecting heritage is reducible on deathbed, unless it is both onerous and compulsory.

It is here admitted, accordingly, that this deed is reducible, but it is said that a certain equity attaches to qualify the right to reduce. A deathbed deed is not a nullity. It requires to be reduced, and there is much equity in the principle that reduction must be accompanied as far as possible with a *restitutio in integrum*. But what is *restitutio in integrum* in this case? Prior to this conveyance the disponee was a personal creditor, and on reducing the conveyance he will be brought back to precisely the same position.

We must therefore reduce the deed, leaving the disponee to the remedies which were open to him before the deed was granted.

This interlocutor was pronounced:—"Find that the deed under reduction was executed *in lecto*, and that the pursuer has a good title and interest to reduce the same: Therefore recall the interlocutor of the Lord Ordinary, reduce the disposition libelled, in terms of the summons, and decern: Find the pursuer (reclaimer) entitled to expenses," &c.

R. P. STEVENSON, S.S.C.—HILL, REID, & DRUMMOND, W.S.—Agents.

No. 151. X. MACPHERSON, 861. 25 June 1872. 2d Div.—Lord Jerviswoode, R.

MRS. JEAN MITCHELL OR M'KERSIE AND HUSBAND, Pursuers.—*Shand—Orphoot.*

JOHN MITCHELL AND OTHERS, Defenders.—*Munro—Fraser.*

Mora—Executor—Partnership, Dissolution of—Executor of Deceased Partner—Public Sale.—The executors of a deceased partner, with the knowledge of the remaining next of kin, entered into a reference with the surviving partners to fix the amount of the deceased's share. The amount was fixed, and lodged in bank, and the partnership was continued with new partners. Eight years afterwards one of the next of kin raised an action of reduction of the reference and decree-arbitral, and of declarator that the executors were bound, on the deceased partner's death, to have brought the business to public sale. *Held* that the pursuers were barred *personali exceptione* and by *mora* from insisting in the action.

Observations on the right of the executors of a deceased partner to insist on a public sale of the business.

[862] Mrs. Jean Mitchell or M'Kersie, wife of William M'Kersie, distiller, Campbeltown, was one of the next of kin of the deceased Archibald Mitchell, distiller, Campbeltown, who died on 2d March 1863, intestate and unmarried. Archibald Mitchell was a partner of the firm of Wylie, Mitchell, and Company, distillers, Campbeltown. All the next of kin except Mrs. M'Kersie had consented that Archibald Mitchell's interest should be fixed by arbitration, and in 1863 a reference was made to two referees, and a decree-arbitral pronounced by them on 2d October 1863, finding that Archibald Mitchell's interest was £3645, 11s. 9d. The pursuers were called on to take part in the choice of the referees, but refused to do so, and the share of the above sum belonging to Mrs. M'Kersie, being, with interest, £622, 13s. 5d., was on 20th August 1870 lodged by the executors in bank on a deposit-receipt. In the same year a new company was formed, under the old name of Wylie, Mitchell, and Company, but the pursuers were not partners of that company. The pursuers alleged that the assets of the old firm were taken over by the new, Archibald Mitchell's share being taken by his two brothers, his executors, at the sum in the decree-arbitral. Mrs. M'Kersie and her husband brought this action in 1871 against the executors-dative of Archibald Mitchell, and Wylie, Mitchell, and Company, and the individual partners of that firm, to have it declared, *inter alia* (1) that Archibald Mitchell's executors were bound on his death to have insisted that the business of Wylie, Mitchell, and Company should have been sold by public sale; and (2) that the business now carried on under the name of Wylie, Mitchell, and Company should be sold in that manner, and the pursuers' share of the

interest of Archibald Mitchell paid to them. The summons also contained conclusions of reduction of the reference and decree-arbitral, and at the same time the pursuers brought a relative action of count and reckoning.

The pursuers pleaded;—(1) The executors foresaid, on the death of the said Archibald Mitchell, were, in the circumstances above set forth, bound to realise, by public roup and sale, the whole capital stock and assets of the said dissolved firm. (3) The foresaid reference, deliverance, and award ought to be reduced, in respect—1. It was *ultra vires* of the defenders, John Mitchell and William Mitchell, without the consent of the whole next of kin, to refer the value of the late Archibald Mitchell's interest in the firm of Wylie, Mitchell, and Company to arbitration; 2. the said reference was unauthorised and objected to by the pursuers, and was entered into by the defenders in the knowledge of the pursuers' objections; 3. the value of the said deceased Archibald Mitchell's share is grossly understated, and the share is valued as at 9th July 1863, while the firm was dissolved on 2d March 1863; 4. the valuators did not themselves value the distillery premises, or capital stock, debts, and assets of the firm, but adopted the valuation contained in the balance-sheet prepared by James Harvey.

The executors pleaded;—(1) The executors of the deceased Archibald Mitchell being trustees for the administration of his estate were entitled to adopt that mode for realising it which, in the circumstances, they deemed most prudent and beneficial for the executry. (2) The executors of Archibald Mitchell being trustees for the management of the executry estate were entitled, more especially having the consent thereto of the majority of the next of kin, to realise the interest of Archibald Mitchell in the firm of Wylie, Mitchell, and Company, by obtaining a private valuation of it as a going work, rather than by insisting upon a public sale of the whole concern; and, in these circumstances, one out of a number of [863] next of kin was not entitled to insist upon such public sale being carried out. (4) Even without the consent of the majority of the next of kin executors are not bound, in order to ascertain the interest of the deceased in a copartnership, to insist that the whole stock, debts, goodwill, and premises of the copartnership should be brought to public sale, this being entirely a matter of prudence and discretion with reference to the circumstances of each case. (5) The pursuers are barred from insisting in this action, in respect that, after notice of the course proposed to be taken, they did not object thereto until it had been acted on, and merely declined to take any part in the realisation of the estate, and left this to the sole responsibility of the executors, who, in the exercise of a sound discretion, adopted the course which seemed to them most beneficial for all parties. (6) The pursuers are barred from insisting in this action, in respect that, they having intimated in 1863 that they intended to challenge the proceedings of the executors by action at law at a time when all matters were entire, failed to do so for seven years, during which a new firm was in existence, carrying on a more extensive business, with new capital, and all this in the same place where the pursuers resided, and without any intimation that the threat of legal proceedings was to be followed up.

The Lord Ordinary (Jerviswoode) allowed a proof, and thereafter pronounced this interlocutor:—"Finds as matter of fact, 1st, that a public sale of the business of the firm or company of Wylie, Mitchell, and Company, including the whole stock, property, goodwill, and other assets thereof (the right and duty of the defenders, the executors of the late Archibald Mitchell, in regard to which sale is now sought to be established under the first declaratory conclusion of the summons), could not have been carried out on the death of the said Archibald Mitchell, otherwise than subject to a serious risk of loss, and of detriment to the interests of the several persons representing him, and to the interests of the partners of the said firm other than the said Archibald Mitchell; and, 2d, that a public sale of the business which is now carried on under the said firm, such as is contemplated under the second conclusion of the summons, would (assuming that the pursuers had right or title to insist on such a sale) be hazardous to, and involve serious risk of loss and injury to the interests of the partners in the said present company: And with reference to the preceding findings, finds as matter of law that the pursuers have failed to instruct by evidence any facts averred on their behalf which are relevant and sufficient to support or warrant the conclusions of the summons, or any of them: Therefore assoilzies the defenders from the whole conclusions of the summons, and decerns: Finds the pursuers liable to the defenders in expenses," &c.

The pursuers reclaimed. They argued;—On dissolution of the partnership the

partnership property became the common property of the partners or their representatives.* Any one interested was entitled to have it brought to public sale.

The defenders argued;—A mere beneficiary on the estate of a deceased partner was not entitled to insist on the partnership property being brought to sale. The pursuers' demands were excluded by *mora*.

LORD JUSTICE-CLERK.—(After stating the facts)—The action presents one feature of peculiarity which has not occurred in any of the prior cases. It is supported in argument by the principles supposed to be established by the cases of Crawshay *v.* Collins (15 Vesey, 218), Featherstonehaugh *v.* Fenwick (17 [864] Vesey, 298), and Brown *v.* De Tastet (Jac. 284). These cases established three propositions in relation to mercantile companies constituted without articles or special contract—First, that they were dissolved by the death, and were dissoluble at the will of any partner; secondly, that on dissolution any partner or the representative of a deceasing partner, was entitled to insist on a sale of the company's stock, and was not bound to accept a valuation; thirdly, that any partner who continued to trade on the joint property was liable to account for the joint profits. These principles are well settled, but they have no application to the present case. The surviving partners, and the representatives of the deceasing partners in this case, settled accounts in 1863. On the one hand, the executors of the deceasing partner accepted certain payments and considerations in full of the claims of the estate on the joint property, and discharged, or became bound to discharge, the surviving partners. On the other hand, the surviving partners by the settlement acquired absolute right to the stock of the old company, which was thus brought to an end, and formed a new company with new partners and new stock. The present challenge is brought neither by a partner nor by the representatives of a partner of the old company, but by one of the next of kin, under the succession of the deceased partner, who has, or says he has, an unsettled claim against his executors. I can find nothing in these cases to support such a demand. I find the very reverse. In Crawshay's case, Lord Chancellor Eldon puts the case of a settlement with the executor as the counterpart of the case before him. He says,—"If the surviving partners think proper to make that which is in equity the joint property of the deceased and them the foundation and plant of increased profit, if they do not think proper to settle with the executor, and put an end to the concern, they must be understood to proceed upon the principle which regulated the property before the death of their partner." In short, these cases did decide that a surviving partner could not insist on a valuation, and was bound to submit to a sale; but they did not decide that the surviving partner, on the one hand, and the representative of a deceasing partner on the other, could not settle accounts on the footing they thought mutually advantageous; nor was there any principle on which such a doctrine could rest, provided the settlement were one not liable to challenge on the ground of collusion or manifest or known inequality and injustice, amounting to fraud.

Two elements were suggested in this case as substantially vitiating the agreement and impugning its good faith. The first was, that John Mitchell, who was one of the executors, was also one of the surviving partners. If John Mitchell had been sole partner, and also sole executor, the objection might be formidable. But he was neither. The Harveys held the greater part of the remaining stock, and had no interest in the share of the deceased; and William Mitchell, the other executor, had no individual interest whatever in the estate. The surviving partners were therefore quite in a position to deal at arm's length with the executors, and were entitled to do so.

The other objection, as far as the surviving partners are concerned, is, that they were privately aware of Mr. M'Kersie's letter of the 3d of October. I do not think they were bound to take any notice of it. No steps were taken to interpel them, and the demand made in that letter we have found to be one entirely inadmissible.

I am therefore of opinion that, as far as the surviving partners were concerned, the old concern was effectually brought to an end, and the interest of the partners validly ascertained and discharged, as between the survivors and the representatives of the deceasing partners. As the new concern, therefore, is distinct from the old, and never traded on the assets which belonged to it, the primary and leading conclusion of the action is untenable.

The only question which remains, and the only one which in my opinion the pursuers can in the circumstances raise, is a question of due administration on

* Bell's Com. (5th ed.) vol. ii. p. 645.

the part of the executor. But I can find no ground on which such a plea can be maintained.

In the first place, it is as well proved as in such a case it could be, that the settlement was perfectly reasonable. The valuators were examined, and gave [865] their reasons for the valuation, and nothing is proved which can lead us to suppose that it was not fairly carried out. It is said that the goodwill was not valued. It was doubted seriously, in Crawshay *v.* Collins, whether an expired partnership could be said to have any goodwill; and if it were to be wound up by a sale it plainly could have none. A goodwill only applies to a going concern, but if stock and premises are disposed of, the goodwill perishes in the process. As it was, the estate of the deceased partner got the benefit of the valuation of a lease which in reality, as we now find, did not exist. The valuators, however, say that they valued the stock as belonging to a going concern, which of course included the goodwill.

But I do not think the executors can in any view be called upon now to enter into any such inquiry. The whole stock has perished long ago. A revaluation is impossible. A sale is equally so. The pursuers deliberately refrained from interposing while they could do so with effect, and kept absolute silence for five years, while they knew that the agreement was being carried out and acted on. Their threats of legal proceedings add force to their delay; for they show that they intentionally refrained from proceeding while in perfect knowledge of such rights as they had. It would be contrary to every principle of justice and reason to sustain such a claim now.

I propose therefore to place our judgment on a somewhat wider ground than the Lord Ordinary has adopted. I do not say that if that ground had been the only one it was not sufficient. The proposal is, that the stock of the new firm should be sold in order to ascertain the difference between the sum consigned for the pursuers and what a sale would have brought in 1863, and also the amount of profit which that excess has yielded since 1863. I doubt if, for such a fractional interest, we should have thought of granting such an order. In the case of Blyth *v.* Blyth, reported in the Law Times in January 1861, Lord Campbell refused to order a sale, and confirmed a valuation, notwithstanding the resistance of the executors of a deceasing partner, and that on the ground of the true interests of those concerned. But I think our judgment should proceed on the broader ground.

LORD COWAN concurred.

LORD BENHOLME.—I agree that the Lord Ordinary has not put the case on its true footing.

A dispute between beneficiaries under an executry as to how the estate is to be managed is in a very different position from a dispute between the executor of a predeceasing partner and the surviving partners. The executor of a predeceasing partner may insist absolutely on a public sale, but one of several nearest of kin cannot put his spoke in the wheel of the executry management whenever he pleases, and insist that the executry shall be wound up by a public sale. The pursuer does not aver that it has been improperly conducted, which of itself is a good answer to the conclusion for damages. But even though there had been doubt as to these matters, the *mora* here has been so great as to constitute a bar to the action. It is inadmissible, that when the position of matters has become entirely changed, and the original estate no longer exists, this party shall be entitled to come forward and to propound the claims he asserts in this action.

LORD NEAVES.—I concur. The position which this pursuer has all along taken up is in the highest degree unfavourable to his present contention. Either from ignorance or from prejudice he has throughout failed to put his rights and contentions upon a proper footing.

In the first place, it was perfectly competent for him to have got himself confirmed executor, but he refrained from doing so.

Then the two persons who got the office were appointed in the usual way; and consequently the ordinary edictal notices must have been served on the pursuer. He was therefore in full knowledge of what was being done, and if he objected to the proposed appointment he should have appeared and opposed. He, how-[866]-ever did nothing of the kind. There is therefore no pretence for his treating or speaking of the executors as "self-appointed executors." They were regularly appointed by the Court.

But, in addition to this, the pursuer was one of the next of kin. Now the

executors called a meeting of the next of kin, and here again the pursuer had another opportunity of appearing and urging his peculiar view upon the other parties interested like himself. But he purposely neglected to take advantage of this opportunity, and refused to come to the meeting at all. Now, the pursuer's main contention in the present action is, that the deceased's share of the business ought to have been sold. But that could not have been done after other arrangements had been made for carrying on the business.

But, independently of these considerations, the pursuer was at that time entitled to have brought this action, and I therefore cannot but think that there has been *mora* on his part in allowing such a lapse of time before bringing this action.

But ought the executors to have taken the step which the pursuer contends for? I do not think they were bound to do so. It is not an absolute indefeasible right that beneficiaries have, to realise. No authority has been shewn us to the effect that any one of a multitude of beneficiaries can insist in breaking up a going concern against the will of all the others, or even a large majority. On this point I agree with the views of the Lord Ordinary.

The following interlocutors were pronounced:—

In the Reduction.—"Recall the interlocutor: Sustain the defences, and of new assoilzie the defenders from the whole conclusions of the summons, and find them entitled to expenses, and remit," &c.

In the Count and Reckoning.—"In respect of the judgment pronounced of this date, in the relative action of reduction at the instance of the pursuers, ordain the defenders, as executors-dative of the deceased Archibald Mitchell, to deliver to the pursuers the deposit-receipt for £622, 13s. 5d., being No. 8 of process, and dated 20th August 1870; and grant warrant to the Commercial Bank, upon delivery of said deposit-receipt, to make payment of the contents thereof, and any interest which has accrued thereon, to the pursuers or their agents: *Quoad ultra* assoilzie the defenders from the whole conclusions of count and reckoning: Find the defenders entitled to expenses in so far as not already determined, and remit," &c.

MORTON, NEILSON, & SMART, W.S.—JOHN GALLETLY, S.S.C.—Agents.

No. 152. X. MACPHERSON, 866. 26 June 1872. 1st Div.—Lord Mackenzie, B.

MRS. ANNIE LAWSON OR SURTEES, Pursuer.—*Sol.-Gen. Clark—Rhind*
ROBERT WOTHERSPOON, Defender.—*Shand—Lancaster.*

Process—Proof—Judicial Examination of Party—Penuria Testium.—The pursuer of an action of declarator of marriage, after a proof before answer had been closed, moved for a judicial examination of the defender. *Held* (refusing the motion), that it is only in cases where there is either *penuria testium*, or reason to suspect fraudulent concealment of facts, that the Court will allow the judicial examination of either of the parties in consistorial cases.

Observations on what constitutes *penuria testium.*

Vide ante, p. 355.

This was an action of declarator of marriage founded on promise *subsequente copula.* The Lord Ordinary allowed a proof before answer, and by a subsequent interlocutor his Lordship, on the pursuer's motion, and before proof was led, appointed the defender to appear for judicial ex-[867]-amination. This interlocutor, however, was recalled by the Inner-House on 20th January 1872, and the proof allowed by the previous interlocutor was taken and closed. Thereafter the pursuer renewed her motion to have the defender judicially examined, and the Lord Ordinary pronounced the following interlocutor:—"Allows the defender to be judicially examined, first, in regard to the carnal connection of the defender with the pursuer, set forth in the record; and second, in regard to the defender's knowledge, during the period between the month of January 1865 and the 5th of July 1871 of and concerning the action at the pursuer's instance against Francis

Dewar, and the procedure therein; and appoints the said judicial examination to take place before the Lord Ordinary on a day to be afterwards fixed." *

* "NOTE.—It appears from the report of the decision of the Court (20th January 1872, *ante*, p. 355), recalling the interlocutor of the Lord Ordinary, dated 23d December 1871, in which the judicial examination of the defender, to the effect set forth in the preceding interlocutor, was allowed, before proof had been led, that such examination should only be allowed where there is a *penuria testium*, or undue concealment or suspicion, and where it is essential to the justice of the case. The case of the pursuer on record is, that she is the widow of an officer in the East India Company's Service; that she became acquainted with the defender in 1865; that he paid his addresses to her; that, on 20th November 1867, he gave her the promise of marriage, No. 6 of process, in which he promised to marry her, and provide for her according to his means, until circumstances warranted such marriage, always providing that in the interim she continued to lead a virtuous and exemplary life, and that, relying upon this promise, she was prevailed upon to allow the defender to have carnal connection with her during the period between 20th November and 1st December 1867, and also in the months of December 1867 and January and February 1868, and subsequently.

"It is, in the opinion of the Lord Ordinary, clearly proved that the pursuer is not the widow of an officer; that in, and for several years after, 1855 she was a prostitute in Edinburgh; that from 1857 to 1859 she kept a brothel in St. James' Square, Edinburgh; and that before going there she kept a brothel in St. David Street, Edinburgh; that she thereafter went to Glasgow, where she accidentally met the defender in 1865, and that he, after visiting her from time to time, at last took her into keeping as his mistress in 1866.

"It was in such circumstances that the promise of marriage, dated 20th November 1867, No. 6 of process, was granted by the defender. The only witness adduced by the pursuer in support of her averments of connection after 20th November 1867, on the faith of that promise, was Jane Bird, her servant in Glasgow from the end of April until the end of December 1867. She deponed that during this time the defender very frequently visited the pursuer at night, and remained a considerable time alone with her, but she never saw any familiarity between them, except upon one occasion, a few days after he had granted her the foresaid promise of marriage. She states that he then called about eleven o'clock at night, and that, as the pursuer was unwell and in bed, he was shown into her bedroom. She further states that, about one o'clock in the morning, she went into the bedroom to gather the fire, thinking the defender had left, and found him in bed with the pursuer. That is the only evidence adduced by the pursuer in support of her averments of repeated carnal connection between the defender and her on the faith of the said promise. The only other inmate of the house, according to Jane Bird, was the pursuer's son, aged twenty-one or twenty-two years, who she states usually went to bed about ten or eleven o'clock. One other witness, Christina Lang, who was servant to the pursuer for nearly two months after 3d January 1868, was adduced by the defender. She deponed that the defender called two or three times a-week, and remained an hour, and sometimes two or three hours, but that she never saw [868] anything like familiarity between them, and had no idea that there was anything of the kind.

"It is in these circumstances that at the close of the proof the pursuer renewed her motion for the judicial examination of the defender. The Lord Ordinary's interlocutor of 23d December last was recalled, and the pursuer's motion for the judicial examination of the defender was refused, as he understands, because there was no undue concealment or suspicion attaching to the defender, and no apparent probability of a *penuria testium* in regard to the matters on which the defender's judicial examination was sought,—the Lord President remarking that 'It is quite possible—I do not say it will be the case, but merely that it is quite possible that the facts of the case, when proved, may ultimately render judicial examination necessary.' Since the decision in the Inner-House was pronounced a proof has been led, on consideration of which the Lord Ordinary is satisfied that there is a *penuria testium* in regard to the alleged acts of connection subsequent to 20th November 1867, the date of the promise. In regard to the defender's knowledge of the action at the pursuer's instance against Francis Dewar there is no evidence whatever, except what may be inferred from the fact that

[868] The defender reclaimed, and argued, that after a concluded proof it was too late to allow judicial examination. Moreover, there was here no *penuria testium*, and the defender was not a competent witness. His statements, even if he were judicially examined, would have no more weight than admissions on record, and it has been decided that in a consistorial case judgment cannot competently proceed upon the admissions of either of the parties to the suit.* Reference to oath is incompetent in consistorial causes,† and the course proposed by the pursuer is open to objection on the same grounds, and also in the special circumstances of the case.‡

The pursuer argued;—An order for judicial examination may competently be pronounced even after judgment. The object in the present case was not to make use of the defender's judicial statements as evidence, but to clear up the proof already taken, where full light was in the peculiar circumstances of the case unattainable.§

At advising,—

LORD PRESIDENT.—We have had several questions argued in the course of this discussion upon which I do not intend to offer any opinion, because they [869] are not at all necessary to the decision of the only point that I think is before us, and that is whether, in the circumstances of this case and at this stage of the cause, this judicial examination ought to be allowed. I am of opinion that it ought not. I adhere to the view which I stated previously, that, in consistorial causes at least, judicial examination is not in modern practice allowed unless there appear to be something of the nature of fraudulent concealment of fact which can be known only to the party proposed to be examined, or *penuria testium*. Now, I think there is a great deal of confusion about what is meant by *penuria testium*. It will not do for the pursuer of such an action as this to examine a witness and then close her proof, and say, "I have no more evidence," and therefore there is a *penuria testium*. That is not the meaning of *penuria testium* at all. *Penuria testium* arises only where it is not possible that there should be any more evidence. A very well-known example of that is the celebrated case of Christie (17th November 1731, Maclaurin's Crim. Ca. 632, 2 Hume, Com. 400) in the last century, who was tried for murder, and whose defence was that he killed the deceased under the provocation arising from finding him in the act of adultery with his wife. No human being knew anything of that except himself and the deceased and the wife; and in these circumstances the wife's evidence was admitted. Now, that is a clear case of *penuria testium*. If the wife's evidence had not been admitted the fact would never have been proved. But that is not the nature of the case before us. All that can be said of the case before us on either of the two branches to which the Lord Ordinary refers is this, that there may be some little difficulty in proving either the *copula* subsequent to the promise of marriage or the defender's knowledge of the action which the pursuer had against the other man Dewar. Now, it may be that there is some little difficulty in proving these things, but at the same time they are facts of a kind that are proved by ordinary evidence in multitudes of cases that come before this

---

the defender's letters to the pursuer, the addresses of which are extant, are all addressed to her as Mrs. Dewar, except one, which is addressed to her as Mrs. Surtees Dewar. It is not unimportant also that none of the letters from the pursuer to the defender prior to 1869 were produced by him, although such letters were written once a-week on an average, these having been destroyed soon after they were received.

"Further, the Lord Ordinary considers that it would not be satisfactory to decide the cause without the judicial examination of the defender, and that it is necessary for the justice of the cause. For these reasons he is of opinion that the judicial examination of the defender should be allowed on the two points set forth in the preceding interlocutor, and in explanation thereof he begs to refer to the note to his interlocutor of 23d December 1871."

* Muirhead *v.* Muirhead, 1846, 7 D. 786.

† Longworth *v.* Yelverton, 1867, Law Rep. 1 Scotch App. 218, *ante*, vol. v. H. L. 144.

‡ Reid *v.* Lang, 1823, 1 Sh. App. 440; Young *v.* Watt, 1747, Dict. 6775; Harvey *v.* Inglis, 1837, 15 S. 964; Campbell *v.* Hill, 1826, 5 S. 54; Campbell *v.* Turner, 1 S. 500; M'Intosh *v.* M'Inlay, 1823, 2 S. 339; Livingstone *v.* Livingstone, 1832, 5 D. and A. 7; Stair, iv. 45, 5; Ersk. iv. 2, 33; 11 Geo. IV. & 1 Gul. IV. cap. 69.

§ A. B. *v.* C. D, 1843, 6 D. 342; Stewart *v.* Stewart, 1870, *ante*, vol. viii. 821.

Court, and there is not suggested any reason why they should not be proved if they be facts in this case; and, therefore, for the very same reason that led me to disapprove of what the Lord Ordinary did at an earlier stage of this cause, in ordering the judicial examination of the party, I think the judicial examination now is just as much out of the question. I see no room for it whatever in the circumstances of this case.

LORD DEAS.—I am of the same opinion, and the reasons which weighed with me formerly are still, I think, very much applicable. On the former occasion, besides going on what may be called the more technical grounds, I am correctly reported as having observed that even if these were met in a satisfactory manner, I still did not see any ground for saying that the proposed examination was essential to the justice of the case. I could not very well go into any detail here as to why I think it not essential to the justice of the case, without making observations which might have a bearing less or more upon the question that remains behind on the evidence, and therefore I think it right to refrain from any such explanations. I may say generally, however, that one reason that weighs with me against allowing this judicial examination is, that, so far as I can see at present, whatever its import might be, it would be unlikely to aid us materially in the decision of the case.

LORD ARDMILLAN.—In the first place, I am not prepared to say that the time when judicial examination was proposed necessarily makes the proposal incompetent. I do not think that. I think that if it were clearly for the ends of justice—essential to the justice of the case—and if that necessity appeared on the proof as taken, there is nothing in the mere time of its being demanded that would prevent the Court from ordering a judicial examination. That was my opinion before. Not that I could anticipate what would take place, but merely that in the refusing it, when we then refused it, I guarded and reserved my opinion as to the possibility of granting it afterwards if it turned out to be necessary for the expiscation of the case. With that observation, I have nothing to add to what has already been stated. I think it is better to avoid saying anything that might even be viewed as indicating an opinion on the evidence [870] itself. I think it is not essential to the justice of this case that the judicial examination should be allowed.

LORD DEAS.—In case what I have said should be misunderstood, I wish to explain that I was not indicating, in the slightest degree, any opinion as regards the result of the case. What I was looking to was this: there are very important questions to be debated and discussed on both sides, and though I have no opinion on the result of these questions, nothing could be expected to come out of the examination which would, to my mind, alter the nature of these questions, or supersede the necessity of deciding them.

LORD KINLOCH.—The rule is, that in consistorial causes the parties shall not be examined, unless in very exceptional cases. The present case is not at all exceptional. No doubt it deals with matters which may be said to be occult. But there is no occultness here which does not occur constantly in similar cases. I entirely agree with your Lordship in the chair as to the meaning of the term *penuria testium*. It does not mean insufficiency of evidence led; it refers to a case where, in fair construction, there is no other possible testimony.

This interlocutor was pronounced:—"Recall the interlocutor: Refuse the pursuer's motion for the judicial examination of the defender; and remit to the Lord Ordinary to proceed with the cause; reserving expenses."

D. CRAWFORD & J. Y. GUTHRIE, S.S.C.—J. & R. D. ROSS, W.S.—Agents.

No. 153. X. MACPHERSON, 870. 26 June 1872. 2d Div.—Lord Mackenzie, R.

NORTH BRITISH RAILWAY COMPANY, Pursuers and Nominal Raisers.—*Sol.-Gen. Clark*—*Moncreiff.*

DANIEL GLEDDEN, Claimant and Real Raiser.—*Watson*—*Strachan.*

P. AND W. MACLELLAN, Claimants.—*Scott*—*M'Laren.*

Process—Reclaiming Note—Review—Prior Interlocutors—Implement—Court of Session Act, 1868, *sec.* 52.—*Held* that an interlocutor sustaining the competency of an action of multiplepoinding, repelling objections to the fund *in medio* and ordering consignation of the fund, which was done, not having been reclaimed against at the time, could not be objected to after the reclaiming days had expired on a reclaiming note from an interlocutor on the merits.

These were conjoined actions of multiplepoinding, reduction, and count, reckoning, and payment as to certain monies due by the railway company under contracts with Messrs. Rosser and Smith, railway contractors, Dalkeith. The present question arose in the multiplepoinding. Objections were raised to the competency of the multiplepoinding, but these were repelled on 26th January 1871. On 4th February the Lord Ordinary found the nominal raisers liable in once and single payment, and apppointed them to lodge a condescendence of the fund, and on 21st February his Lordship ordained them to consign in bank the admitted fund. This was done. Objections to the fund were afterwards lodged, but on 18th July, in respect they were not insisted in, his Lordship repelled them, found the nominal raisers entitled to expenses, and ranked and preferred the claimant Gledden on the fund to £5000 to account of his claims. On 7th November the Lord Ordinary decerned for the nominal raisers' expenses, and ordained them to be paid out of the fund. No reclaiming note was lodged against any of these interlocutors.

An interlocutor on the merits having been pronounced on 15th February 1872, the claimants, P. and W. MacLellan, lodged a reclaiming note in these terms:—"Of this date, Lord Mackenzie, Ordinary, was pleased to pronounce the prefixed interlocutor, which, with all the previous inter-[871]-locutors, in so far as prejudicial to the reclaimers, are humbly submitted to the review of your Lordships." When the case appeared in the Single Bills the nominal raisers objected to the words "with all previous interlocutors, in so far as prejudicial to the reclaimers," stating that the reclaimers had intimated their intention to bring under review the interlocutors holding the action competent and repelling the objections to the fund *in medio*. The words were ordered to be struck out. When the case came out for hearing the reclaimers still insisted on their right to have all prior interlocutors brought under review.*

LORD COWAN.—This case comes before the Court under records prepared in three different processes conjoined by the Lord Ordinary's interlocutor of 11th February 1871. One of these processes is a multiplepoinding instituted in name of the North British Railway Company, the holders of the fund *in medio*, as pursuers and nominal raisers, after the other processes were in dependence.

To the competency of this multiplepoinding objections were stated, which were repelled by the Lord Ordinary's interlocutor dated 26th January 1871. Thereafter interlocutors were pronounced finding the nominal raisers liable in once and single payment, and appointing them to lodge a condescendence of the fund *in medio*. Expenses were awarded and decerned for in their favour. And farther, in the course of these proceedings the pursuers and nominal raisers were appointed to consign the sum in their hands, by interlocutor of 21st February 1871, upon a deposit-receipt taken payable to the party or parties who might be preferred thereto by the Court. This order was complied with, and subsequently condescendences and claims for the competing parties were lodged, and the record having been closed, the interlocutor under review of 15th February 1872 was pronounced.

* Court of Session Act, 1868, sec. 52.

Against this interlocutor a reclaiming note was presented which sought to have it, "with all the previous interlocutors in so far as prejudicial to the reclaimers," brought under the consideration of the Court. To the prayer of this note objections were taken by the railway company, the pursuers and nominal raisers of the multiplepoinding, on the ground that it had been intimated to them that it was the intention of the reclaimers to bring under review of the Court the interlocutor of the Lord Ordinary by which the objection to the action had been repelled and the competency of the multiplepoinding sustained. The words quoted were in consequence struck out of the prayer of the note, which then stood in the usual and prescribed form. The reclaimers still maintained, that under the provisions of the recent statute their reclaiming note had the effect of bringing under review of the Court the whole interlocutors in the cause, including those in which the railway company were concerned.

I am clearly of opinion that this cannot be maintained, and that the interlocutor sustaining the competency of the multiplepoinding, and those by which it was followed, as regards the condescendence of the fund *in medio* and consignation of the amount, not having been reclaimed against, but having been acted on by the parties, and held as the basis on which their several claims were lodged and the competition for the fund *in medio* discussed, became final, and could not, after the procedure that had ensued, be brought under review of the Inner-House. The general words of the statutory provision cannot be held to authorise what would be in itself unjust and contrary to established practice.

DALMAHOY & COWAN, W.S.—A. KELLY MORISON, S.S.C.—J. S. MACK, S.S.C.—Agents.

[*Distinguished*, Gordon *v.* Graham, 1874, 1 R. 1081. *Followed*, School Board of Harris *v.* Davidson, 1881, 9 R. 371.]

No. 154. X. MACPHERSON, 872. 27 June 1872. 2d Div.—I.

DAVID BOAG AND OTHERS (Wallace's Trustees).—*Moncreiff.*
ALEXANDER INNES.—*Moncreiff.*
JANET WALLACE OR WALKINSHAW AND OTHERS.—*Balfour.*
JAMES WALLACE.—*Balfour.*

Heritable and Moveable—Power of Sale—Trust—Implied Power.—By a trust-settlement trustees were directed to divide the residue among certain beneficiaries. *Held* (1) that this direction conferred by implication power to sell heritage which the truster had acquired after the date of the trust-deed; and (2) that the beneficiaries' share of the heritage was moveable.

Observed (*per* Lord Benholme), that if the interest of an heir-at-law had been involved it would be more difficult to hold that the power of sale was implied.

This was a special case presented to the Court by the persons interested in the succession of the late Andrew Wallace. He died on 11th November 1869, leaving a trust-disposition and settlement by which he conveyed the whole of his estate, heritable and moveable, to trustees. The first parties to the special case were David Boag and others, trustees under the deed. The second party was Alexander Innes, who had married Elizabeth Wallace, a niece of the truster, and was entitled to a share of the residue under the settlement. Mrs. Innes was alive at the time of the truster's death, and she died on 10th June 1870. Her heir of conquest was her immediate elder brother, James Wallace, who was one of the third parties to the special case. Mr. Innes, under his marriage-contract, was entitled to his wife's moveable property, but not to heritage. Janet Wallace or Walkinshaw, and six others, nephews and nieces of the truster, were entitled to shares of the residue, and were parties to the case.

The trust-deed contained provisions for payment of the truster's debts, &c., and for the support of the truster's widow. The truster was survived by his widow, and she died on 13th August 1871, and the trust fell to be wound up. The fourth and fifth purposes of the deed were—"Fourth, I direct and appoint my said trustees, as

soon as convenient after my death, to sell and dispose of my shop and stock therein, in Bernard Street, Leith, and that either by public roup or private sale, at such prices and on such conditions as they shall think proper. And fifth, On the death of my said wife I hereby direct and appoint my said trustees to divide the residue of my means and estate equally, share and share alike, between the said Andrew Wallace and Janet Wallace, Barbara Wallace, Margaret Wallace, Isabella Wallace, Elizabeth Wallace, and James Wallace, my nephews and nieces, all children of my said brother Archibald Wallace, and their heirs and assignees."

The only heritable property which belonged to the truster at the date of the settlement was the lease of a shop which he assigned before his death. Before his death he had acquired some houses in Baltic Street, Leith, yielding a rental of £33, 15s. The moveable property left by the truster was more than sufficient for payment of debts, and for the primary trust purposes.*

The questions were—"1. Are the first parties entitled or bound under the trust-deed to sell the subjects in Baltic Street? 2. Does the share of the said subjects, or of the price thereof, which vested in Mrs. Innes, fall [873] as moveable estate to her husband, the second party? or, 3. Are the first parties bound to convey the said subjects *pro indiviso* to the parties entitled thereto? and 4. Does Mrs. Innes's share thereof fall, as heritage, to be made over to her heir of conquest?"

At advising,—

LORD COWAN.—There have been a great many cases in which questions have arisen about trust-deeds containing directions or power to sell heritage. In deeds which give power, but do not direct the trustees to sell, it will depend on circumstances whether or not the power to sell will convert the heritage into moveable estate. The power enables the trustees to act according to their discretion, but they cannot sell heritage if it is not for the benefit of the beneficiaries, and if the effect would be to alter the character of their right in a question of succession. Now, here there is no power to sell heritage except the lease of a subject which the truster had assigned after the date of the execution of the deed, and which, therefore, did not belong to him at the time of his death. In regard to this heritage he desired it to be disposed of and form part of the residue. We have thus a direction that heritable and moveable property should be disposed of in the same way. Both are to form residue, and to be divided. The special provision which the trustees are bound to implement is thus expressed:—"On the death of my said wife I hereby direct and appoint my trustees to divide the residue of my means and estate equally, share and share alike," between the seven parties interested. How is this provision to be carried out? The moveable property is not to be separated from the heritage. There is to be one division after the amount of residue has been ascertained. I think it is necessary there should be a sale in order that the amount may be ascertained. Then you will have a fund which may be divided. The question is whether the trustees have power to carry out such a sale. I cannot see any reason for holding that that power of sale was not given by implication, and therefore I am of opinion that the first question must be answered in the affirmative.

LORD BENHOLME.—The question is whether the power of sale is to be implied, although no such power has been absolutely given by the deed. That question will be materially influenced by the consideration whether or not there is to be any interference with the rights of the heir-at-law. In a nicely balanced case that consideration will have great weight. I can read Lord Brougham's opinion in the case of Allan† in no other light than as turning on the interference with the rights of the heir-at-law. If that consideration had been absent, as it certainly is in the present case, the House of Lords would, as it appears to me, have given a different judgment.

LORD NEAVES concurred.

LORD JUSTICE-CLERK.—I am of the same opinion. First, I think that testamentary trustees are entitled to sell heritable estate when that is necessary to carry out the purposes of the trust, even although there may be no express power of sale conferred

* Angus *v.* Angus, Dec. 6, 1825, 4 S. 279; Burrell *v.* Burrell, Dec. 14, 1825, 4 S. 314; Speirs *v.* Speirs, Nov. 21, 1850, 13 D. 81; Buchanan *v.* Angus, March 13, 1850, 22 D. 979,—H. L. May 15, 1862, 4 Macqueen, 374; Allan *v.* Glasgow's Trustees, Jan. 28, 1842, 4 D. 492, 2 S. and M. 333.

† Allan *v.* Glasgow's Trustees, Sept. 1, 1835, 2 S. and M'L. 333.

by the deed, and I am quite clear that in this case the instruction to the trustees to divide the residue would not be fulfilled by leaving the heritage undivided, and conveying it in that state to the beneficiaries. Therefore the purposes of the trust cannot be fulfilled without a sale.

THE COURT pronounced this interlocutor:—"Find, 1st, that the first parties are entitled and bound under the trust-deed to sell the subjects in Baltic Street; 2d, that the share of the said subjects, or of the price thereof, which vested in Mrs. Innes, falls as moveable estate to her husband, the second party, and decern," &c.

A. D. MURPHY, S.S.C.—M'EWEN & CARMENT, W.S.—Agents.

[*Commented upon*, Wardlaw's Trs. *v.* Wardlaw, 1880, 7 R. 1070; Sheppard's Tr. *v.* Sheppard, 1885, 12 R. 1193.]

No. 155. X. MACPHERSON, 874. 28 June 1872. 1st Div.—Lord Mure, M.

LORD PROVOST, MAGISTRATES, AND TOWN COUNCIL OF PERTH, Pursuers.—*Fraser—Scott.*

THE RIGHT HONOURABLE GEORGE EARL OF KINNOULL, Defender.—*Sol.-Gen. Clark—Gloag.*

THE CALEDONIAN RAILWAY COMPANY, Defenders.—*Lord-Adv. Young—Johnstone.*

THE RIGHT HONOURABLE GEORGE EARL OF KINNOULL, Appellant and Defender.—*Sol.-Gen. Clark—Gloag.*

THE LORD PROVOST, MAGISTRATES, AND TOWN COUNCIL OF PERTH, Pursuers and Respondents.—*Fraser—Scott.*

Superior and Vassal—Condition—Obligation—Specific Implement.—By indentures entered into in 1459 a vassal was bound, as the condition of his right to certain lands, to maintain and repair certain causeways. The obligation was repeated in the titles, and was implemented till a period shortly anterior to 1865. The roads were materially changed in character and in their line, especially by changes effected by the construction of railways, and the amount of traffic upon them had enormously increased. In 1865 the successor of the vassal in the said lands refused any longer to maintain the causeways, and the superior brought an action of declarator and for implement against him. *Held* that the obligation was not extinguished, but that in consequence of the change of circumstances it could no longer be specifically enforced, but must be converted into a money payment.

Railway—Railway Clauses Act—Substituted Roads.—A railway company is not liable under sec. 39 of the Railway Clauses Consolidation Act to maintain and keep in repair substituted roads, but only the bridges constructed under its powers and the immediate approaches thereto.

The Magistrates and Town Council of the city of Perth, as representing the community, were by various titles confirmed by Act of the Parliament of Scotland, 1606, c. 32 (Thomson's Acts, vol. iv. p. 303) vested in the lands of Gildherbar, afterwards called Calsey lands, and others at Perth. These lands were feued out by them at various times, and all ultimately came to be vested in the defender, the Earl of Kinnoull. The lands of Gildherbar were given over to Robert Kinglassie, a predecessor of the Earl, by the aldermen, council, and community of Perth, upon a certain condition specified in indentures entered into between the said parties on 8th May 1459. The condition of the indentures was:—"And also the said Robert sall uphauld for ewir for passage for man and hors the calsay streikand fra the charter hous yet to the burne of Craigie sufficientlie as effeiris, with stane and sand, and als sall uphauld the Cow Calsay passand to Strewilling, streikand to the streip and brig now lieing at the Calsay, and for men, hors, and common passage, as is foresaid, and

in sicklyke manner the said Robert sall uphauld the calsay passand to Methven, as it streiks fra the east nik of sanct Paullis Chappell quhill it come to the burne abone the quhyt frieris: The quhilkis calsayis foirsaidis sall be uphauldin perpetuallie of the samyne breid as they now ar breader on the said Robertis cost, and gif it sall happin the said Robert, his airis or successouris, to failzie in all or any of thir poyntis foirsaid, it sall be lesum to the saidis aldermen, counsall, and comunitie to have regress to the said Gild herbar, with the pertinents, at their awin handis but any process of law the said Robert or his airis being wairnet on fourty dayis on Sommer day to the reformatioun of the saidis calsayis, and on winter day gif the calsayis happins to brek to the quantitie of ane or twa rude, he or his airis sall hawe full license to mend thirs faultis betuix that and lettir Marymes nixt thairefter, sua that he and they sall witt that they are not suddanlie start; and that being not done, the said aldermen, counsall, [875] and comunitie to have recourse to thair gild herbar, with the pertinents. In manner foirsaid," &c. There was a clause of warrandice to "the said Robert and his airis keepand all conditionis foirspokin.".

An instrument of sasine in the lands in favour of Mr. Francis Hay of Balhousie dated 24th September 1634 was produced, in which he is taken bound to repair these three common causeways, conform to the tenor of the said indentures. From that date down to the defender's succession to the Kinnoull estates in 1866 the lands of Gildherbar and others appear to have been held under titles containing the same obligation.

The defender's predecessors maintained and kept in repair the three Calseys down to 1865, although considerable portions of the roadway had been materially altered previous to and since the year 1848 by the formation of the railways passing through the town of Perth. The bridges over the railways and approaches appear to have been maintained and repaired by the railway companies under their statutory obligations.

In April 1866 the Earl of Kinnoull having disputed his liability to repair the said causeways, the pursuers raised an action in the Sheriff-court of Perth, concluding that his Lordship should be decerned to repair the Long Calsey, being a continuation of the High Street of the city, which had then fallen into a state of great disrepair. In September 1868 the other two causeways had also fallen into a state of disrepair, and they raised a second action in the Sheriff-court having the same conclusions in reference to the three causeways. These actions were conjoined, and a record made up and closed in the conjoined actions. The Sheriff allowed a proof of certain averments in the record, whereupon the defender appealed to the First Division of the Court of Session, by whom the cause was remitted to the Lord Ordinary.

His Lordship allowed a proof, and thereafter pronounced, on 26th December 1870, an interlocutor in which he "Sustains the appeal: Finds that the first and second of the common causeways mentioned in the titles and in the conclusions of the summons are situated within the extended police boundaries of the town of Perth; and that the third of the said causeways, with the exception of the portion to the west of Dovecot-land, is also situated within the said police boundaries: Finds that the pursuers have failed to instruct that they have now any right or title to insist in the conclusions of the present actions, in so far as regards those portions of the said causeways which are situated within the said police boundaries: Therefore dismisses the action, and decerns, reserving to the pursuers to establish in any competent process their claim to enforce against the defender the obligation in the indenture and other titles founded on by them to repair the portion of the causeway third above mentioned, and commonly called the Long Causeway, which is situated beyond the said police boundary, and between it and the burn crossing the high road near Cornhill, and to the defender his defences as accords: Finds the defender entitled to expenses, of which appoints an account to be given in, and remits," &c.*

* "NOTE.—This action is directed against the defender at the instance of the Lord Provost, Magistrates, and Council of the burgh of Perth, as representing the community, to enforce an obligation alleged to be contained in the titles under which the lands of Guild Herbar and others are held, to repair the roads or common causeways described in those titles. These causeways appear to have originally formed the main outlets from the burgh of Perth leading in the direction of Edinburgh, Stirling, and Crieff, but they seem now to be chiefly used for street traffic within the police boundaries of the town of Perth.

[876] The pursuers reclaimed against this interlocutor, but after the case was partially heard it was delayed in order that parties might endeavour to [877] effect an arrange-

"The action is rested upon an indenture entered into by the aldermen and [876] council of the burgh of Perth in the year 1459, by which Robert Kinglassie, the feuar in the indenture, was taken bound, as a condition of his right, to uphold as a common passage for man and horse the three causeways described in the indenture, and by which it was provided that if the said Robert Kinglassie, his heirs and successors, should fail to uphold the causeways, the aldermen, council, and community of Perth were to have recourse on the Guild Herbar lands.

"It does not appear at what precise date the lands in question came into the possession of the Kinnoull family. But there is produced an instrument of sasine in the lands, dated in the year 1634, in favour of Mr. Francis Hay of Balhousie, by which he is taken bound to repair these three common causeways, conform to the tenor of the indenture, and from the above date down to that of the defender's succession to the Kinnoull estates in the year 1866 the lands of Guild Herbar and others appear to have been held under titles containing the same obligation.

"At the discussion upon the proof it was maintained upon the part of the defender that the pursuers had failed to shew that the three roads or causeways in question, and more particularly those leading to the Craigie Burn, and to the burn crossing the high road near Cornhill, were the same as those to which the obligation in the indenture referred. Upon considering the evidence, however, it appears to the Lord Ordinary that this objection is not in all respects well founded, and that, apart from the alterations which have been made upon each of these causeways by the formation of the railways by which they are intersected, the evidence is sufficient to shew that the three causeways set out in the summons are in the same line, and lead in the same direction as those described in the title-deeds of the defender, and that down to the date of the defender's succession to the Kinnoull estates the roads or causeways leading from Perth up to the three points mentioned in the titles have been kept in repair by the predecessors of the defender.

"But while the general direction of these three causeways appear to be the same as that indicated in the older titles, they have all of them been more or less materially altered within recent years by the formation of the railways passing through the town of Perth; so that a very considerable portion of the roadway which the defender is now asked to keep under repair is not, in point of fact, any part of the causeways mentioned in the titles, but consists of portions of new road substituted for them by the railways in the course of their operations.

"Thus more than one-third of the causeway leading by St. Leonard's to Craigie Burn, referred to in the first part of the conclusions of the summons, has been taken possession of by the railway company, as shewn on the plan No. 55 of process, and a new and longer road has been substituted for it, passing underneath one railway and over another by a bridge. Part of the second road or causeway referred to in the summons has also been acquired by the railway companies, and the line of road altered to a still greater extent. For instead of leading up a street called Earl's Dyke, to the point described in the titles, and now known as the Stank of Pickletillum, and so out in the direction of the Stirling road, the new line of road is led off from the end of Earl's Dyke in a different direction along the Glasgow turnpike-road, and then back again to a point near the Stank at Pickletillum. The third road or causeway mentioned in the summons has also been altered to a considerable extent, and another road passing over the railway by a bridge substituted for it.

"The whole of these roads or causeways, with the exception of a portion at the extreme end of the one last mentioned, are now included within the boundaries over which the powers of the Police Commissioners of Perth for paving, lighting, and cleansing the town of Perth extend. And it appears from the evidence of the clerk to the Police Commissioners and other witnesses that the commissioners uphold the whole streets in the extended royalty, except those [877] now in question, and that assessments are levied for paving and draining from all occupiers, and, among others, from the tenants of the defender within that extended boundary.

"It is in these altered circumstances that the question is raised whether the defender can now be obliged, under an action at the instance of the pursuers, to maintain the roads or causeways.

ment, or if they should fail to do so that an action of declarator might be brought to obviate certain objections taken by the [878] defender to the title of the pursuers, and in respect that all parties interested had not been called.

"1st. With reference to this important question it appears to the Lord Ordinary that if the pursuers and defender were now in the same relative position towards each other in regard to these causeways as that in which the predecessors of the pursuers stood towards the predecessors of the defender prior to the passing of the Perth Police Acts, and if the causeways had not been altered by the railway companies, but had remained substantially the same as those described in the titles founded on, no material difficulty could have been raised as to the nature of the alleged obligation or the pursuers' right to enforce it.

"In the original indenture the obligation appears to have been made an express condition of the grant; and in the investiture of the Kinnoull family up to the date of the defender's succession it has been expressed in substantially the same terms as those contained in the indenture. It is therefore, as the Lord Ordinary reads it, an obligation binding upon the proprietors of the lands of Guild Herbar and others which belong to the defender; and although it may now be difficult to fix the precise position and boundaries of those lands, they are, it is thought, sufficiently identified as those coloured green on the plan, and lying along and to the north of the causeway called the Long Causeway. In the older titles they are described as bounded 'by the common causeway on the south,' and this is a description which corresponds exactly with the southern boundary of the lands so coloured on the plan, and it does not appear that the defender holds any other land so bounded in that locality.

"But in the view the Lord Ordinary is disposed to take of this branch of the case it is not necessary to ascertain the precise position and boundaries of the property. It is the possession and not the position of the lands to which the obligation is made to attach, and as the defender is admittedly the proprietor of the lands, and the obligation has for a long series of years been inserted in the investitures as a condition of the right, it appears to the Lord Ordinary that its validity is not open to objection on feudal grounds, but that it is one which is capable of being enforced against a vassal on the authority of the case of Coutts, August 3, 1840, 1 Rob. p. 296.

"2d. But the difficulty which the Lord Ordinary has felt in dealing with the case arises from this, that the causeways or subject-matter of the obligation are, as already explained, now very much changed from what they originally were, and that the pursuers are no longer directly charged with the duty of seeing that the causeways are kept in repair.

"The length of the diverged lines of road, as coloured pink upon the plan, and to which the conclusions of the summons apply, appears, from the report of Mr. Smart (Print A, p. 29), to extend in all to about 1500 yards of entirely new roadway, and after deducting from this new roadway the length of the abandoned portions of the old causeways, there remains from 500 to 600 yards of roadway which the defender is called upon to maintain in excess of the length of the original causeways. Now, if in these circumstances such a demand had been made in an action at the instance of a party with a direct title and interest to raise the question, the Lord Ordinary would have had great difficulty in coming to the conclusion that the defender could, in respect of the obligation in the titles, be called upon to keep up such extensive alterations as some of those in question are, or any roadway materially exceeding the original causeway in length, merely because the altered state of the town of Perth required such changes and additions to be made.

"Most of these alterations, moreover, appear to have been made by railway companies in the exercise of statutory powers, and each of the new lines of road [878] is carried over a railway by a bridge, to which the new roadway is used as an approach. But the 39th section of the Railway Clauses Act, 8 & 9 Vict. cap. 33, provides that where public roads are so carried over railways, the bridges, with the 'immediate approaches, shall be executed, and at all times thereafter maintained, at the expense of the company,' and it is contended on the part of the defender that it is against the railway companies, and not against him, that the pursuers, assuming them to be still charged with the duty of attending to the causeways, must proceed to enforce the repair of these parts of the substituted road. In support of this view reference was made to the case of the North Staffordshire Railway Co. v. Dale, Jan. 20, 1858, 27 L. J. Mag.

[879] No arrangement was effected; and afterwards an action of declarator was brought against the Earl of Kinnoull and the Caledonian Railway Company at the instance of "the Lord Provost, Magistrates, and Town-Council of Perth, as representing

---

Ca. 146, in which it was so ruled by a unanimous judgment of the Queen's Bench, with reference to the provisions of a precisely similar clause in the English Acts, and, as at present advised, the Lord Ordinary does not very well see on what grounds the railway companies, if called on, could refuse to comply with this statutory obligation. It appears to him, however, that it rests either with the pursuers as owners of the original causeways, or with the Police Commissioners, if charged with the management of the streets of the town, at the time the alterations were made, to take proceedings against the railway companies, under that section, before any call can be made upon the defender to maintain these portions of the roadway.

"A further and still more important question is raised by the defender, to the effect that by the provisions of the Police Statutes applicable to the town of Perth the duty of maintaining these causeways has been transferred to the Police Commissioners, who are bound to maintain them out of the assessments which they are authorised to levy, and do in point of fact levy, for that purpose from the occupiers within the police bounds, and among others from the tenants of the defender. And there are clauses in the Police Statute of 1839 by which all the former Police Acts are repealed, more especially sections 31 and 32, which seem to countenance this contention, while others of those clauses point in a different direction.

"These, however, are all questions which, in the view the Lord Ordinary takes of them, cannot be disposed of except in an action with the Police Commissioners; and upon the whole matter he has come to the conclusion that as the duty of managing and seeing to the proper repair of the streets and roads within the town of Perth, which at one time lay upon the pursuers as Magistrates of the burgh, has been transferred to the Police Commissioners, it now rests with them, and not with the pursuers, to take proceedings against parties who may be considered bound to repair any of those streets or roads to the relief of the ratepayers, and of the public assessment in the management of the Commissioners of Police.

"That the pursuers have for some time ceased to take charge of the streets and roads within the police boundaries of the town, and that this duty has been transferred to the Police Commissioners under the operation of the Acts, is proved by the evidence of the city clerk and the clerk to the commissioners; and although the latter do not seem to have taken upon themselves the responsibility of keeping the causeways in question in repair, they have admittedly dealt with them as within their charge to a certain extent, such as altering the levels of the pavements and channels, and filling up ditches in some of them, and of opening up and laying drains through the greater part of them. And if the pursuers are right in their contention that notwithstanding the powers given to the Police Commissioners to levy assessments for the repair of those causeways, the defender is bound, in respect of the old obligation, to relieve the commissioners of the expense of keeping them in repair, any action to enforce this relief must, as the Lord Ordinary conceives, be taken under the provisions of the 49th section of the Police Act of 1839 by the commissioners, if they consider that under it they can make good that claim against the defender, for it is to them, under that section, that the right and power is given to maintain the [879] roads and streets out of the rates, or at the expense of the parties whom they may be able to show are bound to uphold them.

"3d. The Lord Ordinary was at one time disposed to think that in the view he takes of the obligation he might give decree for the expense of repairing that portion of the Long Causeway which is beyond the police boundary, because he is not satisfied that there is any evidence that this roadway was ever taken charge of by the statute-labour trustees. But on considering the proof he has not been able to find materials to enable him to deal separately with that part of the case. There is no distinct evidence that this particular portion of the causeway was in bad repair, or that any precise amount of money was expended upon it; and as the object and conclusions of the action are quite general to enforce the obligation to repair the causeways as a whole, and the portion to the west of the police boundary is comparatively small, the Lord Ordinary has thought it better to deal with the actions in the way he has done, under reservation of all right competent to the pursuers to enforce the obligation in regard to that portion of the causeway when it is proved to be in a state of disrepair."

the community of the said burgh, and also as vested with all the powers and jurisdictions of police, paving, watching, lighting, and others granted to the Commissioners of Police of said burgh, under the Local Act 2 Vict. c. 43, or any other Act, and also as vested with all the duties, rights, and liabilities with respect to roads and streets within the royalty and extended royalty of the burgh of Perth, which by the General Police and Improvement (Scotland) Act, 1862, and The General Police and Improvement (Scotland) Supplemental Act, 1865, or any other Act, belong to or are imposed upon the Commissioners of Police of the burgh of Perth, or any burgh, with respect to the roads and streets within their burgh."

The conclusions of the action were, in substance, for declarator,—1st, That the defender, Lord Kinnoull, was bound to keep in repair the whole of the common causeways in question, including the new or substituted portions, except the bridges constructed by the railway companies, and the immediate approaches thereto, and that the Caledonian Railway Company was bound to keep in repair the said bridges and their immediate approaches; or otherwise, 2d, That the defender, Lord Kinnoull, was bound to keep in repair such portions as still exist of the original lines of causeway, as specified in the summons, and that the defenders, the Caledonian Railway, were bound to keep in repair the substituted portions or deviations of these causeways made by the railway companies under Acts of Parliament, including the bridges and their immediate approaches. There were also declaratory conclusions to the effect that the defender, Lord Kinnoull, was bound to contribute three-fourths, or such other reasonable proportion as might be fixed by the Court, of the total expense of repairing the causeways, with the exception of the bridges and approaches; and the summons contained petitory conclusions framed with the view to carry out the law which might be declared under the declaratory conclusions.

In the condescendence the titles were set forth, and thereafter the modern description of the three causeways which the defender and his predecessors were bound to repair, viz. (1) the Long Causeway, which is the High Street of the burgh of Perth, with a continuation westward to a burn crossing the highroad near Cornhill; (2) Leonard's Causeway, being the road from Hospital Street to burn of Craigie; and (3) the Cow Causeway, now called Kinnoull Causeway, from the same point of Hospital Street to a point at or near the junction of Glover [880] Street with the old road to Pitheavlis. The description set forth what parts of the old roads respectively had been destroyed, other roads being substituted therefor by various railway companies.

The pursuers further set forth the various statutes in virtue of which railway companies have made alterations on the said roadways, and that the defenders, the Caledonian Railway, had come into the place of all these companies by the Caledonian and Scottish Central Railways Amalgamation Act, 1865 (28 & 29 Vict. c. 287, Local), and the Caledonian and Scottish North-Eastern Railways Amalgamation Act, 1866 (29 & 30 Vict. c. 350, Local).

The pursuers further set forth various Acts of Parliament and Provisional Orders (in particular 28 Vict. c. 7, and 31 Vict. c. 11, Local), whereby they were now vested in the whole duties, rights, and liabilities conferred on Commissioners of Police under certain former statutes referred to in the Sheriff-court actions.

By the Railway Clauses Consolidation (Scotland) Act, 1845, it is enacted (sec. 39) as follows:—"If the line of the railway cross any turnpike road or public highway, then, except where otherwise provided by the special Act, either such road shall be carried over the railway, or the railway shall be carried over such road by means of a bridge of the height and width and with the ascent or descent by this or the special Act in that behalf provided, and such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company, provided always that, with the consent of the Sheriff, or two or more Justices as after-mentioned, it shall be lawful for the company to carry the railway across any highway other than a public carriage road on the level." The pursuers averred,—"The defenders, the Caledonian Railway Company, are, in virtue of the enactment contained in the said section, bound to keep in repair the three bridges hereinbefore mentioned, crossing the said three causeways and the immediate approaches thereto. It is believed that the said company recognise this obligation to some extent and effect, and that they do in point of fact to some extent fulfil their statutory obligations, but to what extent is not known to the pursuers, and they have been unable to ascertain it."

The defender, the Earl of Kinnoull, averred, that in 1459 the causeways in question were mere rude tracts sufficient only for foot-passengers and pack-horses, and that the repairs made upon them were few and inexpensive, whereas now the roads were paved and macadamised, and otherwise to a large extent completed as the streets of the town, differing entirely in character, breadth, mode of formation and direction from the roads described in the indenture, which had ceased to exist. "The character of the traffic on said roads has been wholly changed, and is now totally different from that which passed along the old roads. Considerable portions of the roads are now lined with dwelling-houses on both sides, and are the constant thoroughfares of a large population.

The construction of the railways, and of the general railway station, to which the road called Leonard Street now forms the principal access, has also occasioned a very great increase in the traffic. The obligation now attempted to be enforced is totally different from, and very much greater than, the obligation expressed in Kinglassie's indenture and in the title-deeds libelled."

The pursuers pleaded *inter alia*;—(1) The obligations to uphold and repair the foresaid calseys or roads being express conditions of the grant of the foresaid lands in favour of the defender, the Earl of Kinnoull, his predecessors and himself, and contained in the charters and other titles [881] under which the property is held, the said defender is bound to fulfil the said obligation when the necessity for doing so arise. (5) The obligation libelled on not being extinguished or removed by any statutory enactment, the pursuers are entitled to enforce implement thereof, even supposing that the pursuers, as now in place of the Police Commissioners, have power and authority to repair these calseys at the expense of the general community; and the pursuers are entitled, for the purpose of freeing the community from that burden, to exact compliance from the said defender of the conditions on which he holds his feus or grants. (6) The alterations made on the said calseys under statutory powers or other legal authority, and by which one piece of ground was substituted for another, cannot affect the obligation incumbent on the defender, the substituted portions of road coming in place of the portions taken by the railway companies and others, but if otherwise, the Caledonian Railway Company are bound to uphold the substituted portions. (7) In the most favourable view for the Earl of Kinnoull, he is bound to pay a contribution, as concluded for, of the expense of repairing said calseys, or otherwise of the original portions still remaining, and in the latter alternative, the railway company are bound to uphold the said substituted portions. (8) The defenders, the Caledonian Railway Company, are bound and obliged in terms of the Railway Clauses Consolidation (Scotland) Act, 1845, to keep in repair the bridges above referred to, and the immediate approaches thereto. (9) The pursuers having kept in repair the said causeways, bridges, and approaches thereto, since Whitsunday 1865, they are entitled to decree for the expense to which they have been so put, from the defenders, according to their respective rights and liabilities. (10) In one or other of the alternatives specified in the last conclusions of the summons, the defender, the said Earl of Kinnoull, has forfeited all right to the foresaid lands of Gildherbar, and the pursuers are entitled to enter thereto as now proprietors thereof.

The defender, the Earl of Kinnoull, pleaded;—(1) *Lis alibi pendens.* (2) At least the present action ought not to be allowed to proceed until the foresaid conjoined actions have been dismissed or withdrawn. (3) In respect the magistrates, in their corporate capacity, and as representing the community, have no right or duty in regard to the management of the roads libelled, and in respect the Police Statutes confer no title to enforce the obligation in the title-deeds libelled, the pursuers have no title to sue. (4) The pursuers have no title to sue for the repair of the roads, so far as they are statute-labour or turnpike roads. (5) In respect the roads, so far as under the charge of the Commissioners of Police, fall to be repaired in the manner pointed out by the Police Statutes, all obligation on the defender under the title-deeds libelled has, if ever existing, been removed. (6) The magistrates, as representing the community, being now under no obligation to repair said roads, have no title or interest to compel the defender to do so. (7) In respect the cost of the repairs of the roads has been or falls to be defrayed out of the police assessment, the pursuers have no title to sue for payment thereof by the defender, and have no right to such payment. (9) The roads specified in the titles libelled having ceased to exist, the obligation to repair them has come to an end. (10) The obligation sought to be enforced being different in all respects from the obligation to repair the calseys originally incumbent on the defender's

predecessors in the lands, and the burden of maintaining them having been greatly increased with the consent or without the opposition of the pursuers and their predecessors in office, the pursuers are not now entitled to insist on the defender repairing said roads. (11) There are no *termini habiles* for fixing on the defender any [882] obligation to repair the roads partially, or to pay a proportion of the cost of repairing them.

The defenders, the Caledonian Railway, pleaded, *inter alia*;—(1) The pursuers' statement is irrelevant and insufficient in law to support the conclusions of the summons in so far as directed against the defenders, the Caledonian Railway Company. (2) The defenders, the Caledonian Railway Company, never having disputed their statutory obligations with regard to the bridges libelled and the immediate approaches thereto, and being always ready and willing to fulfil the same, the action of declarator, in so far as directed against them, was unnecessary, and they are entitled to absolvitor. (3) In so far as the summons seeks to impose any obligation upon the Caledonian Company other or more extensive than their statutory obligation, the said defenders are entitled to absolvitor, there being no grounds stated either in fact or law relevant to infer such obligation. (4) A great portion of the substituted roads libelled not having been made by the Caledonian Railway Company, nor by any railway company whom they represent, or for whom they are responsible, and there being no statutory obligation upon them to maintain the same, they are entitled to absolvitor. (5) A great portion of the substituted roads libelled not being immediate approaches to the bridges condescended on, the defenders, the Caledonian Railway Company, are entitled to absolvitor.

The record having been closed, the Lord Ordinary (11th January 1872), reported the case to the First Division of the Court.*

---

* "NOTE.—This action has been instituted to obviate some of the objections taken by the defender, Lord Kinnoull, to an action which was raised against him some time ago by the pursuers, as magistrates of the burgh of Perth, and is at present depending before the First Division of the Court.

"That action was a petitory one, directed against Lord Kinnoull alone, and was originally brought before the Sheriff-court of Perthshire in the name of the Lord Provost and Magistrates of Perth as representing the community, in order to enforce an obligation contained in the titles under which parts of the Kinnoull estates were held of the town of Perth, and in respect of which it was alleged that Lord Kinnoull was bound to maintain the roads or common causeways described in those titles. The action was, however, met by the objection that the pursuers, as magistrates of Perth, had no title to enforce the obligation; because by the Police Statutes applicable to the town the whole duty of maintaining the streets within the police boundaries, including the causeways in question, which at one time lay upon the magistrates, had been transferred to and imposed upon the Police Commissioners; and it rested with them, and not with the magistrates of the burgh, to take proceedings against parties who might be bound to repair any portion of the streets to the relief of the assessments levied for that purpose by the commissioners. And it was further maintained on the part of the defender that even if the obligation to uphold the old lines of causeway still existed, and was enforceable against him, he could in no view be liable to maintain those portions of the existing lines of causeway which consisted of new or substituted roads carried over the railways intersecting the town; and that, as regards those portions of the roadway, proceedings ought to have been taken against the railway companies, and not against the defender.

"To the first of these objections the Lord Ordinary, upon considering the provisions of the Police Statutes, and the evidence adduced relative to the management of the streets, came to the conclusion that effect ought to be given, to the extent of holding that it lay with the Police Commissioners, and not with the pursuers *qua* magistrates of the burgh, to enforce obligations of the present description, and he accordingly dismissed that action, reserving to the pursuers to establish in any competent process their right to enforce the obligation in regard to those portions of the causeways which were situated beyond the police boundaries. And he at the same time intimated an opinion that it was against [883] the railway companies, and not against the defender, that proceedings should have been taken to enforce the repair of those portions of the causeways which passed over the bridges built by the railway companies, with their immediate approaches.

[883] Argued for the pursuers;—The obligation to maintain the three roadways was the sole condition of the grant of the lands. It had never been [884] extinguished,

"Against this interlocutor a reclaiming note was presented by the pursuers; and although no interlocutor appears to have been pronounced, the discussion was, as the Lord Ordinary understands, stopped by the Court, and the disposal of the case delayed, in order that parties might endeavour to effect an arrangement, or, if they failed in this, that an action of declarator might be brought to try the case, with all the parties interested in the question. No such settlement having been effected, the present action has been raised by the pursuers, not simply as magistrates of the burgh of Perth, but as now reinvested, in respect of the Acts of Parliament and Provisional Orders founded upon the condescendence, with the whole duties and powers relative to the paving and management of the streets and roadways within the police boundaries of the town, which had been conferred upon the commissioners by the Police Statutes; and they have called as defenders the Caledonian Railway Company as well as Lord Kinnoull, as now representing those railway companies by which the lines of the causeways were altered, and carried over the railways passing through the town.

"The conclusions of the summons are somewhat complicated; but the pursuers appear to the Lord Ordinary, in substance, to seek to have it declared—1st, that the defender, Lord Kinnoull, is bound to keep in repair the whole of the common causeways in question, including the new or substituted portions, except the bridges constructed by the railway companies, and the immediate approaches thereto; and that the Caledonian Railway Company is bound to keep in repair the said bridges and their immediate approaches; or otherwise, 2d, that the defender, Lord Kinnoull, is bound to keep in repair such portions as still exist of the original lines of causeway, as specified in the summons; and that the defenders, the Caledonian Railway, are bound to keep in repair the substituted portions or deviations of these causeways made by the railway companies under Acts of Parliament, including the bridges and their immediate approaches. There are also declaratory conclusions to the effect that the defender, Lord Kinnoull, is bound to contribute three-fourths, or such other reasonable proportion as may be fixed by the Court, of the total expense of repairing the causeways, with the exception of the bridges and approaches; and the summons contains petitory conclusions framed with the view to carry out the law which may be declared under the declaratory conclusions.

"1st, Such being the nature of the case as now laid, the Lord Ordinary does not think that it is met by the plea of *lis alibi*, stated on the part of the defender, Lord Kinnoull, because, although the main question here raised upon the merits seems to be substantially the same as that raised in the former case, the present action is brought in name of the pursuers as Police Commissioners as well as Magistrates of the burgh; and if, as was held by the Lord Ordinary in the former case, the right or title which the pursuers had *qua* magistrates to enforce the obligation in question was, by force of the Police Statutes, transferred to the Police Commissioners, that right and title has now, it is thought, been retransferred to the pursuers by the Provisional Orders founded on by them. The action is therefore in this respect different from the former one, and it is also directed against parties who were not called in the first action. It is, moreover, an action of declarator brought to ascertain and fix the legal character and extent of the obligation which the pursuers maintain is imposed on the defenders respectively to keep in repair portions of the causeways in question.

"If therefore the other action had still been before the Lord Ordinary he would have been disposed to repel the plea of *lis alibi*, and to appoint the case to be enrolled in order to fix how the disputed facts were to be ascertained, because the parties were not agreed as to holding the proof led in the former [884] action to be the proof in this one; and even assuming the obligation, as contended for by the pursuers, to be still enforceable, in respect of the combined operation of the provisions of the 32d and 49th sections of the Police Statute of 1839, as regards those portions of the old line of causeway at all events which still exist, the Lord Ordinary does not very well see how the declaratory conclusions of this action can be worked out as regards the new or substituted portions of the roadway, and more especially those substituted for the Kinnoull Causeway, without evidence as to the circumstances in which these alterations were made, and as to the parties by whom they were effected. But as the action on which the plea of *lis alibi* is founded is now before the Inner-House, the Lord Ordinary has

but had been kept up by the titles and usage for centuries; and if the defender failed to perform it he was not entitled to keep the [885] lands. If the nature of the roads

thought it better, instead of disposing of that plea, to report this case for decision along with the other action. For if the Court, on considering the whole questions raised, should come to be of opinion either that the plea maintained on the part of the defender, Lord Kinnoull,—to the effect that the expense of keeping up the causeways, as well as the other streets within the police boundary, has been thrown upon the rates authorised to be levied within those boundaries, without relief against the defender,—is well founded, or that they can, without further inquiry, deal with the declaratory conclusions relative to the substituted portions of the roadway, under the provisions of the railway statutes founded upon in the record, a proof of a very limited nature will be required, and, in that view, a considerable expense will be saved.

"2d, As regards the plea to relevancy maintained on the part of the Caledonian Railway Company, the Lord Ordinary has not been able to come to the conclusion that this plea can at present be given effect to. The claim made against them relates to two distinct matters, viz. the maintenance and repair, 1st, of the bridges and their immediate approaches, and 2d, of the new or substituted roads or deviations. The defenders do not dispute their liability to maintain these bridges and immediate approaches, in so far as made by railway companies whom they now represent, and they thus seem to admit their liability to maintain the bridges with their approaches on what are called the Long Causeway and the St. Leonard's Causeway. But they dispute their liability to maintain a portion of what is called the Glasgow Road Bridge, and of the roadway leading thereto, as belonging to a railway company whom they do not represent. And with reference to the new or substituted roads, as distinguished from the bridges and their approaches, it is contended on the part of the defenders that there is no relevant ground set forth on the record on which this claim can be maintained against them.

"As regards the road substituted for a portion of the Long Causeway no question can well be raised under this objection, because parties seem to be agreed that the alterations there made consist entirely of the bridge and immediate approaches, and for these the defenders do not dispute their liability. But there is, on the other hand, a considerable amount of substituted road on the St. Leonard's, and also on what is called the Kinnoull, Causeway; and with reference to these, it does not appear to the Lord Ordinary that there is any distinct allegations on the ground on which the claim to keep up these roads is made against the railway company. Certain statutes are no doubt founded upon and quoted in the record under which these substituted roads are said to have been formed. But these statutes, so far from imposing liability on the railway company to maintain the substituted roads, appear to fix that liability upon other parties.

"Thus, the road at St. Leonard's which was substituted for the portion of causeway taken possession of by the railway, is, by the 74th section of the statute quoted in the 15th article of the condescendence, declared to be the diverted line of the public road, and is appointed to be 'maintained by the persons or corporations liable to maintain such public road'; and this provision appears to free the railway company of all liability for the future maintenance of the new road, and to impose it upon the parties then liable to maintain the public road. The portion of substituted road, again, which is shewn upon the plan as leading [885] off from the Glasgow Road southward in the direction of Glover Street, and which is alleged to have been substituted for the Kinnoull Causeway under the powers conferred by the statute of 1865, quoted in the 18th article of the condescendence, appears to have been made, not by the Caledonian Railway Company or any company they represent, but by a committee incorporated for managing the general station at Perth, and is appointed to be kept in repair by the 'commissioners or trustees now liable to the repairs of the roads' authorised to be stopped. But it is not alleged that the Caledonian Railway Company came under that designation.

"Whether the defender, Lord Kinnoull, can be held to fall under the above description, or under the description of the 'persons or corporations' liable to maintain the public road at St. Leonard's, will be disposed of in the case between him and the pursuers. Having regard, however, to the clauses of the Act of Parliament founded upon by the pursuers relative to these substituted roads, and to the fact that it does

had been changed, and the expense of maintaining them immensely increased since the date of the grant, on the other hand the value of the property had immensely increased. The Caledonian Railway Company were bound to maintain the new or substituted portions of the roads as well as the bridges with their immediate approaches.*

The defenders, the Caledonian Railway Company, argued;—The summons as against the railway company was irrelevant, in respect that there was no sufficient allegation that they had failed to implement their statutory obligations. They always had in fact maintained the bridges and immediate approaches, which alone they were bound to maintain. No duty was incumbent on them with regard to the substituted roads.

The defender, Lord Kinnoull, argued;—The obligation must be held to be extinguished, because it is now impossible to keep up the causeways specified in the indentures in the manner intended. The roads of the present day differ from the roads specified in the indentures not merely in regard to their character and the expense of maintaining them, but also because there was hardly any part of the original causeways in existence. Moreover, under the provisions of local statutes the magistrates were [886] themselves bound to keep up the roads, in so far as they were within the boundaries of the city.†

At advising,—

LORD PRESIDENT.—We have before us two cases—first, an appeal for Lord Kinnoull from the Sheriff-court; and second, an action of declarator for the Magistrates of Perth against Lord Kinnoull. In the appeal there are two actions brought up—(1) an action at the instance of the Magistrates of Perth to compel Lord Kinnoull to maintain the High Street of the burgh, also called Long Calsey; and (2) an action at the same instance to compel Lord Kinnoull to maintain two other causeways, viz. St. Leonard's Causeway and Kinnoull Causeway. In these actions Lord Muir, having taken a proof, has given a judgment which is still unrecalled. In that judgment his Lordship "sustains the appeal: Finds that the first and second of the common causeways mentioned in the titles and in the conclusions of the summons are situated within the extended police boundaries of the town of Perth; and that the third of the said causeways, with the exception of the portion to the west of Dovecotland, is also situated within the said police boundaries: Finds that the pursuers have failed to instruct that they have now any right or title to insist in the conclusions of the present actions, in so far as regards those portions of the said causeways which are situated within the said police boundaries: Therefore dismisses the actions, and decerns, reserving to the pursuers to establish in any competent process their claim to

---

not appear to be alleged that the defenders, the Caledonian Railway Company, came under either of the above descriptions of parties appointed to keep these roads in repair, or are on any other ground liable to maintain them, the Lord Ordinary is disposed to think that the pursuers have not set out a relevant case against these defenders in regard to this branch of their claim.

"But this does not, in the opinion of the Lord Ordinary, entitle the defenders to have the action now dismissed as irrelevant, because the parties are still at issue as to whether the defenders are bound to maintain the whole of the Glasgow Road Bridge and approaches, and also as to the facts on which the second plea in law for the defenders is founded; and the case will therefore, it is thought, require to be proceeded with in order that these points may be ascertained.

"A minute has been given in by the pursuers of certain amendments they propose to make on the summons and record, with reference to the case made against those defenders. These alterations are not, in the view the Lord Ordinary takes of them, necessary to make the pursuers' case relevant, but as they tend to make it more specific, and to clear up ambiguities in some of the conclusions of the summons, the Lord Ordinary is disposed to think that the amendments should be allowed, subject to such expenses as may, in the circumstances, be considered proper."

* Hodges on Railways, 446, 447 (5th ed.); North Staffordshire Railway Company *v.* Dale, 27 L. J. Mag. Ca. 147; R. *v.* Inhabitants of Kent, 13 East, 220; R. *v.* Inhabitants of Ely, 19 L. J. Mag. Ca. 223.

† Magistrates of Perth *v.* Stewart, Dec. 18, 1830, 9 S. 225—July 11, 1835, 13 S. 1100; Magistrates of Arbroath *v.* Dickson, March 15, 1872, *ante*, p. 630.

enforce against the defender the obligation in the indenture and other titles founded on by them to repair the portion of the causeway third above mentioned, and commonly called the Long Causeway, which is situated beyond the said police boundary, and between it and the burn crossing the highroad near Cornhill." Now, the reason why the Lord Ordinary pronounced this finding was, that the defender set forth on record certain statutes by which the streets were vested in the Police Commissioners, with power to make assessments for the maintenance of these streets; and the Lord Ordinary thus came to the conclusion that the pursuers were divested of all interest in the greater part of the subject-matter of dispute. This conclusion on the part of the Lord Ordinary is not surprising, for, while the defender set forth all the statutes depriving the magistrates of power over the roads within the police boundaries, the pursuers did not explain that there were subsequent statutes reinvesting them in the administration. The magistrates are now invested with the care of the streets; and that being the case, of course we cannot sustain the Lord Ordinary's interlocutor. But in the Lord Ordinary's note other considerations are suggested. He calls attention to the fact that the lines of road have been diverted by railways, and that the length of the diverged lines of road extends in all to about 1500 yards of entirely new roadway; and after deducting from this new roadway the length of the abandoned portions of the old causeways, there remains from 500 to 600 yards of roadway, which the defender is called upon to maintain in excess of the length of the original causeways. Then he calls attention to the circumstance that the railway companies have carried roads across the railways by bridges, and that the 39th section of the Railway Clauses Act provides that, where public roads are so carried over railways, the bridges, with the "immediate approaches, shall be executed, and at all times thereafter maintained, at the expense of the company." So the Lord Ordinary thinks that the defender would have an undue burden imposed upon him by having to maintain a greater length of road than was originally intended; that as to the bridges and immediate approaches the railway company is liable to maintain them; and that, in these circumstances, it would be difficult to give the pursuers in the Sheriff-court actions a judgment in terms of the conclusions of the summons.

When this case was brought here by reclaiming note the difficulty seemed very formidable; and until it could be shewn for how much the railway company was liable Lord Kinnoull's obligation could not be ascertained. So we super-[887]-seded consideration of the cause, and gave the magistrates time to prepare information on these matters; at the same time suggesting that a settlement might be come to between the parties, and that it was a fit case for arbitration. The magistrates, however, did not adopt this suggestion, but brought a new action—an action of declarator; and to this action we must now turn our attention. Here they sue not only as magistrates, but also as vested with all the powers and jurisdictions of police, paving, watching, lighting, and others granted to the Commissioners of Police of said burgh under the Local Act 2 Vict. c. 43, or any other Act, and also as vested with all the duties, rights, and liabilities with respect to roads and streets within the royalty and extended royalty of the burgh of Perth; and they call as defenders Lord Kinnoull, and also the Caledonian Railway Company, as standing in the place of all the separate railway companies who have made alterations on the said roads. The conclusions of the summons are as follows: —(1) There is, in the first place, a conclusion against Lord Kinnoull to maintain the Long Calsey, Leonard Calsey, and Kinnoull Calsey, excepting the bridges after specified constructed by said railway companies in the course of the foresaid alterations, and immediate approaches thereto. (2) Then, in the second place, there is an alternative to find Lord Kinnoull liable to maintain the portions of the calseys not affected by the alterations made by railway companies, and to find the Caledonian Railway Company liable to maintain the portion so altered. (3) In the third place, there is a second alternative, to have Lord Kinnoull ordained to pay three-fourths, or such other proportion as may be fixed by the Court, of the expense of keeping up the whole calseys, or of the original portions of them. (4) In the fourth place, there is a conclusion for decerniture for the sums expended by the pursuers in repairing and maintaining the causeways; and (5) in the fifth place, there is a third alternative that, in case of the pursuers not obtaining decree against Lord Kinnoull, they should be found entitled to have regress to the lands of Gildherbar, called Calsey Lands.

Now, it is desirable, in the first place, to dispose of the case as regards the Caledonian Railway Company. The defence of the railway company consists of three parts, —first, that the company is not liable to repair the substituted roads, as distinguished

from the bridges and immediate approaches; second, that as regards the Glasgow Road Bridge, the company is not liable to keep it up, as it did not make the bridge, and does not represent the company which did; and third, that as regards the other two bridges, the company has never disputed its liability to maintain them and the immediate approaches, and has, in point of fact, done so.

As regards the first of these points, I am clearly of opinion that under the Act of 1845 the railway company is not bound to repair the substituted portion of the roads, as distinguished from the bridges and immediate approaches. In the second place, it is not disputed that the averment of the railway company as to the Glasgow Road Bridge is true; and, in the third place, it is quite confirmed that the company has all along admitted and fulfilled its liability in regard to the other two bridges. There is thus no case against the Caldonian Railway Company, and I am of opinion that, as regards the two bridges which the Company is bound to maintain, the action should be dismissed as unnecessary, and that *quoad ultra* the Caledonian Railway Company should be assoilzied.

Now, we come to the question between the magistrates and Lord Kinnoull, and it is a question of considerable delicacy. The original obligation is contained in the indenture of 8th May 1459, by which the burgh of Perth set in fee and heritage "their gildherbar" to Robert Kinglassie. Then in the indenture follows a reservation in the following terms:—"Reservand furth of the gildherbar four ellis of breid fra the northsyd of the Kingis calsay, and of lenth as the gildherbar lyis sua that the gait and the Kingis calsay may be maid togeddir for cartslaid and common passage." Then comes the consideration for which the conveyance is made—"And also the said Robert sall uphauld for ewir for passage for man and hors the calsay streikand fra the charter hous yet to the burne of Craigie sufficientlie as effeiris, with stane and sand, and als sall uphauld the Cow Calsay passand to Strewilling, streikand to the streip and brig now lieing at [888] the calsay, and for men, hors, and common passage, as is foresaid, and in sicklyke manner the said Robert sall uphauld the calsay passand to Methven, as it streiks fra the east nik of Sanct Paullis Chappell quhill it come to the burn abone the quhyt frieris: The quhilkis calsayis foirsaidis sall be uphauldin perpetuallie of the samyne breid as they now ar breader on the said Robertis cost, and gif it sall happin the said Robert, his airis or successouris, to failzie in all or any of thir poyntis foirsaid, it sall be lesum to the saidis aldermen, counsall, and communitie to have regress to the said Gildherbar." Now, I think that this obligation is a condition of the right, and would go with the lands into whosesoever's hands they might fall, and we find that the obligation has been repeated in all subsequent investitures of the estate. Thus the obligation is binding—it is not extinguished in any way,—and is still subsisting. But this goes only a short way to solve the difficulty of the case, for the difficulty is to see how the obligation is to be enforced under existing circumstances. The causeways at the time of the indenture were, of course, very different from the roads of the present day, and besides, all the causeways (except a small part of one of them) are within the boundaries of the burgh, and are therefore subject to a large amount of traffic, so the obligation to maintain them is very different from the obligation to maintain the original calsays. It is argued, however, that the lands have increased very much in value; but it is hardly consistent with the feudal relations to say that because the value of the subject has increased the reddendo should be increased also. Then Lord Kinnoull argues that the utmost that can now be asked of him is to keep up the causeways in the same way as was stipulated for in the indenture. To this the magistrates answer that it would be of no use, and that it could not be done even if Lord Kinnoull were to try. Now, is this the same thing as saying that the obligation has come to an end? The alterations upon the roads, which have been made necessary by the advance which has taken place in every respect since 1459, have made the roads of the present day as different as possible from the original causeways—they are both ways, but there the likeness ends. Then, it is not immaterial to observe that the length of the roads is increased. It does not matter how this has been done, but there is no doubt of the fact that Lord Kinnoull is asked to maintain five or six hundred yards more of road than he was in the original obligation. Now, in these circumstances, the question is, whether the obligation is not to be enforced because it is impossible; or whether, on the other hand, Lord Kinnoull is in all time coming bound to maintain streets of the burgh instead of the original causeways, no matter what difference there is either in kind or in expense? The difference of expense,

at the present time, is, no doubt, great, and it may be that traffic will increase to such an extent that some new kind of road may be necessary, twice as expensive as the present roads. If this were to take place, would the obligation comprehend the maintenance of these new roads? Now, either one or other of the above alternatives is inequitable. The obligation is not extinguished, and, on the other hand, it cannot be extended in the way asked. But the question remains, what middle course can be adopted? It seems to me that the only solvent is money, and that in the end it must come to a pecuniary conversion. On what principle that conversion is to be made I am not at present prepared to say. The attention of parties has not been turned to that point, and it is a subject upon which they should be heard.

Now, as regards the appeal, I think the result of this opinion is that these Sheriff-court actions cannot be maintained, and the sooner they are got rid of the better, so I think that we should simplify the process before us by disposing of the case in so far as it concerns the Caledonian Railway Company by dismissing the appeal, and by limiting consideration to the question how the conversion is to be made.

LORD DEAS.—I entirely agree with your Lordship in the chair as to the position of the Caledonian Railway Company, and the result at which your Lordship has arrived as regards that company.

Then, as regards the obligation sought to be enforced against Lord Kinnoull, [889] I am of opinion that the obligations laid upon the vassal by the indenture of 1459 were and are binding upon that vassal's successors. The obligation to maintain the causeways was the whole consideration given for the grant of the lands, and there is nothing in law or in practice to prevent that obligation from being enforced. So, if matters had been in the same position as they were at the time of the grant, there would have been no doubt but that the parties who made the grant were entitled to obtain implement of the obligation. The difficulty arises from the change of circumstances, which has led to the causeways being different now from what they originally were, both as regards their construction and the expense of maintaining them. Then the roads themselves have been made five or six hundred yards longer than they were originally, and I suppose little remnant of the original causeways now exists. Again, the change which has been made as to the construction of the roads may be carried still further, as, for example, if it should be found expedient to lay the roads with asphalt or concrete, or to introduce tramways. So I agree with your Lordship that it would be somewhat extravagant to hold that this obligation is still to be enforced in its terms—if, indeed, to maintain the roads of the present day could be called enforcing the obligation in its terms. Correctly speaking, it is impossible to enforce the obligation in its terms, and so the question arises, whether money, the universal solvent, should not be employed here, and I have no doubt that it should. The difficulty—the only one in the case—is as to the principle upon which this conversion into money should be made. I do not know that we can take the money value of the obligation here as it originally was. An increase in the money value of a reddendo may frequently arise from changes incident to the lapse of time. Suppose a feuar to have been taken bound by a feu-right in 1459 to deliver so many dozens of kain hens yearly to the superior, it would not be a good answer to a demand for delivery to say that hens were ten times as dear now as they were when the obligation was undertaken. So we cannot affirm as a universal proposition that a reddendo cannot increase in amount. But in the present case it would be unreasonable to say that the increase of expense consequent upon the increase of traffic is not to be taken into view in fixing the conversion.

As to the inferior Court actions, I agree with your Lordship that the sooner they are out of Court the better. They are now useless, and should be dismissed.

LORD ARDMILLAN.—I concur with your Lordship in the chair that the Caledonian Company is entitled to absolvitor.

Then, as regards the obligation of Lord Kinnoull, it is so clear in its terms, even as admitted in defence, and so set into the titles of the estate, that it cannot be held to be extinguished. But the way in which the pursuers propose to enforce it now is quite inconsistent with the original obligation, and also inconsistent with the proper keeping up of the roads. To enforce the obligation now, according to its terms, would be to destroy the roads, and to enforce it not in its terms would be unfair to Lord Kinnoull. So the only way is that proposed by your Lordship in the chair, viz., to convert the obligation into a money equivalent.

LORD KINLOCH.—I agree with your Lordship in the chair as to the proper mode of

dealing with the appeal from the Sheriff-court. There is thus left before us only the process of declarator.

I have no doubt whatever as to the title to sue in this case, to which an objection has been taken. The Magistrates of Perth are seeking enforcement of a contract entered into by their predecessors with the predecessor of Lord Kinnoull. That the thing sought to be enforced is not a money payment, but repair of certain roads, seems to me to make no difference. It is not the less the stipulation of the contract, sued on by one of the contracting parties. Even if the party interested in the roads had not been the inhabitants of Perth, but some third party, the magistrates would still have a legal title to sue on what is their own contract. It only makes the case clearer when it is the inhabitants of Perth in whose interest the Magistrates of Perth are pursuing.

[890] I consider it equally clear that the obligation to repair the roads contained in the original contract of 1459 was a valid and effectual obligation *ad factum præstandum*, enforceable at that time by actual and literal implement. There may be some difficulty as to the precise extent of the obligation. It seems tolerably clear that, as to two of the causeways, the Cow Causeway and St. Leonard's Causeway, the obligation was only to maintain the roads for the passage of men and horses. I have more difficulty as to the Long Causeway, as to which there is some indication of its breadth being such as to provide for the passage of carts. But to whatever extent the obligation went, it was an obligation enforceable by actual fulfilment, both at the time and, I do not doubt, for long afterwards.

But the question is raised before us, whether actual fulfilment can now be insisted in to the effect of Lord Kinnoull being compelled to repair the roads in their existing condition, and for their existing purposes. I am of opinion that no such obligation lies on Lord Kinnoull. I consider the obligation in the contract to be incapable of being stretched so as to compel Lord Kinnoull to repair the roads as they now exist. Circumstances have so changed that an obligation to do this would, in my apprehension, be an obligation altogether different from that of the contract, and much more stringent and severe. The scanty traffic, chiefly, if not entirely, carried on by men and horses, in the year 1459, presents no image of the traffic carried on now by those passing to and from a large and thriving burgh, or communicating with a whole net-work of railways. I do not mean to say that the obligation was not compatible with a certain increase of traffic, making the slow and deliberate progress appropriate to the fifteenth century. But the present increase is not the increase appropriate to the time of the contract, and capable of being then fairly contemplated. The traffic now is essentially a different thing from that existing, or any which could be anticipated at the date of the contract; and to enforce on Lord Kinnoull the duty of making provision for such traffic would not be to enforce the obligation of the contract, but one wholly different.

There are other circumstances of change which cannot be left out of view. For more than half a century back there have been public boards entrusted with the entire maintenance and repair of the roads or streets within the burgh of Perth. It is no doubt open to be said that this general authority is not inconsistent with certain portions of these streets being repaired by Lord Kinnoull. But I think it cannot be held to have been intended by the statute that any exception should be made from the generality of the obligation laid upon the statutory boards. It never could be intended that the streets generally should be repaired by the statutory board according to their own judgment and discretion, but that little bits of these streets should be repaired in some different way, and on some different design, by some one else. And if it be said that all must be done on one uniform plan, authorised by the statutory board (which is the only reasonable assumption), there at once arises the difficulty that Lord Kinnoull's obligation to repair under the contract 1459 was not one to be fulfilled at the dictate, or according to the plans, of any public board. He was entitled to repair at his own hand, according to the reasonable construction of an agreement of that date, which, whatever it may be held to be, is something wholly different from the modern plans of these statutory boards. The repairs of the causeways mentioned in the deed of 1459 were, according to the very words of the contract, to be made "with stane and sand." How can this be made to enforce an obligation to pave and macadamize the streets according to the mode statutorily in use?

Another considerable change has arisen from the operation of certain railway companies, in diverting the roads in question, and substituting for certain portions of these, roads running in different lines, and of much greater length. Here, also, it may

expenses in terms of article 8th, and the manner in which the residue was to be divided, were thus settled by article 9th of the agreement:—"That out of the said Greenock and Wemyss Bay Railway Company's share of the gross receipts there shall be paid by them—First, the whole charges and expenses of maintaining the said railway, pier, and other works, and also all public and parish burdens, including poors-rates, county-rates, prison assessment, and taxes generally that may be chargeable upon the said railway and pier in respect of the said line and works, also the government duty on passengers, and all payments, if any, to be made for land to be held by the said Greenock and Wemyss Bay Railway Company in feu or lease. Second, the 'general charges' to be incurred in conducting the ordinary directorial and financial business of the company; and third, after providing for these payments, one-fourth of the balance shall belong to and be paid to the Caledonian Railway Company, in respect of their said contribution of £30,000, as further provided for in article 14th hereof, and the remaining three-fourths of the said balance shall belong to the other shareholders in said Greenock and Wemyss Bay Railway Company." And it was further provided by article 14th:—"That in respect of the payment of the said £30,000 of capital, and the other provisions above-written, the Caledonian Railway shall, in perpetuity, have right to one-fourth part or share, neither more nor less, of the net revenue, as defined in article 9th hereof, of the proposed company, whatever may be their expenditure in making the intended railway, pier, and works connected therewith, or otherwise; and the said first parties shall be bound to provide for all excess of cost beyond the amount of capital above specified necessary for completing the said undertaking; and the interest or dividend payable in respect of the said excess of expenditure, and the interest on all money borrowed, shall form a charge on the remaining three-fourths of the net revenue of the said company, but that, subject to the above condition, the proposed company may borrow on mortgage of the whole of the proposed undertaking any sum not exceeding £40,000."

The foresaid sum of £30,000 was contributed by the Caledonian Company to the capital stock of the Wemyss Bay Company, and the line was opened in the first half of 1865, and has since been worked by the Caledonian Company in terms of the foresaid agreement. For the half years ending 31st July 1865, 31st January 1866, and 31st July 1866 there were paid by the Wemyss Bay Railway Company to the Caledonian the several sums of £317, 13s. 5d., £351, 7s. 6d., and £440, 0s. 7½d., "being one-fourth of net receipts, after deducting working expenses, in terms of Act and agreement." In the reports and accounts of the Wemyss [894] Bay Company, from half-year ending 31st January 1867 to half-year ending 31st July 1869, there were similarly brought out various sums amounting in all to £2498, 1s. 3½d., as due to the Caledonian Company as one fourth of the net revenue. Although thus credited to the pursuers, these sums were never paid. The present action was brought to recover payment of the said sum of £2498, 1s. 3½d., as also of £428, 11s. 4d., and £538, 19s., being the one-fourth of the net revenue for the half-years ending 31st January and 31st July 1870 in terms of the foresaid agreement.

The defenders stated that the payments made as averred by the pursuers in 1865 and 1866 were made in error, and that the sums credited to the pursuers in the accounts from 1866 to 1869 were erroneous entries, and that the sums sued for were not due, as during those years there was truly no available revenue out of which the pursuers could claim one-fourth—as the working expenses, maintenance, passenger duty, rates, and taxes, payments on account of land and interest, exceeded the gross receipts of the line. The dispute between the parties thus depended upon the reading of articles 9th and 14th of the agreement.

By article 18th of the said agreement it was provided that "all differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall, from time to time, so often as any such questions or differences shall arise, be referred to arbitration, in terms of the Railway Clauses Consolidation (Scotland) Act, 1845, and the provisions with respect to the settlement of disputes by arbitration contained in such Act shall be held to be incorporated with this agreement, and be operative in the same manner as if they were *verbatim* inserted therein."

The pursuers pleaded;—The sums concluded for being respectively one-fourth part or share of the net revenue of the defenders, as defined in article 9th of the said agreement, for the half-years condescended on, the pursuers were, under and in

exclusively the whole streets of the town which come in place of the said causeways in their present condition: Find that in these circumstances the only way in which the said obligation can now be enforced is by converting the same into a money payment: Appoint parties to be heard on the mode in which such conversion ought to be made, and whether decree for a money payment in lieu of such obligation can competently be made under the conclusions of the summons, or under any amendment of the same, reserving in the meantime all questions of expenses as between the pursuers, and the defender, the Earl of Kinnoull."

HILL, REID, & DRUMMOND, W.S.—MACKENZIE & KERMACK, W.S.—HOPE & MACKAY, W.S.—Agents.

No. 156. X. MACPHERSON, 892. 28 June 1872. 1st Div.—Lord Ormidale, B.

CALEDONIAN RAILWAY COMPANY, Pursuers.—*Lord-Adv. Young—Watson—Johnstone.*

GREENOCK AND WEMYSS BAY RAILWAY COMPANY, Defenders.—*Sol.-Gen. Clark—Balfour—Asher.*

Arbitration.—Circumstances in which it was held that a clause of arbitration did not exclude an action, but only made it necessary to refer to arbitration any questions which might arise in the course of the proceedings falling within the scope of the arbitration clause.

Railway—Agreement.—Where one railway agreed to work the line of another, and the agreement entered into between them provided for the payment of working expenses and other charges, and for the division of the net revenue, and where a dispute arose between them whether there was any net revenue divisible in terms of their agreement, *held* that this question was "a difference arising between the parties respecting the true meaning or effect of the agreement," and that it touched directly "on the mode of carrying the same into effect," and so fell under a clause referring all such questions to arbitration.

The defenders in this action, the Greenock and Wemyss Bay Railway Company, were incorporated by the Act 25 & 26 Vict. c. 160 (17th July 1862). The share capital of the company was fixed at £120,000, and the borrowing powers at £40,000. By an agreement, dated 1st and 2d April 1862, entered into by the pursuers, the Caledonian Railway Company, and the provisional directors of the Greenock and Wemyss Bay Railway Company, and afterwards confirmed by the latter company's Act (1862), it was agreed that the Caledonian Railway Company should contribute and hold in perpetuity £30,000, or one-fourth of the capital stock of the Wemyss Bay Company, but that only under the conditions, stipulations, and provisions thereinafter written. It was also provided that the Greenock and Wemyss Bay Company should make and maintain the line, and that when completed the Caledonian Company should supply the necessary rolling stock, and work it on the terms set forth in article 8th of the said agreement, which was as follows:—"That the cost of working the traffic upon [893] the said railway and pier, and of the stock and plant to be provided by the said Caledonian Railway Company as aforesaid, shall be borne and defrayed by the said Caledonian Railway Company, in respect whereof the said Caledonian Railway Company shall be entitled, from time to time, to receive and retain for their own use £50 out of every £100 of the gross amount of money earned, realised, and levied on the said railway and pier, until from time to time the said gross receipts shall so far exceed £8000 in the year as at £45 per cent. thereof to yield for the said working a sum not less than £4000, in which case £45 out of every £100 of the said gross receipts shall be received and retained by the Caledonian Railway Company for the said working, instead of £50 per cent. as aforesaid, and the remainder of the said gross receipts shall belong to the Greenock and Wemyss Bay Railway Company."

The charges upon the balance of the gross receipts, after paying the working

able. The dispute between the parties is, whether, on the gross revenue there is or is not a balance due to the pursuers. The dispute is not, as the Lord Advocate endeavoured to represent it, about the meaning of the agreement, but as to the "effect or mode of carrying it into operation." I cannot imagine anything more naturally and properly falling under the clause of reference; and if, as is said, it involve matters of fact, I think that makes it all the more suited for arbitration. I think, therefore, that, on the face of the record, this is a dispute comprehended under the reference, which ought to go to the arbiter for investigation and decision.

As to the suggestion that the arbiter could not give decree for payment of a sum of money, if he found such to be due, I am not aware of any case which goes to countenance it. The case of Merry and Cunningham was very different from an arbitration under the Railway Clauses Act, which gives the widest powers of arbitration.

I think the Lord Ordinary took the right view of this case, whether that view shall be carried out by remitting to the arbiter, or, what might perhaps be the more regular course, of dismissing the action.

[896] LORD ARDMILLAN.—I cannot concur with the Lord Ordinary. There may indeed be questions arising in the accounting which must take place under this record which are fit for arbitration; and in regard to these the parties may still be obliged to go before an arbiter. But the Lord Ordinary has dismissed the action before knowing the state of the facts. That course would be right if the record raised directly a question falling within the terms of the clause of arbitration; and it might also be admissible even if such a question were raised indirectly, if it clearly appeared that the whole conclusions of the action really depended on the solution of it. But the question raised here is, whether the defenders ought to be assoilzied in respect that no such sums as those sued for are due by them. That is a question of fact, or at least a question of accounting. So far from there being any dispute now raised as to the meaning or effect of the agreement, both parties are agreed that the question is as to the fact whether or not any sums, and if any, what sums, are due under the agreement. I do not say that there could not be an award by the arbiter finding a certain sum of money due, if the question of ascertaining the sum necessarily involved the construction of this agreement. But it was primarily intended, not that in questions between these parties the arbiter should simply find that the defenders owe the pursuers so much, but rather that he should, with reference to questions raised, read the agreement, and say what is its fair meaning and effect in any circumstances which might arise.

LORD KINLOCH.—This clause is not an obligation to submit all disputes between the parties, but it only applies to "all differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation." This simple action for a money debt raises on the face of it no question falling under the clause. It might have happened that the averments on which the conclusions rested raised such a question; but that is not so. The Judge may still send a special point to an arbiter; but we are not yet arrived at such a point, and even the emergence of such a question may not exhaust the whole case. I am not prepared to say that any arbiter under this clause would not be entitled to give a decree for a sum of money; but that question has not arisen, and need not be decided.

On 13th December 1871 "the Lords having heard counsel on the reclaiming note for the Caledonian Railway Company against Lord Ormidale's interlocutor of 3d August 1871, recall the interlocutor of the Lord Ordinary, reserving the effect of the arbitration clause founded on by the defenders, if any question shall arise in the course of the cause which falls within the obligation to refer to arbiters: Of consent appoint the defenders to lodge, by the box-day in the recess, the accounts on which they now rely, shewing the gross and net revenue of the defenders' company during the years mentioned on record: Find the pursuers entitled to expenses since the date of the interlocutor reclaimed against," &c.

Excerpts from the accounts of the company having been laid before the Court, the case was again heard, when their Lordships directed it to be re-heard before seven Judges, under the following interlocutor:—"Edinburgh, 24th May 1872.—The Lords appoint this cause to be argued on the day of next, before the Judges of this Division, with the assistance of three Judges of the Second Division, in order to it being determined 'whether the question raised by the defenders' second plea, in the circumstances disclosed on the record, and in the accounts produced by the defenders, falls to be settled by arbitration under the 18th article of the agreement libelled?' and

appoint copies of the printed papers in the cause, and of this interlocutor, to be boxed for the said Judges of the Second Division."

[897] Argued for the pursuers and reclaimers;—The dispute between the parties is not truly one which they can be held to have had in view when they agreed to the clause of arbitration founded on.* Because the dispute has arisen under the agreement it does not necessarily follow that it must go to the arbiter,† particularly when, as here, the question between the parties is clearly settled by the terms of a fundamental condition of the contract.

Argued for the defenders and respondents;—The question raised here is one which must be determined by some competent tribunal. The fact that the question is a simple and an easy one does not affect the competency of the tribunal. The pursuers admit that the agreement deals with the matter in dispute, and its decision involves the true meaning and effect of that agreement, as well as the mode of carrying the same into operation. Under the clause of arbitration, therefore, it is a question for the arbiters and not for the Court.

At advising the opinion of the Court was delivered by—

Lord Kinloch.—The present action has been raised by the Caledonian Railway Company against the Greenock and Wemyss Bay Railway Company for payment of a debt alleged to arise under the Act of incorporation of the latter company, passed in July 1862. Anterior to the passing of that Act an agreement had taken place between the Caledonian Company and the provisional directors of the Wemyss Bay Company, which was sanctioned by the Act, and a copy of which was attached to the Act by way of schedule. By this agreement it was arranged that the Greenock and Wemyss Bay Railway, thereby authorised to be constructed, should be worked by the Caledonian Company, who were also to hold £30,000 of the capital of £120,000 authorised to be raised by the Wemyss Bay Company, the borrowing powers of the company being limited to a further sum of £40,000. Various provisions were made as to the division of profits between the two companies, to which I shall afterwards allude more particularly. The present action is raised by the Caledonian Company for certain sums said to be due to them, year by year, from 1867 to 1870, as the share of profits falling to them under this agreement.

It was stated as a preliminary defence against this action that the action was excluded by the 18th article of the agreement, by which it was provided—"All differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall, from time to time, so often as any such questions shall arise, be referred to arbitration, in terms of the Railways Clauses Consolidation (Scotland) Act, 1845; and the provisions with respect to the settlement of disputes by arbitration contained in such Act shall be incorporated with this agreement, and be operative in the same manner as if they were inserted therein."

The Lord Ordinary sustained this plea, and dismissed the action. On a reclaiming note his interlocutor was recalled, the Court being of opinion that the effect of the clause of arbitration was not to exclude the action, but simply to make it necessary to refer to the arbiters any question which might arise in the course of the proceedings, falling within the scope of those to which the arbitration clause referred. By their interlocutor of the 13th December 1871 they "recall the interlocutor of the Lord Ordinary, reserving the effect of the arbitration clause founded on by the defenders, if any question shall arise in the course of the cause which falls within the obligation to refer to arbiters."

The parties then proceeded to a discussion before the Court of the merits of their case. Under their second plea in law the defenders pleaded,—"The [898] defenders ought to be assoilzied, in respect that in none of the half-years in question did any balance of revenue remain after meeting the requisite charges, and that thus there was no sum divisible between the pursuers' and the defenders' shareholders, in terms of article 9th of said agreement." With special reference to this plea, they now contended that the arbitration clause took effect to the extent of making it necessary

* Aberdeen Railway Company *v.* Blaikie Brothers, Jan. 28, 1851, 13 D. 527—H. of L. June 17, 1852, 15 D. 20.

† Mungle *v.* Young, Jan. 8, 1869, *infra*, p. 901; Glasgow and South-Western Railway Company *v.* Caledonian Railway Company, Nov. 3, 1871, *ante*, p. 657.

that this plea should be disposed of by the arbiters. In this state of things the case has been sent to seven Judges, "in order to its being determined whether the question raised by the defenders' second plea, in the circumstances disclosed in the record, and in the accounts produced by the defenders, falls to be settled by arbitration under the 18th article of the agreement libelled." On this question we are now to give judgment.

The question is of some practical importance, as such arbitration clauses are now extremely common. It is clear, as I think, that when such a question arises it is one for the determination of the Court; it is not a question for the determination, that is to say, not for the effectual or conclusive determination, of the arbiter. Each arbiter will, of course, proceed in the submission according to his own best views. But his decision on this point will not be binding upon the parties. To hold that an arbiter was entitled not merely to decide the questions actually submitted to him, but conclusively to decide what questions were within his determination—in other words to determine the extent of his own jurisdiction—would be as unwarrantable in principle as I think it would be inexpedient in policy. The question whether a particular point of controversy is or is not within the submission is not a question in the submission. It is a question on the contract of the parties; and what, and to what effect is this contract, it is for the Court exclusively to decide.

The question may be sometimes one of difficulty for the Court. For it is reasonably urged that some things in the contract must be axiomatic,—that is to say, that some things must be held fundamental conditions of the contract, clearly settled by its terms, and subject to no reference to arbitration. It would be absurd in the present case to make it a question for the arbiter whether the Caledonian Company had agreed to work the railway in question, although how the working was to be carried on might reasonably be matter of submission. So of other questions which may be figured. It is clearly not enough that the parties differ about something. But that something must be one of the things reserved by the contract for arbitration. The Court must decide whether the particular question is one of the questions reserved for arbitration, on a sound consideration of the whole deed, and the circumstances in which it was executed, sometimes even of the position and profession of the arbiters named. They must decide, on such a consideration, whether the question is one which the parties are, on a fair and reasonable construction, to be held as having intended to make the subject of prospective arbitration.

Applying to the present case this principle of decision I am of opinion that the question raised by the defenders' second plea is a question to be determined by the arbiters under the arbitration clause of the contract. This involves a consideration of what that question truly is.

By the 8th article of the agreement it is provided "that the cost of working the traffic upon the said railway and pier, and of the stock and plant to be provided by the said Caledonian Railway Company as aforesaid, shall be borne and defrayed by the said Caledonian Railway Company, in respect whereof the said Caledonian Railway Company shall be entitled, from time to time, to receive and retain for their own use £50 out of every £100 of the gross amount of money earned, realised, and levied on the said railway and pier, until, from time to time, the said gross receipts shall so far exceed £8000 in the year as, at £45 per cent. thereof, to yield for the said working a sum not less than £4000, in which case £45 out of every £100 of the said gross receipts shall be received and retained by the Caledonian Railway Company for the said working, instead of £50 per cent. as aforesaid, and the remainder of the said gross receipts shall belong to the Greenock and Wemyss Bay Railway Company."

There is no question raised as to this clause. It simply provides for payment to the Caledonian Railway Company of the cost of working the line, by a lump [899] sum of one-half of the gross receipts being retained by them, reducible in a certain event from £50 to £45 per cent. After this deduction the clause bears—"The remainder of the said gross receipts shall belong to the Greenock and Wemyss Bay Railway Company."

The 9th clause goes on to provide for the mode in which the sum of gross profits so belonging to the Wemyss Bay Company shall be divided. It enacts thus—"That out of the said Greenock and Wemyss Bay Company's share of the gross receipts there shall be paid by them (1st) the whole charges and expenses of maintaining the said railway, pier, and other works, and also all public and parish burdens, including

poors-rates, county-rates, prison assessment, and taxes generally that may be chargeable upon the said railway and pier in respect of the said line and works, also the Government duty on passengers, and all payments, if any, to be made for land to be held by the said Greenock and Wemyss Bay Railway Company in feu or lease; (2d) The general charges to be incurred in conducting the ordinary directorial and financial business of the company; and (3d) after providing for these payments, one-fourth of the balance shall belong to and be paid to the Caledonian Railway Company, in respect of their said contribution of £30,000, as further provided for in article 14th hereof; and the remaining three-fourths of the said balance shall belong to the other shareholders in said Greenock and Wemyss Bay Company."

In connection with this is to be read the 14th clause, which runs thus—"That in respect of the payment of the said £30,000 of capital, and the other provisions above written, the Caledonian Railway Company shall, in perpetuity, have right to one fourth-part or share, neither more nor less, of the net revenue, as defined in article 9th hereof, of the proposed company, whatever may be their expenditure in making the intended railway, pier, and works connected therewith, or otherwise; and the said first parties shall be bound to provide for all excess of cost, beyond the amount of capital above specified, necessary for completing the said undertaking; and the interest or dividend payable in respect of the said excess of expenditure, and the interest on all money borrowed, shall form a charge on the remaining three-fourths of the net revenue of the said company, but that, subject to the above condition, the proposed company may borrow on mortgage of the whole of the proposed undertaking any sum not exceeding £40,000."

The defenders, the Wemyss Bay Company, raise no controversy as to the meaning and effect of these clauses in the event of the profits remaining, after deduction of the cost of working, being sufficient to pay not only the expenses of maintaining the line, and other charges primarily referred to in clause 9th, but also the interest of the debt. In such a case they admit that the interest must, in terms of the 14th clause, "form a charge on the remaining three-fourths of the net revenue of the said company"; and the one-fourth of this net revenue must be paid to the Caledonian Company without having any part of the interest of the debt laid on it. But the case which actually has occurred, and which is evidenced by the accounts produced, is that this three-fourths is not sufficient for payment of the interest on the debt, which would require for its payment not merely an encroachment on the Caledonian Company's one-fourth share of the profits, but would swallow up that fourth, leaving no divisible profit whatever. What the Wemyss Bay Company maintain is, that according to "the true meaning and effect of the agreement," the Caledonian Company had right to the one-fourth of the profits only when the remaining three-fourths were sufficient to meet the charge of the interest on the debt. If it is not sufficient for this purpose, they maintain that the rule common to all partnerships must be applied, viz., that the charge of the debt, as well as all other charges, must be deducted before there is any division of profit, or any claim for a share of profits, on either hand. The contract, as they contend, did not contemplate that the Caledonian Company should be entitled to carry off a clear one-fourth, to the effect of leaving an amount of interest on debt unpaid out of the revenue of the company, and apparently without means of paying it, except a declaration of bankruptcy and disposal of the whole concern. Or if the creditors in this interest, who, of course, were not affected by private arrangements of the companies *inter se*, should help themselves to their interest out of the revenue, the defenders say that they cannot [900] be held bound to pay, or raise money, to make good to the Caledonian Company a sum of profits which never was earned. They maintain that the contract cannot legitimately be construed so as to sanction this claim by the pursuers. The reverse of this is maintained by the pursuers, who contend that the words of the contract clearly import an allocation of one-fourth to the Caledonian Company, irrespectively of all consideration of the interest of the debt.

I am of opinion that the question thus raised is, in the sound sense of the agreement, a "difference arising between the parties respecting the true meaning or effect of the agreement"; and that it touches directly on "the mode of carrying the same into operation." The question is one of undoubted practical importance in reference to the working out of the agreement. It regards the obligation or non-obligation of the Wemyss Bay Company to pay, year after year, to the Caledonian Railway

that this plea should be disposed of by the arbiters. In this state of things the case has been sent to seven Judges, "in order to its being determined whether the question raised by the defenders' second plea, in the circumstances disclosed in the record, and in the accounts produced by the defenders, falls to be settled by arbitration under the 18th article of the agreement libelled." On this question we are now to give judgment.

The question is of some practical importance, as such arbitration clauses are now extremely common. It is clear, as I think, that when such a question arises it is one for the determination of the Court; it is not a question for the determination, that is to say, not for the effectual or conclusive determination, of the arbiter. Each arbiter will, of course, proceed in the submission according to his own best views. But his decision on this point will not be binding upon the parties. To hold that an arbiter was entitled not merely to decide the questions actually submitted to him, but conclusively to decide what questions were within his determination—in other words to determine the extent of his own jurisdiction—would be as unwarrantable in principle as I think it would be inexpedient in policy. The question whether a particular point of controversy is or is not within the submission is not a question in the submission. It is a question on the contract of the parties; and what, and to what effect is this contract, it is for the Court exclusively to decide.

The question may be sometimes one of difficulty for the Court. For it is reasonably urged that some things in the contract must be axiomatic,—that is to say, that some things must be held fundamental conditions of the contract, clearly settled by its terms, and subject to no reference to arbitration. It would be absurd in the present case to make it a question for the arbiter whether the Caledonian Company had agreed to work the railway in question, although how the working was to be carried on might reasonably be matter of submission. So of other questions which may be figured. It is clearly not enough that the parties differ about something. But that something must be one of the things reserved by the contract for arbitration. The Court must decide whether the particular question is one of the questions reserved for arbitration, on a sound consideration of the whole deed, and the circumstances in which it was executed, sometimes even of the position and profession of the arbiters named. They must decide, on such a consideration, whether the question is one which the parties are, on a fair and reasonable construction, to be held as having intended to make the subject of prospective arbitration.

Applying to the present case this principle of decision I am of opinion that the question raised by the defenders' second plea is a question to be determined by the arbiters under the arbitration clause of the contract. This involves a consideration of what that question truly is.

By the 8th article of the agreement it is provided "that the cost of working the traffic upon the said railway and pier, and of the stock and plant to be provided by the said Caledonian Railway Company as aforesaid, shall be borne and defrayed by the said Caledonian Railway Company, in respect whereof the said Caledonian Railway Company shall be entitled, from time to time, to receive and retain for their own use £50 out of every £100 of the gross amount of money earned, realised, and levied on the said railway and pier, until, from time to time, the said gross receipts shall so far exceed £8000 in the year as, at £45 per cent. thereof, to yield for the said working a sum not less than £4000, in which case £45 out of every £100 of the said gross receipts shall be received and retained by the Caledonian Railway Company for the said working, instead of £50 per cent. as aforesaid, and the remainder of the said gross receipts shall belong to the Greenock and Wemyss Bay Railway Company."

There is no question raised as to this clause. It simply provides for payment to the Caledonian Railway Company of the cost of working the line, by a lump [899] sum of one-half of the gross receipts being retained by them, reducible in a certain event from £50 to £45 per cent. After this deduction the clause bears—"The remainder of the said gross receipts shall belong to the Greenock and Wemyss Bay Railway Company."

The 9th clause goes on to provide for the mode in which the sum of gross profits so belonging to the Wemyss Bay Company shall be divided. It enacts thus—"That out of the said Greenock and Wemyss Bay Company's share of the gross receipts there shall be paid by them (1st) the whole charges and expenses of maintaining the said railway, pier, and other works, and also all public and parish burdens, including

poors-rates, county-rates, prison assessment, and taxes generally that may be chargeable upon the said railway and pier in respect of the said line and works, also the Government duty on passengers, and all payments, if any, to be made for land to be held by the said Greenock and Wemyss Bay Railway Company in feu or lease; (2d) The general charges to be incurred in conducting the ordinary directorial and financial business of the company; and (3d) after providing for these payments, one-fourth of the balance shall belong to and be paid to the Caledonian Railway Company, in respect of their said contribution of £30,000, as further provided for in article 14th hereof; and the remaining three-fourths of the said balance shall belong to the other shareholders in said Greenock and Wemyss Bay Company."

In connection with this is to be read the 14th clause, which runs thus—"That in respect of the payment of the said £30,000 of capital, and the other provisions above written, the Caledonian Railway Company shall, in perpetuity, have right to one fourth-part or share, neither more nor less, of the net revenue, as defined in article 9th hereof, of the proposed company, whatever may be their expenditure in making the intended railway, pier, and works connected therewith, or otherwise; and the said first parties shall be bound to provide for all excess of cost, beyond the amount of capital above specified, necessary for completing the said undertaking; and the interest or dividend payable in respect of the said excess of expenditure, and the interest on all money borrowed, shall form a charge on the remaining three-fourths of the net revenue of the said company, but that, subject to the above condition, the proposed company may borrow on mortgage of the whole of the proposed undertaking any sum not exceeding £40,000."

The defenders, the Wemyss Bay Company, raise no controversy as to the meaning and effect of these clauses in the event of the profits remaining, after deduction of the cost of working, being sufficient to pay not only the expenses of maintaining the line, and other charges primarily referred to in clause 9th, but also the interest of the debt. In such a case they admit that the interest must, in terms of the 14th clause, "form a charge on the remaining three-fourths of the net revenue of the said company"; and the one-fourth of this net revenue must be paid to the Caledonian Company without having any part of the interest of the debt laid on it. But the case which actually has occurred, and which is evidenced by the accounts produced, is that this three-fourths is not sufficient for payment of the interest on the debt, which would require for its payment not merely an encroachment on the Caledonian Company's one-fourth share of the profits, but would swallow up that fourth, leaving no divisible profit whatever. What the Wemyss Bay Company maintain is, that according to "the true meaning and effect of the agreement," the Caledonian Company had right to the one-fourth of the profits only when the remaining three-fourths were sufficient to meet the charge of the interest on the debt. If it is not sufficient for this purpose, they maintain that the rule common to all partnerships must be applied, viz., that the charge of the debt, as well as all other charges, must be deducted before there is any division of profit, or any claim for a share of profits, on either hand. The contract, as they contend, did not contemplate that the Caledonian Company should be entitled to carry off a clear one-fourth, to the effect of leaving an amount of interest on debt unpaid out of the revenue of the company, and apparently without means of paying it, except a declaration of bankruptcy and disposal of the whole concern. Or if the creditors in this interest, who, of course, were not affected by private arrangements of the companies *inter se*, should help themselves to their interest out of the revenue, the defenders say that they cannot [900] be held bound to pay, or raise money, to make good to the Caledonian Company a sum of profits which never was earned. They maintain that the contract cannot legitimately be construed so as to sanction this claim by the pursuers. The reverse of this is maintained by the pursuers, who contend that the words of the contract clearly import an allocation of one-fourth to the Caledonian Company, irrespectively of all consideration of the interest of the debt.

I am of opinion that the question thus raised is, in the sound sense of the agreement, a "difference arising between the parties respecting the true meaning or effect of the agreement"; and that it touches directly on "the mode of carrying the same into operation." The question is one of undoubted practical importance in reference to the working out of the agreement. It regards the obligation or non-obligation of the Wemyss Bay Company to pay, year after year, to the Caledonian Railway

Company, a sum which the revenue of the company does not yield after satisfying the demands of its creditors. An obligation to this effect cannot but have a paralysing influence on the operations of the company, if, indeed, it does not issue in necessary bankruptcy. This being so, I am of opinion that, on a sound construction of the agreement, the question must be held to be amongst those intended by the parties to be referred to arbitration under the 18th clause. It is a question directly bearing on the execution of the agreement, and is just such a question as might form a difference arising, in terms of the clause, "from time to time." It is a question which, whenever or however it may be decided, must be determined according to "the true meaning and effect of the agreement." I am of opinion that the question must go to the arbiters.

It is scarcely necessary to say that, in arriving at this conclusion, I take no judical cognisance of the merits of the question to be referred, nor allow my mind to be in the least influenced by a consideration of how I would myself decide the question if it was before me for determination. Even if I had a clear opinion as to the validity of the claim of the Caledonian Company, this opinion, one way or other, would be no ground whatever for withdrawing the question from the tribunal chosen by the parties. The controversy whether the question is to go to the arbiters or not cannot be solved by the consideration whether the point at issue be a clear or an obscure one. If the question is one which, in the fair construction of the agreement, falls to be determined by the arbiters, I have no other course except to send it to the arbiters.

The practical conclusion at which I arrive is an affirmative of the question sent to us, and that the Court should find "that the question raised in the defenders' second plea, in the circumstances disclosed on the record, and in the accounts produced by the defenders, falls to be settled by arbitration under the 18th article of the agreement libelled."

The following interlocutor was pronounced:—"Find that the question raised by the defenders' second plea, in the circumstances disclosed on the record, and in the accounts produced by the defenders, falls to be settled by arbitration under the 18th article of the agreement libelled: Supersede consideration of the cause until the said question shall be settled by arbitration in the manner prescribed by the 'Railways Clauses Consolidation (Scotland) Act, 1845': Find the defenders entitled to expenses incurred since 24th February last, and remit," &c.

HOPE & MACKAY, W.S.—M'EWEN & CARMENT, W.S.—Agents.

[*Affirmed*, 1874, 1 R. (H. L.) 8.]

No. 157. X. MACPHERSON, 901. 28 June 1872.* 1st Div.—Lord Barcaple, B.

JAMES MUNGLE AND OTHERS, Pursuers.—*Gifford*—*J. C. Smith.*
JAMES YOUNG, AND YOUNG'S PARAFFINE LIGHT AND MINERAL OIL COMPANY, LIMITED, Defenders.—*Sol.-Gen. Young*—*Watson.*

Arbitration—Mineral Lease.—The mineral tenants of the lands of M., who had by their lease the usual powers of working and winning the minerals let to them, had also power by a separate clause in the lease to make use of any pits they might sink in the lands of M. for winning and carrying away the coal, limestone, and fireclay in the adjoining lands. Any disputes that might arise between the parties with regard to the true import of the lease were to be referred to the decision of arbiters named. The proprietors of M. raised this action for the purpose of preventing the mineral tenants from using the roads on the lands of M. for carrying materials not raised from pits in M. to and from their works on adjoining lands, and from storing minerals and making other uses of the lands for the purposes of these works. The defenders pleaded that the action was excluded by the arbitration clause. *Held*

* Decided January 8, 1869.

(1) that the action was not so excluded; and (2) that the lease did not confer on the mineral tenants any power to use the lands in question for the purposes complained of.

By lease, dated 22d April 1862, Andrew Mungle of Muirhall let the coal, limestone, and fireclay on the estate of Muirhall to James Young of Limefield and his subtenants for a period of thirty-two years, with full power to search for, and to work, win, raise, and carry away the said minerals, and for these ends "to set down pits and sinks, and to drive levels for working the said coal, limestone, and fireclay hereby let, and to erect machinery for draining and bringing up the said minerals or either of them, and to make roads or railways, build houses for workmen employed at or in connection with the works, and generally to perform and carry on upon the said lands every other operation usual and necessary for working, winning, and carrying away the said coal, limestone, and fireclay."

A rent, or, in the option of the proprietor, a lordship or royalty, was stipulated for; and the tenant undertook to make good surface damage, and all loss and damage which the landlord might sustain through neglect or irregular workings in the underground operations. The lease further provided—"And in respect that the said James Young has entered or is about to enter into a lease similar to the present with William Smith of Breich Mills of the coal and other minerals in his lands of Breich Mills lying contiguous to the said lands of Muirhall, and may work the coal and other minerals in other lands adjoining the said lands of Muirhall and Breich Mills, it is hereby agreed that, in the event of any pits being sunk or opened in the said lands of Muirhall, the coal, limestone, and fireclay in which, with the foresaid exception, are hereby let, the said James Young and his foresaids shall be entitled to make use of the said pits for winning and carrying away the said coal, limestone, and fireclay in the said lands of Breich Mills and said other adjoining lands: And it is further agreed that the said James Young and his foresaids shall be entitled to win, remove, and take away the coal, limestone, and fireclay hereby let, and also the coal, limestone, and fireclay in the said other adjoining lands, by means of any pits which the said William Smith, or the said James Young and his foresaids, as his tenants, or the proprietors of the said other adjoining lands, may make in the said lands of Breich Mills or said adjoining lands."

[902] It was agreed that in case any dispute should arise between the parties "with regard to the true import of this lease every such dispute shall be referred to the amicable decision and decreet-arbitral to be pronounced by David Landale, civil engineer, Edinburgh, and Ronald Johnstone, civil engineer, Glasgow, with power to them to name an oversman in case of their differing in opinion, whose awards shall be final and binding on both parties," and in the event of their dying or declining that the Sheriff of Edinburgh should have power to appoint an arbiter or arbiters.

In 1867 James Young, under an agreement he had entered into with them, assigned this lease to "Young's Paraffine Light and Mineral Oil Company (Limited)," who entered upon the occupation of the lands.

The pursuers of these actions of declarator and damages and of suspension and interdict, who were the sons of Andrew Mungle, alleged that the company, which had entered into possession of extensive works upon Mr. Young's estate of Addiewell, which marched with the lands of Muirhall on the one side, and had also become subtenants of the minerals in the lands of Breich Mills which lay upon the other side of their lands of Muirhall, had attempted to use and did use the lands of Muirhall for the purposes of their works in Addiewell, and also that they conveyed all sorts of materials from Breich Mills and other lands of which they were tenants over the roads and railways on Muirhall, and carried on other operations which they were not entitled to do under the lease. In the action of declarator and damages against Mr. Young and the company the conclusions were, "(First), That the defenders are not entitled, under the lease or otherwise, to make or use roads or railways through the pursuers' lands of Muirhall, for the service of the defenders' chemical, mineral, or paraffine works at Addiewell, and are not entitled to use the roads or railways already made on the lands of Muirhall for the purpose of conveying materials to or from the works on the lands of Addiewell, the materials not being raised by means of pits in or from mines under the lands of Muirhall, and that the defenders are not entitled to carry over the surface of the lands of Muirhall, whether by roads or railways, for the service or

purposes of the works at Addiewell, coals, or bituminous shale, or other minerals, from pits in the lands of Breich Mills or Baads, or from any pits whatsoever, other than pits in the lands of Muirhall: (Second), That the defenders are not entitled under the lease or otherwise to lay down or store materials on the lands of Muirhall for the use of the works at Addiewell, the materials not being raised by means of pits in or from mines under the lands of Muirhall, and that the defenders are not entitled to lay down on the lands of Muirhall iron or other metal pipes and retorts, and other articles used by the defenders exclusively in the works at Addiewell: (Third), That the defenders are not entitled to erect and use on Muirhall steam or other engines for the purpose of pumping water or propelling water by a force-pump for the use or service of works situated on Addiewell: (Fourth), That the defenders are not entitled to conduct or send water from the Blackbrae Burn or other burn or stream across or through the lands of Muirhall either on the surface or under the surface to the works at Addiewell and for the purpose of being used therein: (Fifth), That the defenders are not entitled, either under the lease or otherwise, to construct or use tanks or ponds on the lands of Muirhall for the purpose of storing or retaining water for the use of works on the lands of Addiewell."

The pursuers pleaded;—(1) The defenders having no title to carry shale or other minerals and materials over the lands of Muirhall, except [903] such minerals as might be dug from or brought to the surface through the pits in the lands of Muirhall, and no title to use the lands of Muirhall for the purposes of the defenders' works, situated on Addiewell, and no title to use the mineral workings on the lands of Muirhall for the purpose of obtaining or transmitting a water supply for Addiewell, the pursuers were entitled to decree, in terms of the declaratory conclusions of the summons, or of one or more of them. (2) The lease granted by the pursuers' father did not entitle the defenders, or any of them, to use the lands of Muirhall, or any part thereof, for any purpose exclusively connected with their chemical works on the adjoining lands of Addiewell, or for any purpose whatsoever not fairly or necessarily connected with the working of the minerals let by said lease, or the conveyance of minerals brought to the surface through Muirhall pits. (6) The arbitration clause founded on by the defenders not having been intended to embrace the questions involved in this action, and not embracing them according to any reasonable reading of the contract of lease, the jurisdiction of the Court was not excluded by said arbitration clause.

The defenders pleaded, *inter alia*;—(2) In respect that the whole questions and matters embraced in its conclusions related to and depended for their determination upon the true import of the lease libelled, the present action was excluded by the arbitration clause contained in the lease. (3) Under a sound construction of the lease libelled the defenders had right to use the line or lines of railway formed by them upon the lands of Muirhall for the purpose of carrying minerals raised from Breich Mills and the adjoining lands of Baads to the lands of Addiewell. (4) In any view, the defenders were entitled to use the line of railway for the purpose aforesaid, in respect that it was necessary for the purpose of working, winning, and carrying the minerals in Muirhall let to the defenders; and the line being in the lawful and exclusive possession of the defenders for such purpose, the pursuers had no right or interest to object to their using it for the conveyance of other minerals. (5) At all events, the proprietors of Muirhall having been cognisant of and having acquiesced in the formation and use of the said line of railway for the purposes now complained of, they were not entitled to decree of declarator, or for damages or wayleave, as concluded for.

The Lord Ordinary (Barcaple) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties on the plea in law stated for the defenders that the action is excluded by the arbitration clause contained in the lease, and considered the closed record and process, Repels said plea, and appoints the cause to be enrolled," &c.*

---

* "NOTE.— . . . In this state of matters the pursuers have brought this action complaining of operations carried on by the defenders upon the lands of Muirhall. These are all set forth as being operations for the service or purposes of the defenders' paraffin works at Addiewell. They are set forth in the conclusions of the actions as, 1st, The use of roads or railways on Muirhall for conveying materials to or from the works on Addiewell, not being materials raised by pits in or from mines under the lands of Muirhall; 2d, Storing such materials on Muirhall for the use of the works at Addiewell, and laying down on Muirhall pipes and retorts and other articles used

[904] The pursuers reclaimed. At the debate parties were heard on the whole cause.

At advising,—

LORD DEAS.—This is an action of declarator and damages at the instance of Messrs. Mungle, as proprietors of the lands of Muirhall, to have it found and declared that the defenders are not entitled to use these lands for any other purposes than those authorised by their lease of the minerals, and in particular, that they are not entitled, 1st, To carry the minerals raised by them in the adjoining lands of other proprietors, by means of roads and railways, across the lands of Muirhall, to the defenders' works at Addiewell; 2d, To store upon Muirhall articles and materials brought from elsewhere for the use of the works at Addiewell; 3d, To erect steam-engines on Muirhall to pump water for the service of works on Addiewell; 4th, To conduct water across Muirhall to the works at Addiewell; or 5th, To construct tanks on Muirhall for storing water for the works of Addiewell.

Various defences were stated to the action. The Lord Ordinary has decided on the second only, viz., that the action is excluded by the reference. But it appeared to us during the discussion that the question whether the action was excluded by the reference depended so much on how far the pleas on the merits were well founded, that the most satisfactory course would be to hear parties on the whole case. If this can be fairly said to raise a dispute as to the true import of the lease, it is clear that the clause of reference is applicable. But otherwise it is not applicable.

This is not the first case in which the Court have found it necessary or expedient to consider the merits of a dispute, along with the question whether that dispute fell under a clause of reference. That happened in the case of Blaikie. Looking at the defenders' pleas upon the merits here, in connection with the terms of the lease, my opinion is that these pleas do not, in any fair and reasonable sense, raise a dispute as to the import of the lease, but are founded upon views and considerations altogether outwith the lease.

It is very clear, I think, that rights might be claimed by the mineral tenant over Muirhall which we would at once pronounce to be outwith the lease. For instance, the lease stipulates that the tenants shall "leave all the arable ground [905] that may

---

exclusively in these works; 3d, Erecting and using on Muirhall steam-engines for pumping or propelling water for the use of these works; 4th, Conducting water across Muirhall, either on the surface or under the surface to these works, to be used there; and 5th, Constructing or using tanks on Muirhall for storing water for the use of these works. The defenders' lease does not expressly, or by necessary or obvious implication, give them power to carry on any of these operations. They are not challenged on the ground that they are excluded by the provisions of the lease, [904] but as being as entirely outwith the lease as any other use which the defenders might choose to make of the surface of the pursuers' lands. The case of the pursuers in regard to them is that they are altogether unconnected with the working of the Muirhall minerals, and with the exercise of the special powers conferred on the lessees in regard to the adjoining minerals. Such being the nature of the question between the parties, the Lord Ordinary thinks that it cannot be held to be within the arbitration clause, merely because the defenders contend that the operations complained of are justified by the powers conferred on them by the lease. The contention of the pursuers is at least as plausible, that the lease has no reference to the matter in question at all, and that therefore there is not, in any proper sense, any dispute as to its meaning or import. The present case is different from any of which the Lord Ordinary is aware that has hitherto occurred as to the effect of a clause of arbitration ancillary to another contract. But he thinks that the principles which have been established in these cases exclude the extension of such a clause to matters which must be held to have been beyond the contemplation and intention of the parties, though its words may admit of being so construed as to embrace them. The contention of the pursuers, which is not obviously excluded by the terms of the lease, is that the operations of which they complain are in that position. That is a question which, in the opinion of the Lord Ordinary, they are entitled to have tried in this Court.

"As the parties were only heard upon the plea that the arbitration clause excludes the action, the Lord Ordinary can only dispose of that plea at present. There must apparently be investigation of the facts set forth by the pursuers."

have been damaged or used by them in an arable state and capable of bearing crops." Now, suppose the tenants were to maintain that this implied a right to use a portion of the surface for agricultural purposes, would that be a question as to the true import of the lease, which fell to be referred to the two mining engineers named as referees, Mr. Landale and Mr. Johnstone? Or suppose it were to be maintained that, because the lease gives power to "build houses for workmen employed at or in connection with the works," this implied a right to build houses to be let for profit to persons not employed at the works at all, it is clear enough, I persume, that we could not allow such a contention to go to the arbiters. The rights asserted by the defenders in the present case may not be so palpably outwith the lease as these rights would be, but still the question arises upon the defenders' second plea in law, whether they do not substantially fall within the same category.

The lease was granted on 14th May 1868. It is a lease of certain minerals, and conditionally of the whole minerals in the lands of Muirhall estate for thirty-two years, the landlord reserving right to work or let to others the ironstone, and some others of the minerals, if the tenant did not avail himself of his conditional right to work the whole.

The tenant is empowered by the lease to work, win, and carry away the minerals let, and for these ends to sink pits, drive levels, erect machinery, and to make road or railways, &c. So far, the powers are limited to the working and carrying away of the minerals thereby let,—that is, the minerals in the lands of Muirhall,—and the tenant is laid under a corresponding liability to pay annually "all surface damage which shall be occasioned to the lands by any of their operations in working, winning, and carrying away the coal, limestone, and fireclay hereby let." It is not immaterial to observe that this is the only clause providing for payment of surface damages contained in the lease.

Then comes the only part of the lease which can be said to raise any difficulty,—"And in respect the said James Young has entered or is about to enter into a lease similar to the present with William Smith of Breich Mills, lying contiguous to the said lands of Muirhall, and may work the coal and other minerals in other lands adjoining the said lands of Muirhall and Breich Mills, it is hereby agreed that in the event of any pits being sunk or opened in the said lands of Muirhall," the tenant (Young) "shall be entitled to make use of the said pits for winning and carrying away the said coal, limestone, and fireclay in the said lands of Breich Mills and said other adjoining lands: And it is further agreed that the said James Young and his foresaids shall be entitled to win, remove, and take away the coal, limestone, and fireclay hereby let, and also the coal, limestone, and fireclay in the said other adjoining lands, by means of any pits which the said William Smith or the said James Young and his foresaids as his tenants, or the proprietors of the said other adjoining lands, may make on the said lands of Breich Mills or said adjoining lands."

The provision thus is that Young, the tenant, may use the Muirhall pits for bringing up and carrying away the coal, limestone, and fireclay wrought in the adjoining lands, or he may use the pits in the adjoining lands for bringing up and carrying away the whole from both sets of lands.

But there is no mention made of any power to use the surface of Muirhall for carrying away any minerals not brought up through a pit or pits in Muirhall. There is no such power contained in this lease.

Now, the right asserted by the mineral tenant here is substantially a right to use the surface of the lands of Muirhall for all the purposes of the defenders' works on the adjoining lands of Addiewell, or others, altogether irrespective of whether these purposes are connected with minerals brought up through pits in the lands of Muirhall or not.

This is a right of a very extensive kind. It is a strong thing to give a mineral tenant the power of bringing up the minerals of one proprietor along with the minerals of another, which may increase the difficulty of detecting fraud against either, if the tenant is inclined to be dishonest; nevertheless, such a power is occasionally granted, and is a boon to the mineral tenant by saving him expense. But it is a power that could not be inferred, and if it had not been [906] granted I should have thought a proposal to refer to the arbiters whether the lease meant it, was as extravagant a proposal as the one here made by the tenant.

The fact, however, of that somewhat unusual power being conferred does not at all imply the still more unusual and almost unknown power of carrying minerals across

the surface of the whole of Muirhall to the tenants' works at Addiewell or elsewhere, without payment of any wayleave or other consideration, from all the adjoining lands in which the tenant may think proper to take a lease of the minerals. The inference is rather the other way—that when giving this unusual power, if the parties had meant to give others still more unusual, they would have said so.

This is not the first case in which the Court has found it necessary to consider the merits of the question in dispute at the same time with considering whether that question came within the clause of reference. In Blaikie's case (28th January 1851, 13 D. 527), the Court found themselves in that position, although no doubt the effect of the reference clause falls always to be primarily decided, and if held to comprehend the question, there will be no decision on the merits. The clause of reference in Blaikie's case to the company's engineers was so broad and explicit that it was held (though with much difference of opinion) to comprehend the question in dispute. But that was a very different question from the present.

The case of Pearson and Oswald, 4th February 1859, 21 D. 419, comes nearer to this, and there, as here, there was a reference to a mining engineer, in very broad terms, of all disputes or differences as to the "meaning or execution of these presents," and one consideration amongst others was the improbability of such a question of law as that which was there raised being intended to be referred to such an arbiter possessed of no legal knowledge.

On these grounds I am humbly of opinion that the clause of reference in this case does not cover the questions here raised, and I am further of opinion, on the merits, that the pursuer is entitled to decree in terms of the declaratory conclusions of the summons.

LORD ARDMILLAN concurred.

LORD KINLOCH.—According to the agreement of the parties we are now to give an opinion both on the preliminary plea decided by the Lord Ordinary, and, supposing we repel that plea, on the merits of the case. It is difficult, if not impossible, to separate these in mental contemplation. But in proper logical sequence they should be considered separately and successively.

On the preliminary point brought before us by the reclaiming note I am of opinion that the Lord Ordinary is right. I consider it to be established by undoubted authority that a clause of arbitration, such as that which occurs in the lease in question, does not import a reference of every possible dispute occurring between the parties in regard to the subject-matter of the contract. Such is not the clause, either in its expression or fair import. It bears to refer "any dispute which shall arise between the parties with regard to the true import of this lease," and the lease being a lease of minerals, the reference is to two civil engineers. According to the fair construction of the clause it is what has been aptly termed an executory clause, that is to say, a clause for the purpose of facilitating the practical procedure under the contract, by affording the ready means of settling any difference by which such procedure might be impeded. Hence the reference is to two practical men, presumably well skilled in the actual conduct of a mineral lease. But the clause is not brought into operation merely by one of the parties claiming a certain right as legally belonging to him, and saying that he claims it under the lease. The inquiry raised by such a claim may be as far as possible removed from the presumable contemplation of the parties, and the presumable fitness of the arbiters to deal with it. The arbiters named may be, of all, the most competent to deal with the mode of working the mines; the preservation of the levels and air courses, and the like topics; they may be, of all, the most incapable to decide a proper question of law, and the [907] last persons in the world to whom the parties can be fairly presumed to have entrusted the determination of such a question.

The distinction now alluded to may throw upon the Court a somewhat difficult task, in the way of determining whether a particular point of controversy falls within the clause of submission or not. The point may sometimes lie on the confines of either category, and may by different minds be placed differently in the one or in the other. But the duty lies on the Court to determine the question to the best of its judgment. And it will do so safely, and in general successfully, by having a sound regard to the presumable intentions of the parties, as expressed in the language employed.

In the present case, the discussion must be made to bear reference to the special points of supposed claim stated in the summons, as to which the pursuers ask the judgment of this Court, and by implication set forth that they do not fall within the

operation of the clause of submission. I am of opinion, with the pursuers, that they do not so fall. The alleged claims are not such as arise under the letter of the contract. No clause in the lease confers *per expressum* the privileges alleged to be claimed. Nor can it be said, as I think, that they arise out of any direct or necessary implication from the words employed. They are rights which are made in some way or other to rest on an implied obligation derived from the contract considered as a whole. But further, they are not rights which are necessary, or which fall to be enjoyed, in the working of the minerals under the lease. They are rights to use the lands of Muirhall, and the roads and railways on these lands, for the purposes and for the benefit of the defenders' chemical works at Addiewell, a property with which the lease has no connection, and which is situated wholly apart from the lands of Muirhall. So the summons sets forth; and it is with the rights supposed to be claimed as set forth in the summons that we have now to do. It is only these that our judgment will effect; and except as to these, the defenders will not be touched by any judgment to be pronounced in the case. The rights to which the summons bears reference, and claims to have negatived by the judgment of the Court, are (1) a right to carry by the roads or railways on Muirhall to the works at Addiewell minerals or materials raised on other lands, and not raised through pits on Muirhall; (2) a right to store materials on the lands of Muirhall for the use of the works at Addiewell; (3) a right to erect steam or other engines on Muirhall for the purpose of pumping or propelling water to the works at Addiewell; (4) a right to send water from the Blackbrae Burn across the lands of Muirhall for the use of the works at Addiewell.

I am of opinion that all these claims, whether well founded or not, are, on their bare statement, entirely out of the sphere of the submission clause in the lease. They have no reference whatever to the practical operations involved in working the minerals on Muirhall. The claim stated is that of a certain privilege to be enjoyed by the works at Addiewell, to which works the lease does not bear reference at all, over the lands of Muirhall. It is in vain for the defenders to say that they claim this right as arising by implication out of the general tenor and legal effect of the deed. It still remains true that the claim is not one which, on any fair construction of the intentions of the parties, can be held to be within the submission clause. It is not one intended to be referred, and therefore not one *de facto* referred, to the two civil engineers mentioned in the lease. It is one, therefore, as to which the jurisdiction of the Court is not excluded, but on which the Court is, on the contrary, the only tribunal competent to pronounce.

Assuming now that the question is on its merits before the Court for decision I am of opinion that the defenders have not shewn any valid ground on which to rest the claims which the summons seeks to negative. I have stated what these claims are. I can scarcely use any other terms in deciding the merits than what I have already employed in regard to the preliminary question. The rights are not given by any express clause in the lease. They are not given by any direct or necessary implication from the words employed. I see no reason for holding them implied by the general tenor of the lease, or by anything which it contains. I am of opinion, therefore, that judgment ought to pass in terms of **[908]** the declaratory conclusions of the summons. But if, as to any of these, it appears to your Lordships that further information should be had, I do not object to its being obtained. The other conclusions have not yet been spoken to.

The LORD PRESIDENT concurred with Lord Deas.

The following interlocutor was pronounced:—"Recall the interlocutor: Repel the second and third pleas of the defenders; and find, decern, and declare in terms of the first particular conclusion of the summons; and remit to the Lord Ordinary to proceed further in the cause: Find the pursuers entitled to expenses since the date of the interlocutor brought under review, and remit the account thereof, when lodged, to the Auditor to tax and to report to the Lord Ordinary, with power to his Lordship to dispose of said expenses when ascertained; reserving also to his Lordship to dispose of the expenses hitherto incurred in the Outer-House."

WILLIAM MILNE, S.S.C.—JAMES WEBSTER, S.S.C.—Agents.

[*Referred to*, Mackay & Son *v.* Police Commrs. of Leven, 1893, 30 S. L. R. 919.]

No. 158. X. MACPHERSON, 908. 28 June 1872. 1st Div.—B.

DONALD M'LENNAN (Inspector of Poor of Contin), First Party.—*Millar*—*Burnet.*

JOHN WAITE (Inspector of Poor of Dunse), Second Party.—*Sol.-Gen. Clark*—*Low.*

Poor—Settlement, Residential and Derivative—Parent and Child—Pupil.—A daughter after her father's death resided in family with her mother in the parish of A. during four years of pupillarity and the three following years. She then left her mother's house and removed to another parish, where she lived two years and became a pauper. *Held* that she had not a settlement in the parish of A. and that her own birth parish was liable.

Opinion, that after a father's death a mother may acquire a residential settlement for herself and the children residing with her, which they retain after pupillarity and until they leave her family.

This special case was presented by Donald M'Lennan, inspector of poor of the parish of Contin, and John Waite, inspector of poor of the parish of Dunse.

The facts stated were as follows:—The pauper, Jane Elizabeth M'Gregor, was born in the parish of Contin on 15th July 1851. Her father died on 12th December 1857, having a residential settlement in Contin. On 24th February 1858 her mother and the family, including the pauper, left Contin parish, and resided for about eighteen months in Glasgow. In 1859 they all went to Dunse, where the pauper resided in family continuously with her mother till October 1866, when she went to live with an aunt in Kenmore parish. The mother died in Dunse on 10th December 1867. The father was not born either in Contin or Dunse. Neither mother nor daughter applied for parochial aid during their residence in Dunse. On 6th June 1868 the pauper applied for parochial aid in Kenmore parish, and being a proper object of relief received it, and had since continued chargeable to that parish. Statutory notice having been duly given by Kenmore to Contin and Dunse, these parishes agreed jointly to pay to Kenmore the advances made, on the understanding that this special case should be submitted for the opinion and judgment of the Court on the question "whether the parish of Contin or the parish of Dunse was the parish in which the pauper had her legal settlement on 6th June 1868 when she became chargeable?"

[909] It was argued for Contin;—The mother's industrial residence in Dunse from 1859 to 1866 was sufficient to give the pauper living in family with her a settlement there.* The case of Craig *v.* Greig and M'Donald † is not adverse to this proposition as settled by the cases cited, because that case only decided that a minor whose father has died during his pupillarity is forisfamiliated by attaining puberty, and is thenceforward chargeable on the parish of his own birth, if he has not acquired another residential settlement. Here the pauper had acquired such a settlement by residence in family with her mother, her only surviving parent, and as such the head of the family; and neither her own birth parish nor that of her father's residential settlement could be held liable. The derivative residential settlement which she possessed in Contin at her father's death had been lost by absence. That derivative settlement was the pauper's to all intents and purposes, but being so it was necessarily lost, just as any other residential settlement, by absence for four years. She had acquired a settlement in Dunse by her residence there in her mother's family in pupillarity coupled with her residence there after puberty, which might legitimately be combined for that purpose.‡

It was argued for Dunse;—It was impossible for the pauper to have acquired a settlement in Dunse or in any other parish, as five years had not elapsed since she

* Crieff *v.* Fowlis-Wester, July 19, 1842, 4 D. 1538; Grant *v.* Reid, May 25, 1860, 22 D. 1110.

† July 18, 1863, *ante*, vol. i. 1172.

‡ Hume *v.* Pringle, Dec. 22, 1849, 12 D. 411; Beattie *v.* Adamson, Nov. 23, 1866, *ante*, vol. v. 47; Allan *v.* Higgins, Dec. 23, 1864, *ante*, vol. iii. 309.

attained the age of puberty and so acquired capacity to do so. Her father's settlement adhered to her till then, and had not since been lost. It was not competent to piece together her residence before and after puberty.*

At advising,—

LORD PRESIDENT.—The question which is submitted in this special case for the opinion and judgment of the Court is practically determined, in my opinion, by the decision in the case of Craig *v.* Greig and M'Donald. It was there decided that a person who has no residential settlement in his own right is chargeable on the parish of his birth if he is above the age of puberty; and as soon as he does attain the age of puberty, his father being dead, his settlement is in his birth parish in preference to any derivative settlement, which he previously had. Applying this rule to the present case, we find that when the pauper applied for relief in 1868 she was seventeen years of age, having been born on 15th July 1851. She then had a settlement in the parish of her birth, unless she had a residential settlement in her own right; but being only sixteen years of age she could have no residential settlement in her own right, as such a settlement could not begin to be acquired until her attainment of the age of puberty. It was contended that she had lived continuously in Dunse for five years. But for two of these years she was in pupillarity and living in family with her mother, and it is out of the question to say that a residential settlement can be constituted by a five years' residence which is the residence partly of the pauper as a pupil in family with her mother, and partly of the pauper after puberty in her own right.

LORD KINLOCH.—The pauper in the present case became chargeable in June 1868, when she was seventeen years of age, having been born in 1851.

Her father died in December 1857, when she was six years of age, possessed of a residential settlement in the parish of Contin. She went in 1859 with her mother to live in the parish of Dunse, where they resided together till **[910]** October 1866. By this residence of seven years the residential settlement of the father was lost to both widow and child; and I think a residential settlement was acquired in Dunse for both. For I hold it to be settled by the case of Crieff *v.* Fowlis-Wester, July 19, 1842, 4 D. 1538, that after a father's death the mother may acquire a residential settlement, both for herself and all the children residing with her, and forming along with her the family of which she is the head. I do not consider the settlement so acquired by the children necessarily to cease when each attains puberty. For puberty is not *eo ipso* emancipation; nor will the mere arrival of puberty necessarily cause the child to cease to be a child of the house. So it would unquestionably hold, if it were the father who was alive and the children resided in family with him. I think it equally holds in the case of the surviving mother continuing to have her children living in family with her. Any other doctrine would involve a premature separation between mother and child, to which our system of poor-law is peculiarly hostile.

If, then, the pauper had become chargeable in October 1866, when she had been seven years with her mother in the parish of Dunse, I should have had no doubt that her settlement was in Dunse, although at that time she was fifteen years of age, or three years past puberty. I think the pauper would have still been a child in her mother's house, and following her mother's settlement.

But in October 1866 the pauper left her mother's house, and went to reside in the parish of Kenmore; and in 1867 her mother died. As already said, she did not become chargeable till June 1868. The question is, where was then her settlement?

I am of opinion that by that time she was in the condition of an emancipated child, past pupillarity. And I think in that case her settlement was no longer in her mother's place of settlement, but in her own parish of birth. I consider this result to flow directly from the decision in the case of Craig *v.* Greig and M'Donald, July 18, 1863, 1 Macph. 1172. In that case no decision was pronounced in regard to any settlement derived, or supposed to be derived, from the mother. The case was that of a boy of sixteen, whose father had been six years dead. This was clearly an emancipated child, beyond pupillarity. According to the old law, this would have given him a capacity to acquire a new settlement for himself; but the settlement derived from his father would have subsisted till such acquisition. But it was held by a majority of the whole Court that, under the law as now existing, the effect of emancipation, combined with puberty,

* Adamson *v.* Barbour, May 30, 1853, 1 Macq. 376; Thomson *v.* Knox, June 28, 1850, 12 D. 1112; Kirkwood *v.* Wylie, Jan. 19, 1865, *ante*, vol. iii. 398.

was, so soon as puberty arrived, to destroy the original settlement, and to place the party's settlement in the parish of his own birth. So I think it must be held in the present case.

I was one of the minority in the case of Craig, thinking the old law still to subsist, to the effect of retaining the father's settlement till the emancipated child acquired a settlement for himself, or when the settlement was residential, till it was lost by non-residence. But I consider the case to be a binding authority fixing the law from its date. I do not consider the decision in that case to interfere with the condition of children, whether below or beyond puberty, who are unemancipated, and are residing in family either with their father, or with their mother after the father's death. But in regard to all emancipated children, I hold the case to settle that their arrival at puberty *eo ipso* discharges any settlement derived from a parent, and in default of any other settlement, throws them on the parish of their birth. Applying this principle to the present case, I think the pauper's settlement in 1868, when she became chargeable, was not in her mother's place of settlement, but in the parish of her own birth, and therefore that the parish of Contin, in which she was admittedly born, must bear the burden of her maintenance.

LORD DEAS.—I agree with your Lordship in the chair, coupled with the explanatory observations of Lord Kinloch.

LORD ARDMILLAN.—I am of opinion that a pupil can acquire no residential settlement at all in its own right. A pupil is a member of the father's or the mother's family in which it resides, and is a burden upon the means of sub-[911]-sistence of its father or mother, and does not by residence in family acquire a settlement for itself.

When the father dies the child is forisfamiliated if it be not still in pupillarity, or as soon as it ceases to be a pupil; and, therefore, I hold that as this was what really happened here, this pauper has no other settlement than that of birth, which was in the parish of Contin.

The authority of the case to which your Lordship has referred is conclusive.

The following interlocutor was pronounced:—"Find and declare that the parish of Contin, as the parish of the birth of the pauper, Jane Elizabeth M'Gregor, is liable for the maintenance of the said pauper from the time she became chargeable on 6th June 1868: Find and declare that the parish of Contin is liable to the parish of Dunse in the sum of £8, 18s. 6d., with interest since 19th August 1871, and decern: Find the parish of Contin liable to the parish of Dunse in expenses, and remit," &c.

ADAM & SANG, W.S.—J. & J. TURNBULL, W.S.—Agents.

[*Principle applied*, Ferrier *v.* Kennedy, 1873, 11 M. 402. *Distinguished*, Inspector of Poor of St. Cuthberts *v.* Inspector of Poor of Cramond, 1873, 1 R. 174.]

No. 159. X. MACPHERSON, 911. 29 June 1872. 2d Div.—R.

JOHN GUILD AND OTHERS (Guild's Trustees), of the First Part.—*Sol.-Gen. Clark—M'Laren.*

MARION GUILD OR LEARMONTH AND OTHERS, of the Second Part.—*Watson—Balfour.*

Liferent and Fee—Minerals—Clayfield—Trust.—The proprietor of a clayfield left a settlement conveying to trustees the *universitas* of his estate, with directions to hold the residue, after payment of debts and legacies, for behoof of a certain person in liferent, and of others in fee. The trustees were prohibited from selling the heritable estate until the youngest beneficiary had reached majority. *Held*, construing the settlement, that the rents of the clayfield were intended to be included in the liferent.

This special case was presented by the trustees of the late William Guild, brick-maker, Glasgow, and certain parties liferenters and fiars under his will.

The circumstances were as follows:—William Guild died in 1866, unmarried,

leaving a trust-disposition and settlement, and two codicils, by which he disponed to trustees "all and whole the estate and effects, heritable and moveable," which should belong to him at the date of his death,—1, For payment of debts, &c.; 2, for payment of legacies; and 3, "that my said trustees may hold the whole residue and remainder of my means and estate for behoof of the parties after mentioned, and may divide the same among them in the following proportion, viz.:—First, One-tenth part thereof to the children of my brother, James Guild, who may be alive at my decease. . . . Third, One-fifth part thereof to Janet Guild, residing at Broomhill, my sister, for her liferent use allenarly, and after her decease the said fifth shall be divided into three equal shares, one of which shall go to the children of the said James Guild," &c. The fourth and fifth articles contained similar liferent provisions in favour of the truster's sisters, Marion and Beatrice, the fee being given to their children. The deed further bore,—"Declaring further, that no portion of my heritable property shall be sold or converted into cash until the youngest of the beneficiaries herein named shall attain the age of twenty-one years complete, and shall be sold only then in the event of my said trustees considering it the most prudent course for all concerned that the said property be not kept longer; with power to my said trustees, however, in the event of their considering it to be the best course, to delay [912] disposing of the said heritable property for such longer period, not exceeding five years, as they may think proper." Besides personal property, which proved insufficient to pay his debts, the truster's estate consisted of heritable property at Camlachie, within the municipality of Glasgow, embracing feu-duties, dwelling-houses, and about twelve acres of land, in which there exists near the surface a thick stratum of clay. Part of the twelve acres had been let during the truster's life as a brickfield. The gross income of the residue of the estate was about £750 per annum. Of this sum about £270 was derived from the brickfields. The remainder was made up of house rents and feu-duties. There were bonds over the property, and the net income was about £400 per annum. A question having been raised as to whether the liferentrices were entitled each to one-fifth of the whole clay rents, and if not, what was the extent of their interests in the clay rents, the opinion and judgment of the Court was requested upon the following questions:—"(1) Do the whole clay rents received for the brickfields form part of the annual income of the trust, divisible to the extent of one-fifth to each among the liferentrices? If said question is answered in the negative, (2) To what proportion of or payments from the said rents are the liferentrices entitled?"

The first parties argued;—The general rule is that liferenters are not entitled to the produce of minerals.* The rule was that liferenters must enjoy *salva rei substantia*. There must be a special indication of intention on the part of the truster to carry to the liferenter the produce of the minerals. Even assuming that the Court were to be of opinion that the liferentrices in this case were entitled to some part of the income derivable from the clayfield, they would not give them the whole. They would distinguish between what was truly the rent and what was capital.

The second parties argued;—The truster had shewn an intention to give the liferentrices the rent of the clayfield. He gave liferents of the *universitas* of his estate,† and at the date of, and for a long time preceding his death, the only rents or profits arising from these lands were from the clay. If the ground was sold for building the interest of the price would succeed the rent of the clayfield.

At advising,—

LORD JUSTICE-CLERK.—The question raised in this special case relates to the right of certain liferenters under a general settlement to participate in rents drawn from surface clay workings under a lease granted by the testator some years before his death, and terminating in 1875. It is contended for the fiars that, as the clay is *pars soli*, the right to these rents is in the fiar, and not in the liferenters, who are bound to use the subject *salva rei substantia*; and they maintain that these rents must be capitalised, and that the interest only can be drawn by the liferenters.

The general rule that the right to work coal or quarries does not pass with such a legal liferent as terce, or with localities in lieu of terce, may be held as settled in our law, although the authorities are meagre, and our earlier writers, Craig and Stair, do

* Preston, July 13, 1677, M. 8242; Swinton *v.* Duke of Roxburgh, Feb. 1, 1814, F. C.; Belshier *v.* Moffat, M. 15,863; Stair, ii. 6, 4.

† Waddel *v.* Waddel, Jan. 21, 1812, F. C.

not lay down the law quite so stringently. Stair rather seems to favour the liferenters' right when the minerals were in the course of being worked by the granter, and there was no danger of exhaustion. There is also a text in the civil law favourable to the right of a usufructuary to work mines which had been opened and worked by the father of the family. But probably the cases of Preston and the Duchess of Roxburgh may be held to decide that in such circumstances the liferenter has only a usufruct [913] and cannot appropriate the produce of mineral workings as being a diminution of the capital or substance of the land.

The case is different, however, with a liferenter by reservation, and it is also different, as was found in the case of Waddel, when a liferent is constituted not in specific lands, but in the *universitas* of the granter's estate. In that case the testator had granted to his sister a right in liferent to his whole means and estate. Prior to his death he had let a mineral field for 999 years. On a very deliberate advising, and a review of all the authorities, the Court sustained the liferenter's claim to the rent, not on any specialty, which was disclaimed by the bench, but on the intention of the testator as disclosed by the terms of such a settlement. The main ground relied on by the Judges was, that the minerals had truly ceased to be an adjunct or accessory of the land, and constituted a separate estate, bearing an annual money return, and that it could not be supposed that the testator intended to exclude his sister from this important source of income. I think Mr. Bell in his Principles rightly states the authority of this decision as applicable to cases of general settlement, although, of course, in all such cases the intention of the granter must prevail. If a liferent of a mineral field were specifically given, or if the granter of the general settlement had no estate but mineral rents, I do not suppose the question would be doubtful. But looking to the special facts in this case, I entertain no doubt that the liferenters must prevail.

The subject is one in the immediate vicinity of Glasgow, and within the municipality. The ground in question is building ground, which is rising rapidly in value, but cannot be so used pending the lease of the clay on the surface. The rent derived from the clay is more than a third of the whole free rental of the testator's property, but is less than the annual return which would arise from the building value of the ground. It is plain from the facts stated that even now the use of the ground as a clayfield is not the most valuable to which it might be put. In two years the trustees will be entitled to sell the ground, and it is expected to bring about £10,000 as building ground. This would yield a return exceeding the clay rent by more than £120. I look therefore on the clay lease as being only a temporary mode of occupying the surface, which in no respect impairs the capital or substance of this estate, but leaves it as valuable as it was before; and that there is no ground for excluding the three ladies to whom this liferent has been left from a benefit which they were certainly intended to enjoy.

The other Judges concurred.

This interlocutor was pronounced:—"Find that the whole clay rents received for the brickfields form part of the annual income of the trust, divisible to the extent of one-fifth to each among the liferentrices; and find the second parties entitled to expenses; and remit to the Auditor," &c.

J. & R. D. Ross, W.S.—J. & A. Peddie, W.S.—Agents.

[*Referred to*, Wardlaw *v.* Wardlaw's Trs., 1875, 2 R. 368. *Commented upon*, Ferguson *v.* Ferguson's Trs., 1877, 4 R. 532. *Referred to*, E. of Home *v.* Lord Belhaven, 1900, 2 F. 1218.]

No. 160. X. MACPHERSON, 913. 4 July 1872. 2d Div.—Lord Mure, I.

THOMAS JACKSON AND OTHERS (Jackson's Trustees), Pursuers.—*Watson*—*Asher.*

JOHN MARSHALL, Defender.—*Sol. Gen.-Clark*—*Balfour.*

River—Property.—Held that the proprietor of lands bounded by a private river was not entitled, without the consent of the opposite proprietor, to fill up a channel upon his property used by the river in time of ordinary floods.

River—Alveus—Property.—Observations on the rights of riparian proprietors to make operations on the *alveus* of a private river.

This action was raised by Thomas Jackson and others, trustees of the late Robert Jackson of Bardykes, against John Marshall of Caldergrove, concluding to have the defender ordained to restore the channel of the [914] river Calder, a private stream which formed the boundary between the pursuers' and defender's properties, to the state in which it was before certain operations had been executed by the defender.

It appeared that, before the operations complained of, the river at the point in question had, during the summer months, confined itself to a channel about thirty feet in width, but that in floods it had formed for itself an additional channel on the other side of an alder tree, within the defender's lands. The breadth of the river at this point was thereby increased to about fifty feet in time of flood.

The defender had, besides deepening the ordinary channel of the river, built a wall which excluded the river from the second or flood channel.

The pursuers pleaded;—(1) The defender having wrongfully and illegally encroached on the *alveus* of the said stream, and on the pursuers' property, as condescended on, they are entitled to decree as concluded for.

The defender pleaded;—(2) The action cannot be maintained, in respect that the only operations executed by the defender, with the exception of the removal of the three small pieces of rock above referred to, were not in the *alveus* of the stream, but upon the defender's own lands, for the protection of which they were necessary. (3) The pursuers are not entitled to complain of the removal of the said pieces of rock, in respect that—1, the same were on the defender's property; and, 2, were removed at the request of the pursuers. (4) The defender ought to be assoilzied, in respect that none of his operations have been or will be productive of any injury to the pursuers lands.

A proof was led, the import of which appears from the following interlocutor, pronounced by the Lord Ordinary on 10th April:—"Finds, 1st, That upon the defender entering into possession of the estate of Caldergrove in the year 1869 the water of the river Calder passed in time of flood in a considerable body across the lower part of the road leading down to the river, between the point H and J upon the plan No. 100 of process, and from thence through an opening on the Caldergrove side of the point marked I upon the plan, into a rut or channel which ran along the Caldergrove side of the alder tree marked K upon the plan, and through which the water flowed into the main stream below the alder tree, after passing over the ledge of rock shewn upon the plan: Finds, 2d, That this ledge of rock extended at that time across the river to the Bardykes side, and consisted of solid rock, with the exception of a place about four feet wide, near the point marked O in the centre of the stream, at which the water passed over one or more large blocks of stone, which were detached from the rest of the rock: Finds, 3d, That there was at this time a considerable quantity of detached rock and boulder stones lying along the main bed of the river, from the letter C to the letter R upon the plan, which had the effect of breaking the force of the stream; and that there were also large stones lying along the greater part of the Bardykes bank, which had the effect of protecting that bank from the action of the river: Finds, 4th, That on the right-hand side of the road leading down to the river there were the remains of a rough wall or dyke which had extended into the river; and that there were also on the left-hand side of that road some loose rough stones laid along the ground on which the retaining wall is now built, but that neither this old wall nor the rough stones had the

effect of preventing the river in time of flood from finding its way across the road into the rut or channel on the Caldergrove side of the alder tree, and thereafter discharging itself into the stream below: Finds, 5th, That shortly after the defender acquired the property he rebuilt the wall on the right side of the road, and raised it at the part where it entered the bed of the river higher than it had originally [915] stood; and that he also built upon the left side of that road what is marked 'retaining wall' upon the plan, and raised that wall from one to two feet higher than any of the loose stones that lay along the road; and that he thereafter, in the course of the year 1869–1870, filled up the above-mentioned rut or channel, which had previously formed a portion of the ordinary waterway of the river in time of flood: Finds, 6th, That during the same period the defender removed, in considerable quantities, the loose rock and boulder stones from the bed of the river, and used them in making the artificial banks of stone and stone pitching shewn upon the plan; and that he also removed the large block of stone from between the ledges of rock near the point O upon the plan, and quarried out a considerable quantity of solid rock on either side of the place where that block of stone had lain, and so deepened the river at that place, and caused the main body of water to discharge itself through the opening thereby made, instead of diffusing itself across the river, and passing over the ledge of rock as it had formerly done: Finds, 7th, That there was also, during the same period, a quantity of rock quarried out by the defender at or near the centre of the stream at the point marked R upon the plan; but that the pursuers have failed to prove that there was any rock quarried by the defender at the point marked M upon the plan: Finds, 8th, That the effect of the operations thus carried on by the defender has been to prevent a considerable portion of the water of the river from passing as formerly, in time of flood, through the rut or channel on the Caldergrove side of the alder tree; and to divert it from the points marked H and I upon the plan, into the ordinary summer channel of the river, and thereby direct it against the banks of the pursuers' property in a greater body and with a greater force than it was in use to run before the said operations were performed, and in a manner which is injurious, or calculated to be injurious, to the property of the pursuers: Finds, 9th, That a considerable portion of these operations,—and in particular a portion of the wall at H, where it enters the bed of the river, and of the retaining wall at I, the filling up of the rut or channel on the Caldergrove side, the excavation of the rock at or near the point O, the place marked 'artificial bank of stones,' and a portion of the stone pitching shewn between the places marked 'rock' and K upon the plan,—were operations upon the bed of the river, which, as a whole, the defender was not entitled to make without the consent of the pursuers; and that it is not proved that these operations were carried on with the knowledge and acquiescence of the pursuers; . . . and before further answer, remits to Mr. James Leslie, civil engineer in Edinburgh, to examine the localities in question, and to report (1) what portion of the retaining wall between the points marked J and I upon the plan, and of the bank marked 'artificially raised,' and of the stone pitching between the points marked K L O, it will be necessary to remove, in order to allow the water of the river, in times of flood, to pass down through the old rut or channel on the Caldergrove side of the point marked K upon the plan to the ledge of the rock below," &c.*

---

* "NOTE.—The evidence in this case is, in several respects, very contradictory; but it appears to the Lord Ordinary to be clear, even from the defender's own account of the condition in which he found the river when he acquired the property, that there was a well-defined rut or channel which ran from the road leading down to the river at H, along the Caldergrove side of the point marked K upon the plan, and extending to a considerable width at that point, by which a large portion of the water of the river passed down in time of flood, and joined the main body below the ledge of rock on the plan; and [916] that the effect of the defender's operations has been to prevent this portion of the water from passing down on the Caldergrove side, as formerly, is very clearly established. The witnesses are not at one as to the precise width or depth of this rut or channel; but they seem to be almost all agreed that, so far back as they can recollect, a considerable portion of the water of the river—according to the defender's witnesses, in all extraordinary,—and according to the pursuers' witnesses, in all ordinary floods—passed through this channel to the depth of several feet, instead of going down the main channel on the Bardykes side; and that this was no mere occasional spreading of flood-water over a piece of low-lying land, is, in the opinion of the Lord Ordinary,

[916] The defender reclaimed, and argued;—The pursuers had failed to prove that the operations were injurious, and therefore they were not entitled to object to them. *

---

pretty clear from the description given by most of the witnesses of the gravelly and stony character of the bed of the rut; and, in particular, from the fact spoken to by two of the witnesses for the defender, M'Lellan and Main, who state that the soil and gravel lying along the rut had in places been scoured away and cut down to the rock.

"The fact that there was a passage for the river at this place is also shewn by the Ordnance Survey, which all the men of skill are agreed in stating indicates the bed of the river as extending from about the point I on the plan across the bank artifically raised, and very much in the direction and to the same extent as the rut or channel as it existed before the defender commenced his operations, and thus making the river from forty-five to fifty feet wide at that place instead of about thirty feet, as shewn by the defender's plan.

"In these circumstances, the misapprehension under which the defender appears to have acted, is in supposing that a passage of this sort, which forms the ordinary waterway or channel by which a river is relieved in time or flood, is not subject to the same restrictions, in a question with the opposite proprietor, as the *alveus* in which the river runs in its ordinary state. The contrary has, however, been decided by the House of Lords, in the case of Menzies, 4th July 1828 (3 W. and S. p. 235); and having regard to the rule laid down in that case, it appears to the Lord Ordinary that the filling up of the rut or passage, and consequent diversion of the water which used to run through it in time of floods from its accustomed course, was an operation which the defender was not warranted in having recourse to, at the risk of injury to the opposite proprietors, and that he is now bound to restore that passage to its former state.

"The same observation applies to the removal of the rock at O, which was beyond question an operation in the bed of the stream; while, as regards the other operations, the proof is, in the opinion of the Lord Ordinary, sufficient to instruct that a few feet of the wall next the river, on the right side of the road, at H, and of the pitching between it and the retaining wall, as also a portion of the 'retaining wall' itself, and the artificial bank of stones and pitching, reaching down to and round below the alder tree, are operations on the bed of the river tending to contract the waterway, and to force the water over to the opposite side. But whether these operations are of a description which will require to be altogether or partially removed, when the old rut or channel is opened up, cannot, in the view the Lord Ordinary takes of the case, be disposed of until a report is obtained from a man of skill upon the subject. Nor can the passage on which the artificial bank has been raised be itself restored except at the sight of some one appointed by the Court. The Lord Ordinary has therefore made a remit to Mr. Leslie to report upon the several points which appear to him to require to be cleared up before any operative decree can be pronounced.

[917] "With reference to the injury to the pursuers' property, it may be that no serious injury has as yet been actually sustained. But it is in evidence that several parts of the banks on the Bardykes side have been to some extent affected since the defender's operations were begun; and this at the places where, in the opinion of the pursuers' engineers, they would expect the river to run with greater force in consequence of these operations. And although the men of skill examined on the part of the defender do not appear to be apprehensive of much injury, there is, in the opinion of the Lord Ordinary, sufficient in their evidence, particularly in that of Mr. Gale, to shew that it is not improbable that the blocking up of the passage on the Caldergrove side may seriously increase the risk of the river cutting into the Bardykes side, and this, having regard to the law as laid down in the case of Bicket *v.* Morris, 13th July 1866 (4 Macph. 44), seems sufficient to entitle the pursuers to the remedy they ask.

"In disposing of this case the Lord Ordinary has not considered it necessary to decide whether the original bank of the river, on the Caldergrove side, was in the

---

* Farquharson *v.* Farquharson, June 25, 1741, M. 12,779; Menzies *v.* Breadalbane, July 4, 1828, 2 W. and S. 235; Morris *v.* Bicket, May 20, 1864, *ante*, vol. ii. 1082, and H. of L. July 13, 1866, *ante*, vol. iv. 44; Lindsay *v.* Thomson, Nov. 15, 1866, *ante*, vol. v. 29.

[917] Counsel for pursuers were not called upon.

LORD JUSTICE-CLERK.—I concur in the result arrived at by the Lord Ordinary, who has disposed of the case in a very able and discriminating manner, and have little to add to the views contained in his note.

It is not necessary, in my opinion, in coming to that conclusion, to question the law which was pleaded to us on the part of the defender. Had the operations complained of been shewn to be *innocuæ utilitatis*, I do not say they would have been necessarily illegal. The *alveus* of a running stream belongs *ad medium filum* to the proprietor of the adjoining bank; but he is not entitled to put that property to a use which injures or may probably injure his opposite neighbour, and if he perform operations on the *alveus* which obstruct or alter the current, the opposite proprietor may prevent him unless he shews that no injury can thereby arise. This was clearly laid down in Morris *v.* Bicket. I am not prepared to say that all operations on the channel are in themselves illegal, nor does that judgment establish any such proposition. I can conceive operations on the channel incident to the legitimate use of the bank and river, and plainly productive of no injury, with which a Court of law would not interfere. But there is no such case before us.

On the fact my opinion proceeds mainly on the evidence of Mr. Marshall himself, which seems to me both candid and conclusive. The rest is to a large extent exaggerated on both sides. But it seems clearly established that the ordinary flood channel of this stream, a rapid and brawling brook, the banks of which at this part of its course require protection, passed behind and within the alder tree marked K on the plan,—so much so that it left, in the ordinary state of the stream, a well-marked water-course. To prevent this Mr. Marshall heightened an old wall above the alder tree, and made some excavations below it to admit of the flood stream escaping more rapidly. These operations, their [918] object, and their success, are not disputed; and being operations *in alveo*, which diverted and were meant to divert the flood stream, were collectively, as the Lord Ordinary has found, plainly illegal. The case of Menzies *v.* Breadalbane is entirely parallel; indeed the latter is the stronger, for the old channel there had become arable land, which this never was.

It will be of course open to the reporter to make any observation on the probable effect of the operations he may think likely to be of use.

LORD COWAN.—The findings in fact contained in the Lord Ordinary's interlocutor appear to me consistent with the proof. The first matter is to ascertain the state of the river and its banks before Mr. Marshall's operations began, and then to ascertain the nature, extent, and effect of those operations on the *alveus* and course of the stream, and how far they affected the flow of the water. The Lord Ordinary, after specific findings in fact, concludes with this general finding, "that a considerable portion of these operations,—and in particular a portion of the wall at H, where it enters the bed of the river, and of the retaining wall at I, the filling up of the rut or channel on the Caldergrove side, the excavation at or near the point O, the place marked 'artificial bank of stones,' and a portion of the stone pitching shewn between the places marked 'rock' and K upon the plan,—were operations upon the bed of the river, which, as a whole, the defender was not entitled to make without the consent of the pursuers." We have thus to consider if these operations were legal. They were of a twofold character; some were on the bank of the river on his own side, and some on the *alveus* of the stream. The alder

---

precise line shewn upon the pursuers' plan. But he has dealt with the case upon the broad fact, deponed to by most of the witnesses, that, so far back as they remember, the accustomed course of a considerable portion of the water in the river in time of flood was upon the Caldergrove side of the alder tree, after the water had crossed the road, a few feet above the point marked I upon the plan. As regards the original bank, he thinks it not improbable that Mr. Cunningham may be correct in his opinion that the line claimed by the pursuers, at least between B and J upon the plan, has not been the river boundary for many years; but he thinks it pretty clear, on the other hand, upon the evidence, that the river, as contracted by the defender's operations, is not now in all respects in its original bed. And as the width of river shewn upon the Ordnance Survey map corresponds pretty nearly with the line in which the water is proved to have passed for many years in time of flood, the Lord Ordinary has come to the conclusion that the safest way to deal with this part of the case upon the evidence may be to take that line to be the boundary of the river on the Caldergrove side."

tree was in such a position that the stream flowed round it in time of flood, so that any operations between it and the bank were *in alveo*. A distinction was attempted to be taken between ordinary and extraordinary floods, which is not supported by the proof. The gravelly rut or course on the land side of the tree was that part of its bed by which the river discharged its overflow of water when flooded by rainfalls. The other operations were on the bank of the stream, and were of such a character that the defender was entitled to make in order to protect his own bank, provided he did not thereby so divert the course of the river and affect the channel as to cause it to do damage to the opposite bank. There is a remarkable resemblance between the operations here complained of and those which were for judicial consideration in the case of Menzies *v.* Breadalbane. With regard to the operations made, as was alleged, in order to defend the Earl's own property, but which were *in alveo*, the Court declared the interdict perpetual "in so far as it prohibits and interdicts the Earl of Breadalbane from continuing to erect the jetty or any other building upon the *alveus* of the river Tay." That part of the judgment was not taken to the House of Lords, and stands as settled law in every similar case. But on the other question, of the Earl of Breadalbane being entitled to erect a jetty or other building upon the banks of the river and on his own ground, the Court recalled the interdict. This part of the judgment was appealed, and was recalled, and it was specially declared by the judgment of the House of Lords "that the respondent ought to be prohibited and interdicted from the further erection of any bulwark or any other *opus manufactum* upon the banks of the river Tay which may have the effect of diverting the stream of the river in times of flood from its accustomed course, and throwing the same upon the grounds of the appellant." This authoritative declaration of legal principle in this branch of the law of real property is directly applicable to the facts held to be proved by the interlocutor under review. And concurring, therefore, as I do, in the views of the law and of your Lordships, that the defender's operations in the *alveus* and on the banks of the Calder are calculated to throw the water in a different channel, and so to injure the banks on the other side, the result is that the judgment of the Lord Ordinary is right.

LORD BENHOLME.—In this case I agree with the opinions which have been delivered. I apprehend that the whole operations in the *alveus* are illegal, and that it is irrelevant to allege that they were not injurious to the other side. It was laid down by the House of Lords in the case of Bicket *v.* Morris, that no [919] human sagacity can say what injury will arise from operations in the *alveus* of a stream. Therefore I am not prepared to go so far as your Lordships have gone.

A proprietor may fortify his own bank, but he must not do it to such an extent as will cause injury to the other side. The difference is, that when the operation is *in alveo* it is not necessary to allege injury. Mr. Marshall has not only interfered with the *alveus*, but he has also raised an embankment which has had the effect of throwing the water on the opposite bank. Upon the whole I think the Lord Ordinary has pronounced a very able and just judgment.

LORD NEAVES concurred.

THE COURT adhered.

MORTON, NEILSON, & SMART, W.S.—WEBSTER & WILL, S.S.C.—Agents.

[*Distinguished*, D. of Sutherland *v.* Ross, 1878, 5 R. (H. L.) 137. *Commented upon*, Robertson *v.* Foote & Co., 1879, 6 R. 1290. *Questioned*, Murdoch *v.* Wallace, 1881, 8 R. 855.]

No. 161. X. MACPHERSON, 919. 5 July 1872. 1st Div.—Lord Jerviswoode, B.

ALEXANDER STEVENSON, Pursuer.—*Watson—Innes.*
JOHN ADAIR, Defender.—*Adam—Mackay.*

Minor—Cautioner.—Held that the cautioner in an indenture of apprenticeship entered into by a minor without consent of his father is bound in the event of the minor deserting his master's service.

Opinions that the contract *quoad* the minor is not void, but only voidable on proof of lesion.

This was an action against the cautioner in a contract of apprenticeship to recover £50, the damage alleged to have been sustained by the employer of the apprentice in consequence of the latter having deserted his service. By the agreement, the cautioner bound himself to indemnify the master for all loss he might sustain by the omissions or default of the apprentice during the subsistence of the contract, or by his failure to implement it, and there was also a clause whereby both parties bound themselves to implement the premises to each other under a penalty of £50.

At the date of the agreement the apprentice was in minority, but his father, who was alive, was not a party to the contract, and did not give any consent thereto.

In these circumstances the defender pleaded;—(1) The alleged agreement having been entered into by a minor, without the consent of his father as his administrator-in-law, is null and void. (2) The said agreement being null and void as regards the principal, cannot be enforced as regards the defender, who is bound merely as his cautioner.

The Lord Ordinary, on 11th December 1871, pronounced this interlocutor;—"Finds that the agreement, as set forth and founded on on the part of the pursuer, is not in point of law null and void, in the sense and to the effect maintained and pleaded on behalf of the defender, and with reference to this finding appoints the cause to be enrolled with a view to further procedure."*

[920] Thereafter a proof was taken, the import of which is stated in the following interlocutor of the Lord Ordinary, dated 13th February 1872:—"Finds, as matter of fact—1st, That the agreement founded on by the pursuer was revised by Mr. James Mason, S.S.C., acting as on behalf of the minor, John Bain Mackenzie, under instructions received from Mrs. M'Alister, grandmother of the said John Bain Mackenzie; 2d, That Thomas Mackenzie, the father of the said John Bain Mackenzie, took no charge of him, or in any respect discharged his duties as a parent towards him; 3d, That the said John Bain Mackenzie entered into the employment of the pursuer as an apprentice under the said agreement, and continued in the same until the month of March 1871, in the course of which he abandoned the said employment, and has not since returned thereto; and 4th, That in consequence of the said abandonment of his employment by the said John Bain Mackenzie the pursuer has suffered loss and damage to the extent of £20: Therefore, in respect of the obligations undertaken by the defender in the said agreement, as cautioner for the said John Bain Mackenzie, decerns

* "NOTE.—The question which has here arisen, and which gave occasion to a full and very satisfactory debate before the Lord Ordinary, does not appear to the Lord Ordinary to be so precisely and fully settled under the authorities as might have been thought probable.

"It is maintained strongly, on the part of the defender, that an obligation by a minor having a curator, such as that here in question, is absolutely null, and so is incapable of homologation. The Lord Ordinary cannot think so. It appears to him that if the act of a minor who has no curators be good until set aside on the ground of actual lesion, it must follow that the mere want of consent on the part of the curator, where such does exist, cannot operate an absolute nullity, though it may have the effect of subjecting the act to challenge. **[920]** This is not, however, the matter here in question, as raised on the part of the defender, whose pleas are rested on the pure ground of nullity."

against the defender for payment to the pursuer of the said sum of £20 sterling accordingly: Finds the defender liable," &c.*

The defender reclaimed, and argued;—The agreement is null,† and at any rate no damage has been proved.

The pursuer argued that a contract of apprenticeship forms an exception to the rule that deeds granted by minors without consent of their guardians are voidable. But, even although the contract is incapable of being enforced against the minor, the cautioner may nevertheless remain bound, having incurred a more stringent obligation than his principal.‡

LORD PRESIDENT.—This is an action of damages for breach of indenture by an apprentice, brought, not against the apprentice, but his cautioner, the apprentice not being called as a defender at all. There is no dispute about the mere fact that a breach of contract was committed. The Lord Ordinary has found against the defender. On the reclaiming note we have had an elaborate argument on the question whether a *minor pubes*, whose father is alive, and who enters into an indenture of apprenticeship without consent of his father, is bound by the indenture, and whether that indenture can be enforced against him. The defender maintains the absolute nullity of the contract as against the apprentice, in order to let in his second plea. I do not think that it can be affirmed that the contract is absolutely null and void. It may be that the contract cannot be enforced against the apprentice, and this on account of the peculiar position of the minor, who does not contract effectually without consent of his curators. But supposing the contract objectionable in this more limited sense, is that sufficient to liberate the cautioner? Even supposing that the apprentice would not be bound by the indenture, I think that the cautioner would be bound. The doctrine is nowhere better stated than by Erskine, iii. 3, 64—"A cautioner can [921] in no case be bound in a higher sum to the creditor than the proper debtor is, for there cannot be more in an accessory obligation than in the principal. Yet he may be more strictly obliged than the proper debtor, as when the cautioner gives the creditor a pledge or a real right in his lands, or where one is cautioner for a debtor who is not himself civilly or fully obliged, for a cautionary obligation may be effectually interposed to an obligation merely natural. Thus a cautioner in an obligation where the debtor's subscription is not legally attested, or a cautioner for a married woman, or for a minor acting without his curators, is properly obliged, though the debtor himself should get free by pleading the statutory nullity, or his own legal incapacity." He adds, "The reason of this is obvious —*sibi imputet* who interposed in such a case. As the cautioner is presumed to know the debtor's condition, the plain language of his engagement is, that if the debtor take the benefit of the law, he, the cautioner, shall make good the debt." Applying that rule to the present case, the cautioner was bound to know, and I think did know, that the apprentice's father was alive. He chose to come under an obligation which, in its terms, bound him whether the apprentice was bound or not. I think the Lord Ordinary is right in his interlocutor, and that the first and second pleas for the defender are bad in law.

But I feel a little difficulty as to the subsequent interlocutor of 13th February 1872. The Lord Ordinary has there found the pursuer entitled to the sum of £20 as damages. I look in vain for any evidence that the pursuer has suffered loss to that or any extent. No doubt, as there was a breach of contract, there must be some damages due; but to justify an award of £20, loss must be proved. It would be a pity to incur further expense by allowing the pursuer to prove the loss actually sustained. It would be much better for the parties to agree in fixing some sum in place of £20.

LORD DEAS concurred.

---

* "NOTE.—It has appeared to the Lord Ordinary, on resuming consideration of this case, with the proof which has been led, and having regard to the terms of his previous interlocutor of the 11th December last, and to the character of the proof, that the only duty which remains to him now to discharge is to assess the sum of damages due to the pursuer.

"The Lord Ordinary has little confidence in his ability to do exact justice in such a matter; but he is partly relieved in the discharge of his duty by the fair statement made on behalf of the pursuer, that he did not wish to insist for high damages."

† Ersk. i. 7, 33; Fraser on Parent and Child, 2d ed. p. 385 *et seq.*

‡ Ersk. iii. 3, 64.

LORD ARDMILLAN.—The circumstances out of which this action has originated are so few and simple that scarcely any explanation is required. In October 1870 an agreement of contract of indenture was entered into between the pursuer, Mr. Stevenson, and John Bain Mackenzie, in terms of which John Bain Mackenzie bound himself apprentice to the pursuer for three years, and the pursuer undertook to instruct him in the business. The defender Adair became a party to that agreement of indenture as cautioner for John Bain Mackenzie, and bound and obliged himself to indemnify the pursuer, Stevenson, for all loss, damage, and expense which he might happen to sustain through the omissions or default of John Bain Mackenzie during his apprenticeship, or by his failure to implement the agreement, to the extent of £50 sterling. By another clause both parties bound themselves to implement the premises to each other under the penalty of £20.

At the rate of the indenture John Bain Mackenzie was between seventeen and eighteen years of age, and his father was, and is, alive. Therefore John Bain Mackenzie was a minor having a curator-at-law.

The deed of agreement was revised by an agent, Mr. Mason, on behalf of John Bain Mackenzie. That agent was aware of the fact that the father of John Bain Mackenzie was alive. He immediately, and before execution of the agreement, communicated with Mr. Adair, the intended cautioner; and I think it plainly appears from the evidence that Adair also knew that John Bain Mackenzie was a minor, and that his father was alive.

It appears that in March 1871 John Bain Mackenzie deserted and abandoned his apprenticeship, and departed from the obligations therein contained. The present action has been brought to recover damages from the defender Adair, as cautioner under the agreement.

Two questions—both of them interesting and important—have been raised. The first is, whether the indenture is *ipso jure* null and void without proof of lesion, in respect that it is a deed executed by a minor having a curator, without his consent? The second is, whether, assuming that the indenture is void for the reason stated, the cautioner is thereby released from obligation; or, [922] whether the cautioner is not still responsible for the default of the principal obligant?

If it were necessary here to dispose of the first question, I must say that I should have difficulty in holding that an indenture of service is not only voidable on proof of lesion, but *ipso facto* and absolutely void and null, in respect that it was entered into by a young man, between seventeen and eighteen years of age, without his father's consent. I am aware that there are authorities to that effect, applying generally to deeds and obligations undertaken by a minor. But the contract of indenture or agreement for apprenticeship, or service, for three years, as in this case, is naturally appropriate to the age and position of a minor, and may perhaps be presumed to be for his benefit; and, unless I am much mistaken, such agreements by young men of that age are very generally signed without the father's interposition. He may be absent, or aged, or careless, and, so far as I am aware, the want of his signature, if there be no lesion or injury to the minor, has not, in the practice of Scotland, been held to be necessarily and absolutely fatal to the agreement. There must be hundreds of instances in which engagements to serve for two, three, or four years rest entirely on the obligation of the minor and his cautioner.

I do not mean at present to express any decided opinion upon this point. I reserve my opinion till such a case arise, merely saying that it merits serious consideration.

In dealing with the second question, I must, however, assume, as I now do, that the obligation in the indenture is null and void, in so far as regards the minor, John Bain Mackenzie.

But the cautioner has by his own act voluntarily become liable to the employer, and for the employer's security, that the party engaging to serve him shall duly and faithfully do so. Within the scope and meaning of the cautionary obligation there is included and implied an obligation to protect the employer against the attempt by the apprentice to escape from the duties and responsibilities undertaken. This proposition, in point of law, is distinctly stated by Mr. Erskine (Ersk. iii. 3, 64) in the passage which your Lordship has mentioned and read. I may add that Mr. Erskine says, "As the cautioner is presumed to know the debtor's condition, the plain language of his engagement is, that if the debtor take the benefit of the law, he, the cautioner, shall

circumstances, combined with the parole testimony of the wife, sufficiently established a *mortis causa* donation in her favour.

Opinion, by the Lord President, that donation was not proved—(1) because the only evidence in support of it was the testimony of the donee; and (2) because the words said by the donee to have been used by her deceased husband did not necessarily import a present intention to make a donation *mortis causa*.

This was an action of count, reckoning, and payment, against the widow and executrix-dative *qua* relict of the deceased William Hutchison. After the case came into Court the summons was amended by the insertion of a declaratory conclusion that "all sums of money deposited or consigned in bank in name of the said William Hutchison and the defender, or either of them, prior to the death of the said William Hutchison, belong to, and form part of, his executry estate."

The pursuers averred that the following sums of money were *in bonis* of Mr. Hutchison at his death in August 1870, viz. (1) a sum of £185 which had been deposited in bank in his name, but uplifted by him a few months before his death; and (2) a sum of £235 which had belonged to the defender prior to her marriage, and had been allowed to remain deposited in bank in her maiden name until the date of her husband's death.

[924] The pursuer, Mrs. Gibson, who was Mr. Hutchison's daughter-in-law, claimed the fee of both of these sums, as executrix-nominate and residuary legatee under a settlement executed by Mr. Hutchison in 1866, whereby he bequeathed to her his whole estate, subject to a liferent in favour of his wife, the defender.

The defence was that both the sums of money in question had been effectually transferred to the defender by Mr. Hutchison during his life.

The Lord Ordinary allowed a proof, in the course of which it appeared that after Mr. Hutchison had executed the settlement of 1866 above mentioned, disputes had arisen between him and the pursuer, and in 1868 he resolved to execute a new settlement in favour of his wife, giving her, in the event of her surviving him, his whole property of every description. On his instructions a deed to that effect was prepared, and he attempted to execute it, but did not do so effectually, his hand having been led by one of the instrumentary witnesses. On being made aware that the deed was thus rendered inoperative, Mr. Hutchison, to avoid the expense which would be incurred in having the error in the execution amended, acting upon the advice of a law-agent, uplifted the sum of £185 deposited in bank in his own name, and gave it to his wife about five months before his death. The other sum of £235 was never uplifted by Mr. Hutchison, but was allowed to stand deposited in his wife's name until his death.

Several witnesses deponed that Mr. Hutchison and his wife used to quarrel about the money deposited in her name, from which he said that he got no benefit.

Laurie, the law-agent who had recommended him to uplift the sum in the deposit-receipt, deponed—"He spoke about the money that was in bank in his wife's name, and said it was all safe, because it was in her maiden name. By that I understood him to mean that nobody could touch it except herself."

The defender deponed—"No. 20 is the paper which Nicol shewed me. My husband told me he had signed it. . . . My husband told me afterwards that Mr. Laurie doubted the will, and he was very much vexed about it. He expected Mr. Laurie down, but he never came. When Mr. Laurie did not come, my husband went up to Edinburgh, and uplifted the money in the bank. I think that was some time in March. He brought the money with him to Newbigging. He took it out of his pocket, and put it into my hand, and said 'Tak' that as a gift, for thae devils M'Dougalls will be down upon you whatever may befall me.' He was then in very bad health; his back was bad. After that I thought myself all secure in the money. I thought it was my own, as my husband had told me it was. I put it into a drawer and locked it, and took money from it as I wanted it for the expenses of the house, and for doctors, and for funeral expenses. I could not get up to the town to lift any of my own money, and I had to take that. My husband died on a Saturday morning. On the previous afternoon he said to me, 'Nobody shall touch that money that you earned hard, for it is your own money.' He did not say anything more about my own money. These were the last words he said. He was looking for death at the time he said that. There was no one present at the time but himself and me. There was no one present when he

gave me the £185, but he said he would not have taken the trouble of going in for it if he had not been wanting to give it to me."

The pursuer deponed—"Deceased told me the defender had money in bank in her own name—her own money—and he never got any of her money at any time. She always kept her own, and said he had nothing to do with it. I have often heard them quarrelling about that money. He complained that she gave no money for the expenses of the house. I [925] have heard him swearing at her because she would not give any of it to him. He said it was very hard that she should have means and he was none the better of it. I remember being present when he gave instructions to Mr. Hunter to prepare a settlement. He did not say anything about Mrs. Hutchison's money at that time; it was only about his own. He said he did not want any of hers. He said he could take it from her if he liked, but he said it would turn her wrong in her mind if it was taken from her, and it would cost him more to keep her than all he would get, and therefore it was better to let her alone."

The Lord Ordinary pronounced this interlocutor:—"Finds it sufficiently instructed in point of fact that the late William Hutchison, the husband of the defender, sometime before his death, did make over in gift and donation to the defender, his then wife, a sum of £185 or thereby, which he uplifted from the bank in or about March 1870; and finds that the donation or gift of this sum by the said William Hutchison to the defender stood unrecalled and unrevoked at the death of the said William Hutchison, which took place in or about August 1870: Finds it farther sufficiently instructed in point of fact that the said deceased William Hutchison renounced in favour of the defender, his wife, and gifted and made over to her all right competent to him in a sum of £235 or thereby, deposited in the Bank of Scotland, Edinburgh, on deposit-receipt dated 9th May 1870, in name of Miss Jane Graham, 13 India Place, that being the maiden name of the defender, his wife; and finds that the gift or donation of this sum by the said William Hutchison, or of all right competent to him therein, stood unrecalled and unrevoked at the death of the said William Hutchison: Therefore, and in regard to both the sums above-mentioned, assoilzies the defender from the declaratory conclusion of the action, and decerns: *Quoad ultra* appoints the cause to be enrolled, that any farther procedure may take place under the petitory conclusions of the action, if such procedure is competent or necessary: Finds the defender entitled to the expenses," &c. *

---

* "NOTE.—The closed record as amended sufficiently raises, under the new or declaratory conclusion, the true questions between the parties. These questions are (1) whether a sum of £185, which stood deposited in bank in name of the late William Hutchison, and which was uplifted by him in March 1870, formed part of his estate at the date of his death, or whether it had been effectually gifted by him to his wife; and (2) whether a sum of £235, which stood deposited in the maiden name of the wife, was or was not the property of the husband at the time of his death, or whether that sum also had not been effectually renounced and made over to the wife.

"In point of fact the wife had the absolute possession and control of both sums at the date of her husband's death, and in the Lord Ordinary's view it is a pure question of fact whether the monies at the date of the death—that is, at the date of the dissolution of the marriage—did or did not belong to the husband, or whether they or either of them had or had not been gifted or made over to the wife.

"Probably the presumption of law may be taken to be that both sums were the property of the husband. There was no contract of marriage between the spouses, either antenuptial or postnuptial. There is no averment of any deed either renouncing or excluding the husband's *jus mariti*, and if there be no evidence to the contrary the Lord Ordinary would feel himself bound to hold that both sums fell under the *jus mariti*, and were in law the property of the husband at the time of his death.

"It would be no answer to this to shew, as has been done in the present case, that one of the two sums formed the proper and separate earnings of the wife, and that the same had been accumulated by her, at least to a considerable extent, before marriage. The wife's moveable property, whether acquired by [926] her before marriage or during its subsistence, falls under the husband's *jus mariti*, and must be dealt with as his estate where there is no effectual provision to the contrary. All this is quite clear, and was conceded in argument on both sides of the bar.

[926] The pursuers reclaimed, and argued;—The evidence of donation in both cases depended only upon the statement of the defender, who was [927] also the donee.

"But then it is equally clear that a husband may effectually make donations or gifts to his wife, and although all such gifts are in their nature revokable, still if the husband dies without revocation the gift will receive effect. It was urged that there is a legal presumption against such donations, and that at all events they cannot be proved to any extent by the testimony of the wife herself. This proposition, however, seems to be broad, for although it is true in one sense that there is a presumption against donation when there is room for any other contract, and the maxim probably applies *donatio nunquam presumitur*, still there is no special presumption against a husband making a donation to his wife, but rather in many cases a likelihood that he will do so, and in all cases the question is one of evidence, and the whole evidence and the whole circumstances must be taken into account.

"Nor is there any difficulty in the present case about the competency of parole evidence. What is to be proved is not an obligation to give, or an agreement to give, but a completed donation, the full possession of the thing said to be gifted being undoubtedly with the alleged donee. The Lord Ordinary sees no ground for holding that in such a case the proof of donation must be limited to writ or oath. On the contrary, in all such cases he holds that donation may be proved *pro ut de jure*.

"So standing the question, the Lord Ordinary thinks that in the present case donation unrevoked has been sufficiently made out by the defender. Undoubtedly the proof is somewhat narrow, and it may be said the defender has barely made out her case. Still the Lord Ordinary thinks there is enough, and he is satisfied that the defender's claim is in accordance with the intentions of her late husband and the equities of the case.

"The two sums stand in some respects in different positions, but in great part the evidence is applicable to both. A very few words will explain the view which the Lord Ordinary takes of the evidence.

"The pursuer claims as executor-nominate and residuary legatee or beneficiary under a *mortis causa* settlement made by the late William Hutchison on 28th July 1866, whereby he made his wife, the defender, the liferentrix of his whole estate, and gave the fee thereof to the pursuer. The pursuer was then the widow of William Hutchison's son, and the deed bears to be made for the love and favour which the testator had to his wife and daughter-in-law.

"Some evidence has been led about this deed, and it may be taken as proved in point of fact, in accordance with the presumption of law, that at its date the testator intended it to regulate the disposal, not only of the money which stood in bank in his own name, but also of that which stood in name of his wife. This seems to have been explained to him by the agent, and there is no reason to doubt that he fully understood it. The whole funds were to be liferented by his widow, and then to go to his daughter-in-law. He had no children or descendants.

"After this deed was made, however, Mrs. Hutchison, the daughter-in-law, entered into a second marriage with her present husband, and became Mrs. Gibson. It is in evidence that this marriage was not approved of by the late William Hutchison, and very serious disputes took place between him and the pursuers, Mr. and Mrs. Gibson. Indeed a Court of Session litigation was begun between them, and although that action was abandoned it seems clear that Mrs. Gibson's relations with her father-in-law were not what they had been before her second marriage.

"In particular, it is proved that in the year 1868 the late Mr. Hutchison resolved to make a new settlement in favour of his wife, giving her, in the event of her survivance, his whole property of every description. On the instructions [927] of Mr. Hutchison this deed was prepared by Mr. Thomas Laurie. The draft of the deed is No. 24 of process, and after the draft was approved of the deed was extended by Mr. Laurie, and sent in 1869 to Mr. Hutchison to be executed. The extended deed is No. 20 of process. This deed was attempted to be executed in the beginning of 1870, not only by the late Mr. Hutchison, but also by the defender, his wife, but unfortunately their hands were led by one of the instrumentary witnesses, Mr. Nichol, and thus the deed was not effectually signed. Owing to this error or defect in its execution the deed is inoperative as a will, but it becomes a very pregnant piece of evidence in considering the proof of the donation which followed. It is quite plain, upon the proof, that the late William

Such evidence was insufficient to prove donation. The sum of £185 might have been uplifted to defray household expenses, or [928] for some such purpose, so the mere drawing of the money out of the bank could not be held to infer an intention to give it to his wife. The second sum of £235 was clearly the husband's in virtue of his *jus mariti*, and there was here at all events no delivery. The sum remained in bank, and was certainly not bodily transferred to the wife.

Argued for the defender;—The settlement, which was ineffectually executed, and so improbative, was yet of value to shew what clearly was Hutchison's intention at the time, and he adopted the method of donation to avoid the expense of notarial execution. As regarded the sum of £235, in a question between the wife and the bank, that sum was at her disposal, and indeed she had used it as her own. That being so, the husband *intuitu mortis* gave her the property of that of which she always had had the use, and that was sufficient without actual delivery to constitute donation. When a subject was in a donee's possession, transference can take place by mere expression of intention on the part of the donor.*

Hutchison, when he attempted to make his second will, intended his wife, if survivor, to get his whole estate, whether it stood in his name or in her own. Mr. Laurie's evidence, and the other evidence regarding the abortive settlement of 1870, is quite conclusive on this point, which, indeed, admits of no dispute.

"The next point of importance is, that when the deceased brought back the settlement of 1870, and explained how the signatures had been affixed, he was told that the deed was bad and ineffectual, and that he would require to get a notary to sign for him. He demurred to the expense, when he was informed that if he chose he might take his money out of the bank, and give it to his wife in a present, and that this would be effectual. Acting on this advice he did lift the money, he did give it to his wife, and he reported to Mr. Laurie that he had done so. This evidence is confirmed by the evidence of the defender, and if believed, seems not far from conclusive on the subject. The Lord Ordinary entirely credits the evidence of the defender herself, of Mr. Laurie, and of Mr. Begg, as well as the evidence of Mr. Nichol, whose want of skill or experience led to the mal-execution of the settlement of 1870. He thinks it proved that the late Mr. Hutchison, finding that his attempted settlement was inoperative, and being advised that he might make a donation of the money to his wife, took that advice, and did make the donation accordingly. The donation never having been revoked, remains effectual to the present defender.

"The sum deposited in the defender's own name raises a point of some subtlety, but really stands in the same position as the money uplifted and handed over by the husband. As the sum was already in the wife's name, there could of course be no actual transference or handing over, but there was everything of which the circumstances admitted. In addition to the evidence of the defender, the evidence from the abortive settlement, the evidence of Mr. Laurie, Mr. Begg, and Mr. Nichol, there is really the evidence of the pursuer herself, who proves that Mr. Hutchison, while aware that he could take his wife's money if he wished, stated that he did not want to do so, as he did not want any of his wife's money. Independent of the pursuer's evidence, however, the Lord Ordinary thinks there is enough to instruct donation to the defender of the money which lay in her own name. The very fact that the husband allowed it to continue in his wife's name for nearly twenty years, allowed the wife to uplift and re-deposit it at pleasure, and never interfered therewith in any way, goes a long way to prove or to imply donation; and when to this is added the circumstances which followed on the abortive settlement of 1870, the Lord Ordinary thinks that neither in law nor in justice is there any room for any distinction between the money which originally stood in the husband's name and that which stood in the name of the wife. The husband intended the wife to get the whole, and although the case may not be free from doubt, it is thought he has sufficiently effectuated this intention.

"Practically, the declaratory conclusion of the action exhausts the whole dispute, and accordingly the Lord Ordinary has disposed of the question of expenses. In point of form, however, the conclusion of count and reckoning remains, and if the parties wish it, the case may be put to the roll to exhaust that conclusion."

* Wood *v.* Menzies and Others, May 26, 1871, *ante*, vol. ix. p. 775; Robertson *v.* Taylor, June 12, 1868, *ante*, vol. vi. p. 917; Morris *v.* Riddick, July 16, 1867, *ante*, vol. v. p. 1036.

At advising,—

LORD ARDMILLAN.—We have, in this case, two questions of alleged donation by the late Mr. William Hutchison to his wife, the one of a sum of £185, and the other of a sum of £235.

There are some important facts common to both questions, but it has been strongly and rightly urged that the evidence of donation in regard to each sum must be considered separately, though of course each question must be viewed with reference to the whole facts.

Mr. Hutchison had been previously married. The pursuer, Mrs. Helen M'Dougall or Gibson, was the widow of his only son, Ralph Abercromby Hutchison, who died in April 1864. She is now the wife of Mr. John Gibson. Mr. William Hutchison died, leaving no child, on 20th August 1870.

It appears that, before the date of the pursuer's second marriage to Mr. Gibson, and while she was the widow of Ralph Hutchison, old Mr. Hutchison had executed a disposition and settlement *mortis causa*, by which he conveyed his whole estate to his wife, the defender, in liferent, and to his daughter-in-law, the pursuer, in fee. He then meant to dispose of his whole funds and estate. Some money was then under deposit in bank in his wife's name. It was explained to him that that money was his own property, and accordingly he disposed of it as his, along with his own other funds. After the pursuer's second marriage, Mr. and Mrs. Hutchison adjusted and attempted to execute a mutual disposition and settlement in March 1870, by which each conveyed their whole estate to the other in case of survivance, the longest liver to take all. In consequence of informality and defective subscription, occasioned by both Mr. and Mrs. Hutchison's blindness, this mutual deed was not effectually executed. But it is a fact in this case not to be overlooked in considering the indications of intention, that Mr. Hutchison did not wish the previous settlement to take effect, and did desire that his wife, if she survived him, should take his whole estate. He had not been pleased at the second marriage of the pursuer, the widow of his only son. He knew that part of the money in bank was in his own name, and that part was in his wife's name, and he knew, for his agent had told him, that what was deposited in his wife's name was really his own property, and within his own control.

It is alleged that some short time before his death he made a donation to his wife of the sum of £185, which he uplifted from the Bank of Scotland, where it lay on deposit-receipt in his own name; and that, soon thereafter and very shortly before he died, he made a further donation to her of a sum of £235, which had been in the same bank accumulating for nineteen years, on a succession of deposit-receipts in her own name, "Jane Graham," which was known [929] and permitted by her husband, and of which the property was explained to him as being his own, though in her name.

In regard to the first of these sums, the £185, I am of opinion that that sum has been, by satisfactory evidence, proved to have been the subject of a *donatio mortis causa* by Mr. Hutchison to his wife. If a gift at all, it is a gift *mortis causa*, and I have no doubt of the competency of parole evidence to prove a *donatio mortis causa*. That is now settled by repeated decisions.

It is only necessary to refer to the cases of Bryce *v.* Young's Executors, 20th January 1866, and Morris *v.* Riddick, 16th July 1867, and Robertson *v.* Taylor, 12th June 1868, where the point was carefully considered. Such evidence, being competent, is in my opinion sufficient in this instance to sustain the averment of donation. The change of circumstances on the marriage of Mrs. Ralph Hutchison to Mr. Gibson, and the ineffectual attempt by Hutchison and his wife to make a mutual settlement, the survivor to take all, renders such a *mortis causa* gift natural and probable; and the testimony of Mr. Laurie, Mr. Begg, and Mr. Nichol, confirming the clear and direct testimony of Mrs. Hutchison herself, leaves in my mind no room for reasonable doubt on the matter, in regard to which I concur with the Lord Ordinary.

The second question, viz., the alleged donation of the sum of £235, which was deposited in the wife's own name, is attended with more difficulty. There is no doubt that this sum was the property of Mr. Hutchison. A sum accumulated and laid aside by a wife, and deposited in bank in her own name on deposit-receipt, is not hers. It belongs to her husband. Unless and until it is made the subject of gift by her husband it remains his property. I think that Mr. Hutchison was told this in 1866, and understood it, and framed his settlement accordingly, disposing *mortis causa* of his

whole means and estate. I think that the pursuer herself, and her husband Mr. Gibson, and her brother James M'Dougall, and her sister Mrs. Aitchison, all concur in stating that Mr. Hutchison knew the money to be his, and at his disposal. Now, knowing this and having attempted in vain to make a settlement in favour of his wife, and having considered and consulted about another mode of doing what he had intended to do by settlement, the course which he takes is this—First he uplifts from the bank the money deposited in his own name, and he makes a donation *mortis causa* of that sum to his wife. Then, finding his end approaching, and, as the witness, says "looking for death" —knowing how the other sum stood on deposit, knowing that it was his own, though deposited in his wife's name, having no children or near relative, and retaining the desire that his surviving wife should take all he had, he said to her that "she had earned it"—that "it was all her own"—"nobody shall touch that money that you earned hard, for it is your own money." Now, it is true that the use of these words rests on the testimony of the surviving wife, who claims the gift. That testimony is not, however, shaken by cross-examination, nor contradicted by other evidence, nor is the fact which she states unnatural or improbable, or inconsistent with the other facts and circumstances of the case. In regard to the first sum, the £185, the testimony of Mrs. Hutchison is corroborated so far as corroboration was possible, and that corroboration tends to sustain her credibility as to the second sum, while the attempt by the husband, though accidentally unsuccessful, to leave all he had to his surviving wife, renders natural, probable, and reasonable the act of making a dying gift, to which she swears. That he knew the money was in her own name, uplifted and re-deposited by her repeatedly during many years—that he permitted and sanctioned it, and though informed that the money was legally his own never desired to disturb it—and that he attempted by settlement to leave all his funds to his wife—all this does not prove the money to have been hers while he lived. It was not so; but it tends strongly to corroborate the statement that, in the near prospect of death, he made to his wife a donation *mortis causa* of this sum to be enjoyed by her after he was taken away. The position of this money on deposit in her own name rendered the uplifting of the money unnecessary; and her personal possession of the receipt—a fact known to her husband—rendered its transference or handing over needless and unsuitable. If the testimony of Mrs. Hutchison is credible, as I think [930] it is, then there is, in my opinion, such corroborative evidence as to make it sufficient. This second question, regarding the sum of £235 standing on deposit in the wife's name, is one of great delicacy. It is not without difficulty and hesitation that I have arrived at the same conclusion as the Lord Ordinary. But the whole facts, circumstances, and evidence must be taken together, and, so reading them, I have formed the opinion, that after failing in the attempt to make a mutual settlement, Mr. Hutchison, adopting the advice of his friend, when he found death approaching, substituted a gift *mortis causa* for a settlement, and made the donation of both sums which the defender has alleged.

LORD DEAS.—The defender in this case is the widow of the late William Hutchison, to whom she was married in 1853. There were no children of the marriage. But Mr. Hutchison had had a son by a former marriage, who, after having been married to the pursuer, predeceased his father without issue in 1864. In 1866 Mr. Hutchison, having no issue alive, executed a deed of settlement, conveying all he possessed to his wife in liferent, if she survived him, and to his daughter-in-law, the pursuer, in fee. In spring 1870 Mr. Hutchison, being displeased with the pursuer's marriage to Mr. Gibson, got a new settlement prepared in the form of a mutual deed between himself and his wife (the defender), by which everything was to go to the survivor; but he was afterwards advised that this deed was invalid, as the hand of each of them had required to be led in adhibiting their subscriptions. As he objected to the expense of having a deed signed by notaries, he was at same time told that he might uplift his money from the bank and make a gift of it to his wife. Accordingly it is said that he at once took that course as to one of the two sums in dispute, £185; and as to that sum I see no room to doubt that he did so,—the defender's statement in regard to it being satisfactorily corroborated by several witnesses, confirmed by the real evidence afforded by her husband's inoperative settlement, which plainly shews what his intention had been, and to that effect may be looked at along with the parole testimony.

As regards the only other sum in dispute, the £235, there is more difficulty. That sum stood upon a deposit-receipt in the defender's own name at the date of her husband's death on 20th August 1870. The money was the produce of her own

industry prior to her marriage, and formed part of a somewhat larger sum which had stood at that time deposited in the same form. She had, from time to time, uplifted the money and used part of it,—re-depositing the balance in her maiden name as formerly, and Mr. Hutchison had never in any way interfered with it. She depones that the day before Mr. Hutchison died he said "Nobody shall touch that money that you earned hard, for it is your own money. These were the last words he said. He was looking for death at the time he said that." On her re-examination she gives his words a little differently, but to the same purpose. She says he said the day before he died "It belongs to nobody but yourself. It was your own working for." Reading these words in the light of Mr. Hutchison's previously expressed intentions to the witnesses, Mr. Nichol and Mr. Laurie, to leave his wife all he had, I think they are sufficiently expressive of his purpose of donation, and that there is sufficient corroboration of Mrs. Hutchison's evidence in support of that donation.

It is contended that Mr. Hutchison did not know that he had any power over his wife's money, and that he could not gift to her what he did not think belonged to him. But it is proved by five different witnesses, viz., the pursuer herself, her husband, her brother and sister, and her agent, that Mr. Hutchison knew quite well that he could dispose of his wife's money, and I see no reason to infer that anything Laurie vaguely said to him on that subject led him to change his opinion.

The only real difficulty as to the sum of £235 arises from there having been no actual delivery of the money, or of the document of debt representing the money; and there can be no doubt that delivery, or its equivalent, is necessary to this sort of donation.

The Lord Ordinary deals with the whole case as if it related to donations *inter vivos*. If that were so there would arise a very important question, upon which [931] we have as yet, I think, no direct precedent, whether a donation *inter vivos* of a sum of money can be competently proved by parole testimony? But the donations here were *mortis causa* donations, which, it is settled, can be proved by parole, and which, we have further decided, may be made by a husband to his wife. The point of novelty is, as I have already indicated, the want of actual delivery. But I am disposed to think that we have here what is equivalent. The circumstances are very peculiar. If the deposit-receipt had been changed from the husband's name to the wife's name, that would clearly have been sufficient. But was it necessary to make changes in the form of the deposit-receipt which were to end where they began? I can hardly think so. It is not essential, I apprehend, to *mortis causa* donation, that there should be delivery by the hand of the donor. Suppose a dying soldier, on the field of battle, should say to his comrade, take my money from my pocket, when I am dead, and give it to my wife. That, I cannot doubt, would be sufficient. Or, suppose the money in the present case had been in a drawer in the next room, and Mr. Hutchison had said to his wife, go and take it and keep it. Or, suppose it had been in her wardrobe drawer, and he had said, let it remain there, and if I do not recover use it as your own. Whether, in such cases, we say there is what is equivalent to delivery, or that there is constructive delivery, the law as to delivery may, I think, fairly be held satisfied, the intention always being clear, as it is in the present case, to make a donation *mortis causa*.

LORD KINLOCH.—The pursuer, the executrix of the deceased William Hutchison, now sues the defender, his widow, for payment of two several sums of £185 and £235, alleged to have belonged to the deceased, and to be in the possession of the defender. The substantial question is whether these sums, or any of them, formed a donation *mortis causa* by the deceased William Hutchison to his wife.

In regard to the first sum of £185, originally lying in bank on a deposit-receipt in William Hutchison's name, I conceive that no doubt can be entertained. It is proved that in 1870 William Hutchison intended, and in fact attempted, to execute a disposition and settlement, under which his wife, if she survived, would have right to everything he possessed. An attempt was made by both husband and wife to place at the bottom of the deed what would be held to be their subscriptions; but their hands being led, the proposed signatures were ineffectual. The agent employed by them, Mr. Thomas Laurie, depones that in this state of things he said to Hutchison—"If you wish not to incur the expense of that way of doing it, then the better way would be for you to take the money out of the bank in your own name, and give it to your wife as a present, and that would save all further trouble and annoyance about it." Mr. Laurie depones that on a day afterwards he met Hutchison, "and he told me he

had uplifted the money as I had advised him." The widow herself depones that the husband did uplift the money and give it over to her, saying "take that as a gift, for thae devils Macdougalls will be down on you whatever may befall me." This was in March 1870, when the husband was in bad health; and he died in August following.

I cannot have any doubt that the deceased was in this performing an act intended to form a substitute for the execution of the settlement, and that he made to his wife a donation *mortis causa* of this sum. I entirely believe the testimony of the widow, which is confirmed by that of Laurie, and by the real evidence of the case. The effect, as I think, was just to give to his wife this sum by actual delivery, as she would have got it by means of the settlement. This sum, I therefore think, clearly cannot be recalled.

There is more difficulty as to the other sum of £235, which stood on a deposit-receipt in name of Mrs. Hutchison, the wife. It was originally her own money, but came of course to her husband by the legal assignation of marriage; and I think it is sufficiently proved by the evidence of the pursuer's own witnesses that the husband perfectly understood this to be the case. The difficulty on this point lies in the fact that there was no uplifting of the money and formal delivery of it to the wife, as in the other case, and there was no assignation [932] executed in her favour. But the observation at once occurs, that the formal title being in the wife, such an act would naturally appear unnecessary; and it cannot be maintained that a donation *mortis causa* cannot be made of money so situated. It is reasonably, and I think effectually urged, that a distinct declaration of the intention to make the donation ought to be in such a case sufficient. This being so, the evidence of donation is, I think, sufficient in this case. The widow expressly depones that on the very day before he died, and in immediate prospect of death, her husband said to her "Nobody shall touch that money that you earned hard, for it is your own money"; or, as she expresses it in another place, "It belongs to nobody but yourself; it was your own working for." I cannot put on this statement any other construction than that it was an intentional expression of a donation *mortis causa*. The evidence of the pursuer's witnesses as to the husband knowing that the money was legally his own prevents the supposition that he was here enunciating a mere truism as to its being his wife's, and, I think, leaves no other inference than that he was then expressing his wish and purpose that what was legally his should be truly and legally hers. I entirely believe the widow's statement. It is confirmed by the whole course of conduct on the part of the husband during their married life of nineteen years; for he never touched this money from the time of the marriage downwards, and expressed on more than one occasion an intention never to meddle with it. I am clear that it was his purpose to let it go down to his wife as her own property in the event of his predeceasing her, which would in truth have been the result of the intended settlement if it had not proved abortive. It was only to follow out this intention, to make the formal declaration on his deathbed to which the widow depones; and, in the special circumstances, I think that this declaration is sufficient to satisfy the law, and to render this donation also effectual.

I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD PRESIDENT.—I think that the donation of £185 is satisfactorily proved. The witness Laurie says that, when the deceased found that his settlement would not be effectual, and hesitated to have it made effectual by calling in a notary, he suggested that it would be a better way to take out the money lodged in his own name (for that is how I read the proof), and give it to his wife as a present. This was in March 1870. The next piece of evidence is the deposit-receipt of March 1870, and then the fact that when Laurie met him casually at the railway station he said what plainly implied that he had uplifted the money and given it to his wife. This evidence of Laurie and the deposit-receipt go far to prove donation, but it is made quite clear by the statement of the wife herself. While I am quite clear that donation *mortis causa* cannot be proved by the single testimony of the donee, I think there is here as ample corroboration as could be conceived.

The other sum stands in a very different position. The £235 was lodged in bank in the wife's maiden name. She had the ostensible title to it, and could have drawn it out, for, although she had not the legal right, banks are in the custom, as we know, of paying money to those who have lodged it. But it was certainly possible for Hutchison to make a gift of it, though he could hardly do it in the same way as he did in regard to the £185. The fact of its standing in the wife's own name made it

more difficult to preserve evidence of his having gifted it. I do not think that actual delivery is necessary to make a donation *mortis causa* effectual, especially if the money stands in the name of the donee. The existence of the *animus donandi*, and the clear expression of that, as a present intention, are enough, but less is not enough. The question, therefore, is whether here there was an expression of a present intention to transfer the sum to the wife as a donation *mortis causa*. One great difficulty which I feel is, that the only evidence of such intention is the unsupported testimony of the wife herself. It is to be kept in view that the donations alleged were not made at the same time, but the second one was five months later in date than that of the £185, and indeed on the very day before the husband's death. Now, what the wife says is—(His Lordship here read the passages in the evidence above quoted). [933] Now, is there anything to corroborate that, supposing it to be an expression of present intention. I am afraid that there is not. There are indeed some passages in the history of the married life of the Hutchisons which render the wife's statement not improbable, but there are not enough to overcome the presumption against donation. When you admit the sole evidence of the donee as sufficient to rebut the presumption which the law holds to exist against donation you put an end to that presumption altogether.

But I have also a difficulty in arriving at the conclusion that the words ascribed to the husband on his deathbed express a present intention to make a donation of the sum in question. They seem to me rather to be the words of a man who believed that the money belonged to his wife. It is said that he was quite aware that he had power to dispose of that money, and I think that this is quite true as at a certain date, and down to a certain date. He certainly had that belief when in communication in 1866 with Mr. Hunter, the agent who drew the settlement. But was not some change induced by his conversations at a later date with Laurie. He went to this witness about making a settlement,—not a very prudent step to take, seeing that he was an accountant, and not a law-agent. At the first interview he said that his wife had some money.

Now, it seems to me that Laurie's evidence does nothing to corroborate the widow's testimony, when she says, if she does say, that a gift was made to her of the £235 the day before her husband died. But I think it goes far to explain the meaning of the words used by him, and to infer his understanding that the money did not belong to him but to his wife. If it be so, how is it possible to impute to him a present intention to transfer that money to his wife? Unless there was such a gift it belongs to the husband's executry. But how could there be a gift if he thought it was his wife's money? These are the difficulties which meet me in the second part of this case, (1) that the donation alleged is supported only by the testimony of the donee; and (2) that the alleged words of the donor are not words of gift at all. It is the more disagreeable to be obliged to differ from your Lordships, because there was certainly a general intention on the part of the deceased that the money should remain his wife's, but that is an intention to which I think effect cannot be given in law. I am not sorry, however, that your Lordships have been able to arrive at a different result.

The following interlocutor was pronounced:—"Adhere to the interlocutor, and refuse the reclaiming note: Assoilzie the defender from the whole remaining conclusions of the summons, and decern: Find the defenders entitled to expenses since the date of the said interlocutor: Allow an account," &c.

DAVID HUNTER, S.S.C.—GEORGE BEGG, S.S.C.—Agents.

[*Commented upon*, Crosbie's Trs. *v.* Wright, 1880, 7 R. 823; Blyth *v.* Curle, 1885, 12 R. 674.]

No. 163. X. MACPHERSON, 933. 5 July 1872. 2d Div.—L.

ÆNEAS WILLIAM MACKINTOSH AND ANOTHER, First Parties.—*Sol.-Gen. Clark—Mackintosh.*

MADELEINE WOOD AND OTHERS, Second Parties.—*Marshall—Rutherfurd.*

STEWART CLARK, Third Party.—*Sol.-Gen. Clark—Mackintosh.*

Succession—Testament.—Held that a legacy directed to be paid on the marriage or death of a person vests at the death of the testator, the term of payment being postponed until either event happens, but a legacy to be paid on the marriage of a person does not vest until the marriage, as that event may never happen.

Parent and Child—Trust.—Held that testamentary trustees who held a fund for children, to be paid on their attaining majority, were bound to pay to the children's father, out of the income, the sum necessary for their maintenance and education.

This special case was submitted by Æneas William Mackintosh, Esq. of Raigmore, and another, executors of the late Mrs. Boileau, of the first [934] part; Madeleine Wood, and others, children of the late Mrs. Wood, daughter of Mrs. Boileau, and Edward Wood, as administrator-in-law for his children, of the second part; and Stewart Clark, executor-nominate of the late Charles Elliot Boileau, son of Mrs. Boileau, of the third part.

Mrs. Boileau died on 8th October 1856, leaving a last will and testament and two relative codicils. The will contained the following clause:—"I ordain and appoint my executors to invest the free residue of my personal estate and executry either in the best heritable or personal security, and pay over the annual interests, dividends, or proceeds thereof to my daughter, Isabella Ann or Annie Boileau, in liferent during all the days of her lifetime, or until the period of her marriage, whichever of these events shall first happen; and in the event of the marriage of the said Isabella Ann or Annie Boileau, I ordain and appoint my said executors, immediately thereafter, to make payment to Thomas Theophilus and Charles Elliot Boileau, my sons, the sums of £600 sterling each; and the residue and remainder of my said personal estate and executry I ordain them to settle, by such deeds and documents as they may think necessary and requisite at the time, on the said Isabella Ann or Annie Boileau, in liferent during all the days of her lifetime, but for her liferent use only, exclusive of the *jus mariti* of any husband whom she may marry, and not affectable by his debts or deeds, or by the diligence of his creditors, in any way or manner, and to the child or children of the said Isabella Ann or Annie Boileau, in fee, equally and share alike, on their respectively reaching the years of majority or being married, and the respective heirs of their bodies *per stirpes et non per capita*, in the event of any of said children predeceasing their mother and leaving lawful issue, that is to say, the children of the deceased parent taking equally among them the succession that would have opened to said parent had he or she lived to the period of division of the sums hereby bequeathed to them in fee." In the event of Isabella Ann or Annie Boileau dying without leaving issue, certain other provisions were made. The first codicil contained the following clause:—"Having come into the possession of more money than I calculated upon by the will of Miss Maddie Macpherson, I now bequeath the additional sum of £400 to each of my two sons, Thomas Theophilus Boileau, and Charles Elliot Boileau. This additional sum not to be paid to them, but in the event of the marriage of my daughter, Isabella Ann or Annie Boileau, or her death." The second codicil contains this clause:—"It is my intention that the provisions contained in the foregoing codicil, as to take effect in favour of my sons in the event of the death of my daughter, refer only to her death without leaving issue." The testator was survived by her three children, Thomas Theophilus Boileau, Charles Elliot Boileau, and Isabella Ann or Annie Boileau. Thomas Theophilus Boileau is still alive. Charles Boileau died leaving a testament under which the party of the third part was named his executor. Isabella Ann or Annie Boileau was married on 17th August 1858 to Edward Wood. She died on 22d April 1871, leaving four children, the parties of the second part. These children were all in pupillarity. They lived in family with their father, who was their legal guardian, and whose domicile was in England.

The legacies of £600 and £400 bequeathed under Mrs. Boileau's testament and codicils to Thomas Theophilus Boileau were paid to him on the marriage of his sister; but the legacies of similar amount left to Charles Boileau had not been paid. No deed of settlement or other deed was executed by the parties of the first part for the purpose of settling the residue of the estate upon Mrs. Wood and her children.

[935] The following were the questions for the opinion of the Court:—"1. Whether the shares of residue falling to the children of Mrs. Isabella Ann or Annie Boileau or Wood under the testament and codicils of Mrs. Boileau have now vested in the children, parties hereto of the second part? (2) Whether the parties of the first part are bound or entitled to apply the annual income arising from the said residue, or such part of said income as may be necessary, towards the maintenance and education of the said children (parties hereto of the second part), during their respective pupillarities and minorities? (3) In the event of the preceding question being answered in the affirmative, whether the said first parties are entitled or bound to pay over the said income, or such part thereof as may be applicable to said purpose, to Edward Wood, as the legal guardian of his said children? (4) Whether the said legacies of £600 and £400, bequeathed as aforesaid to the said Charles Elliot Boileau, vested in him prior to his death, and now belong to the third party as his executor; or whether the said legacies, or either of them, lapsed, and now form part of the residue of the estate of the said Mrs. May Clark or Boileau?" *

At advising,—

LORD BENHOLME.—The question in this case arises out of the settlement of Mrs. Boileau. She was survived by three children, viz., Theophilus, Charles, and Isabella Ann. Isabella married and left children.

Now, there are two sets of questions presented in this case—first, regarding the special legacies; and, secondly, regarding the residue. There is a distinct leaving of a bequest of £600 each to the two sons. Then there is a second legacy by a codicil in the following terms:—"Having come into the possession of more money than I calculated upon by the will of Miss Maddie Macpherson, I now bequeath the additional sum of four hundred pounds (£400) to each of my two sons, Theophilus Boileau and Charles Elliot Boileau. This additional sum not to be paid to them but in the event of the marriage of my daughter, Isabella Ann or Annie Boileau, or her death."

Regarding the two legacies to Theophilus there can be no doubt, for he survived the two events specified.

It was not so with Charles. He died before the marriage, and consequently before the death of the daughter. The question then arises, is the first legacy to be paid? The marriage of the sister not having in fact taken place during the lifetime of Charles, can we hold that that legacy ever vested? The ordinary rule (founded on the civil law) is, that it did not so vest, and I think that this rule applies to the circumstances here.

But this does not go to settle the question regarding the second legacy of £400. It was left on a different footing, namely, "on the marriage or death of Annie." Here there is a contingency besides marriage. The legacy is not left dependent on that uncertain event. It was left dependent on a certain event, namely death. It is true the marriage might come before the death, but one or other of these events must happen. Therefore, I think Charles's heirs were entitled to his share. The rule derived from the civil law is this—that when a legacy is made dependent on a certain event, and the legatee does not survive that event, the legacy is merely postponed. The certainty of an event happening some time renders the vesting absolute, postponing the time of payment. This rule was well illustrated in the case of Home *v.* Home. The case was this—A legacy was left to a party, half on attaining majority or marriage, the [936] other half on the death of A. B. The lady died before majority or marriage. It was held that there was a good claim by her next of kin for the half depending upon the certain event, namely A. B.'s death. As regarded the other half—depending

* Laing *v.* Barclay, July 20, 1865, *ante*, vol. iii. p. 1143; Ogilvie *v.* Cuming, Jan. 27, 1852, 14 D. 365; Hardman *v.* Guthrie, June 6, 1828, 6 Sh. 920; Home *v.* Home, Jan. 28, 1807, Hume, p. 530; Forbes *v.* Luckie, Jan. 26, 1838, 16 Sh. 374; Halbert *v.* Dickson, March 26, 1853, 16 D. 609; Carleton *v.* Thomson, July 30, 1867, *ante*, vol. v. H. L. p. 151.

upon majority or marriage, which never arrived—the legacy was held to have lapsed. The remarks made by Lord Braxfield appear to me sound, and to rule the present case. "One-half of it clearly lapsed, being left pendent on the condition of majority or marriage, which never arrived. . . . As to the other half, I think it vested in the child, though suspended in point of payment till the mother's death, which is a *dies certus*, that will happen, though uncertain when." This points out the capital distinction between events which *must*, and events which *may*, happen. It is clear that if the legatee does not survive the uncertain event, he does not take. But if he does not survive a certain event that does not interfere with the vesting.

As regards the vesting of the residue of the estate:—The terms of the document give a liferent to the daughter so long as she remains unmarried. Then in the event of her marriage there is a legacy to the sons. The lady died leaving children, and the questions are these—First, "Whether the shares of the residue falling to the children of Mrs. Wood under the said last will and testament and codicils of the said Mrs. Boileau have now vested in the said children, parties hereto of the second part?" This, I think, must be answered affirmatively. The second question is as follows—"Whether the parties of the first part are bound or entitled to apply the annual income arising from the said residue, or such part of said income as may be necessary, towards the maintenance and education of the said children, parties hereto of the second part, during their respective pupillarities and minorities?" This question must also be answered in the affirmative. The question cannot be considered without reference to the fact that these children have a legal guardian. They are English children, and their father is their legal guardian. In regard to the third question, I entertain no doubt. The executors are bound to pay over such part for the maintenance of the said children.

LORD COWAN.—On the first point submitted for the consideration of the Court I am of opinion that the shares of residue falling to the children of Mrs. Wood vested in them, subject, as regards the extent of their interest, to be diminished should other children be born entitled to participate in the bequest. The direction to the executors is to "invest" the free residue of the estate (in their own names), and pay over the annual proceeds for the liferent use of the daughter while unmarried, and in the event of her marriage (which happened), to "settle" the amount by such deeds as might be necessary on the daughter, in liferent, for her liferent use only, and to her "child or children in fee, equally and share alike, on their respectively reaching the years of majority, or being married,"—the issue of predeceasers taking "the succession that would have opened to their parent had he or she lived to the period of division of the sums hereby bequeathed to them in fee." This is a direct disposition of the fee to the children when born, as a class, so that, while the fee until their existence would be in the parent fiduciarily, the beneficial interest vested in them when they were born. There is no ulterior destination of the fee failing the children, assuming the daughter to be married and to have children of the marriage,—so that, upon her death leaving children, which is the case that has occurred, those children are the only parties having interest in the residue of this estate under the deed. This being so, I cannot view the words "on their respectively reaching the years of majority or being married" as a condition failing which, on the predecease of all the children, there would be intestacy. I think any such result would be inconsistent with the intention of the maker of this deed, and it appears to me that the words above recited must be held to have exclusive regard to the period of payment of their respective shares. Meanwhile, as a class, the existing children, in the circumstances which have occurred, are vested with right to the residue of this estate. And there can be no difficulty in carrying into effect the intention of the testatrix, seeing that the executors, in terms of the deed, have invested in their own names the funds, and which are held by [937] them, consequently, for behoof of and to all effects and purposes in trust for these beneficiaries.

2 and 3.—I concur in the views stated by Lord Benholme.

4.—As the testator's son Charles predeceased the event of his sister's marriage, I am of opinion that the legacy of £600 must be held to have fallen. The bequest is "in the event of the marriage" of his sister the executors are appointed "immediately thereafter to make payment" to each of the testator's two sons, Thomas and Charles, of the sum of £600. I do not think it doubtful that the bequest in its terms was conditional, and that the death of Charles, one of the legatees, before the condition

was purified, had the effect of preventing any right vesting in him that can now be claimed by his executors.

The other sum of £400 stands in a different position, inasmuch as by the terms of the codicil which bestows it there is, first, an unconditional bequest of the amount which by its terms would have vested the legacy in the legatee but for the condition which follows; and, in the second place, the condition attached to payment of the legacy is not merely the event of the sister's marriage, but also of her death. This last event, had it been the sole condition attached to the legacy, would not have prevented it vesting in the legatee at the testatrix's death. And I cannot think that the alternative condition should affect this result. As one of the two events could not have prevented the vesting of the legacy *a morte testatoris*, subject to the liferent of the daughter, I hold the better view to take of the intention of the testatrix in annexing the alternative condition was to give right to the legatee to immediate payment on that condition being purified, but not to suspend the vesting.

The LORD JUSTICE-CLERK and LORD NEAVES concurred.

THE COURT pronounced this interlocutor:—"Find, 1st, That the shares of the residue falling to the children of Mrs. Isabella Ann or Annie Boileau or Wood, under the last will and testament and codicil of Mrs. May Clark or Boileau, have now vested in the children, parties hereto of the second part; 2d and 3d, That the first parties are bound to pay over the annual income arising from the said residue to the said Edward Wood, as the legal guardian of his said children, towards the maintenance and education of the children, parties hereto of the second part, during their respective pupillarities and minorities, or such part thereof as may be necessary for such purpose; 4th, That the legacy of £600 bequeathed to Charles Elliot Boileau did not vest in him prior to his death, but lapsed, and now forms part of the residue of the estate of the said Mrs. May Clark or Boileau; and that the legacy of £400 bequeathed to Charles Elliot Boileau did vest in him prior to his death, and became payable on the marriage of Mrs. Wood," &c.

GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—MACKENZIE & BLACK, W.S.—Agents.

No. 164. X. MACPHERSON, 937. 5 July 1872. 2d Div.—I.

MRS. MARY HEPBURN HOME OR PAUL AND OTHERS.—*Crawford.*
LOUIS OLEAN HOME.—*Rhind.*
MRS. MARY HEPBURN HOME.—*Duncan.*

Succession—Conditional Institution—Substitution.—A testator assigned and disponed to A. and B., "equally between them, and in the case of the death of either without heirs of his or her body to the survivor of them, my whole real and personal effects whatsoever." *Held* that this was a conditional institution and not a substitution; and both A. and B. having survived the testator, the share of one who died intestate without heirs of his body went to his heir-at-law.

Heritable and Moveable—Undelivered Disposition—Bill.—Where subjects [938] stood feudally vested in a trustee for behoof of a beneficiary, and the trustee, with consent of the beneficiary, disponed them to a third party "under the real burden" of the price, taking at same time the disponee's bill for the amount, the bill having never been retired nor the disposition delivered, *held* that the interest of the beneficiary in the subjects was heritable.

Miss Christian Aitchison, by a codicil dated 27th May 1830, assigned and disponed "to John Belsches Home and Mary Hepburn Home, equally between them, and in case of the death of either without heirs of his or her body, to the survivor of them, my whole real and personal estate and effects whatsoever." The granter died in December 1836, survived by John Belsches Home and Mary Hepburn Home, who were both then resident abroad. John Belsches Home died in Texas in October 1851, unmarried and intestate. The personal representatives of John Belsches Home were the first parties to this case. Louis Olean Home, the heir in heritage to John Belsches Home, was the second party.

The other disponee, Mary Hepburn Home, previous to the death of the testatrix, married Mr. Francis Wilson Paul, who died about the year 1862 or 1863. With the exception of a small sum of money, the only estate left by the testatrix consisted of her right and interest in two small house properties in Edinburgh, viz., the fourth flat of a house in Hunter's Close, and a shop in South Union Place. The title to these properties in Hunter's Close and South Union Place was never completed in the person of the testatrix, but they were, at the date of her settlement and codicil, and at the date of her death, feudally vested in Mr. Harry Davidson, W.S., for her behoof. Mr. Davidson had acquired right to the subjects in Hunter's Close (for behoof of the testatrix), in virtue of a disposition in his favour by Patrick Cockburn, in consideration of a price paid, dated 15th May 1810. Mr. Davidson had acquired right to the subjects in South Union Place (for the security of the testatrix), in virtue of a disposition in his favour by John Inglis, in consideration of the price of £400 (advanced by the testatrix), dated 30th November 1804. The name of the testatrix did not appear in either of the dispositions. On Mr. Harry Davidson's death in 1859 his son Mr. Laurence Davidson made up titles as sole surviving trustee under his father's settlement to both subjects, and conveyed them to trustees, "in trust for behoof of the party or parties entitled thereto under the said disposition and settlement and codicil of the said Miss Christian Aitchison." No steps were taken on the death of Miss Aitchison, the testatrix, in 1836, to have these properties made over to the disponees under her settlement, but the rents had since that date been uplifted by Messrs. Davidson and Syme, W.S., and remitted or accounted for from time to time as follows, viz., one-half to Mrs. Paul, and one-half to Major John Belsches Home until his death.

Of the same date as the disposition and settlement by Miss Aitchison, Mr. Harry Davidson (in whom the subjects were then feudally vested), along with the testatrix, also executed a disposition and assignation of the property in South Union Place in favour of Alexander Preston. The narrative clause of this disposition proceeds as follows:—"I, Harry Davidson, W.S., considering that in the year 1804 Alexander Preston purchased the subjects after-mentioned from John Inglis, at the price of £400, and not having funds of his own to pay the price the same was advanced by Miss Christian Aitchison, and for her security the disposition of said subjects was taken in my favour, and I granted an acknowledgment to said Alexander Preston that upon payment of said sum I should convey the said premises to him, and it being now agreed that I should convey the same to him and [939] his spouse under the real burden of the said sum of £400, and interest thereof, therefore, with the special advice and consent of the said Miss Christian Aitchison, I hereby dispone," &c., in favour as aforesaid, the said subjects, &c. The price of £400, with interest, was thereby declared a real burden on the subjects conveyed. The disposition was not delivered to Alexander Preston or acted upon, but was retained by Mr. Davidson, as agent for the testatrix. Prior to the date of the disposition, Alexander Preston had granted a bill in favour of the testatrix for £400, dated 15th May 1814, which bill was referred to in the disposition in the clause declaring the real burden, viz., "under the express burden of the said sum of £400, and interest thereof from and since the term of Whitsunday last, payable to the said Christian Aitchison, her heirs or assignees, on the 30th day of November next, as contained in his bill to her dated the 15th day of May last," &c. Alexander Preston continued to occupy the subjects down to the year 1832. He paid the testatrix interest at 5 per cent. on the £400 down to November 1830; and on 8th October 1832 he wrote to the testatrix expressing his inability to continue to pay interest "upon the money borrowed to purchase the shop which I possessed from the year 1804," and requesting her to ask Mr. Davidson to get "the shop" (being the subjects in South Union Place) sold. In consequence of Mr. Preston's inability to pay interest, the subjects were retained by Mr. Davidson (in whom they remained feudally vested) for behoof of the testatrix, as an investment for her. The disposition to Alexander Preston was never delivered, and payment of his bill was never made.

The right to the one-half *pro indiviso* of the subjects in Hunter's Close, and the right to the one-half *pro indiviso* of the subjects in South Union Place, which belonged to Major John Belsches Home, was claimed by the personal representatives of Major Home, who were the first parties to this special case, also by Mr. Home, Major Home's heir-at-law, who was the second party to the case, and, lastly, by Mrs. Paul, who was the third party to the case; and the question submitted to the Court was, "whether

the share of the testatrix's estate to which the deceased Major John Belsches Home had right, under and by virtue of her disposition and settlement and codicil, so far as it consists of a right to one-half *pro indiviso* of the subjects in Hunter's Close and South Union Place, Edinburgh, or either of them, now belongs to the first parties, or to the second party, or to the third party?"

The first parties argued;—The testatrix had conveyed the bill, and therefore she looked upon the right as moveable. The right therefore vested in John B. Home, and went to his next of kin and not to his heirs.*

The second party argued;—The right of John B. Home was heritable, as it consisted of a right to heritable subjects vested in a trustee for behoof of the testatrix. There was no substitution of Mary H. Home. At the death of the testatrix the one-half vested in John B. Home, and went to his heir-at-law.†

Mrs. Paul, the third party, argued;—The codicil gave her and John B. Home a *pro indiviso* right in the subjects during their joint lives, and on the death of John B. Home the subjects vested in Mrs. Paul *jure accrescendi*, or at all events from the terms of the codicil she succeeded to the sub-[940]-jects on the death of John B. Home, the parties being substituted to each other.

At advising,—

LORD JUSTICE-CLERK.—The first question raised before us is, whether the interest which Major Belsches Home had in this estate was heritable or moveable? I am of opinion that, as regards both of the subjects in dispute, the right was heritable.

With respect to the first subject, the title was a trust title for behoof of the testatrix in the person of Mr. Davidson, and with respect to it there can be no doubt. With regard to the other subject the title is somewhat anomalous.

A disposition of the property at the price of £400 was taken to Mr. Davidson, the trustee for the testatrix, and the subjects were feudally vested in him. By a subsequent undelivered disposition and assignation by Mr. Davidson and the testatrix, describing the nature of the transaction, these subjects were disponed to Preston under "the real burden of the" sum of £400. This money was advanced by Miss Aitchison, but Preston turned out to be unable to repay her, though he granted her a bill for the amount, which he never retired, and the state of the case is that the subjects have been retained since 1832 as an investment for the testatrix. In these circumstances, the interest of the testatrix in both of the subjects is heritable, and therefore they would go to the heir in heritage of Major Home.

The other question is, whether the right conferred subsequently by the codicil is a conjunct right of such a nature that the right of the predeceasing disponee accrued to the survivor, or on the other hand, as is contended for the other parties, that it was only on the predecease of the testatrix by one or other of the disponees that the conditional institution was to take effect. There is no proper case of accretion here. Conjunct fiars take *pro indiviso*—that is the rule of law as stated by Lord Stair. There is a distinction in that respect between the law of England and the Scotch feudal law, which is clearly pointed out by Craig (ii. 27, 7). The general rule of Scotch law, as I have said, is that conjunct fiars take *pro indiviso*; that is unquestionable. Cases in regard to accretion have only occurred in connection with moveable property.

There are two elements here which make it impossible that the doctrine of accretion can apply. First, this is a bequest of a *universitas*, shares of mixed succession, and at the date of the settlement it was not known whether it was heritable or moveable. It is left "equally between" these two persons. It is not a case of a special subject granted to two parties conjunctly, but of a general mixed estate granted to two disponees. The cases of Rose‡ and Torrie, which have been quoted to us, make it clear that when the words "equally" or "proportionally" are used, that is necessarily an indication that a division was intended.

The other element is, that the heir of the body of either of the disponees is to take. Now, that destroys the contention that the survivor of the two disponees was to take

---

* Young *v.* Robertson, Feb. 11, 1862, 4 M'Queen, 314; M'Laren on Wills, vol. i. p. 687; Paul *v.* Boyd's Trustee, May 22, 1835, 13 S. 818.

† Macreadie *v.* Smart, Nov. 15, 1752, M. 4402; Barber *v.* Findlater, Feb. 6, 1835, 13 S. 422; Torrie *v.* Munsie, May 13, 1832, 10 S. 597; Bannerman *v.* Bannerman, 6 D. 1173.

‡ Jan. 15, 1782, Elchies, Legacy, No. 9.

all. That implies that it is a several and not a joint right. I cannot doubt that the heirs of the body of either of the disponees, had they survived, would have taken under this destination.

Neither was there here a substitution. Without enlarging upon that argument I will only say the presumption of law is against substitution.

Upon the whole matter, I am of opinion that the doctrine of accretion does not apply, and that this is not a case of substitution but of conditional institution. That a right vested in Major Home, which is carried to his representatives, I have no doubt. He survived the testatrix, and the conditional institution accordingly flew off, owing to the right vesting in his lifetime.

LORD COWAN.—This is a question of considerable nicety, and has been very ably argued.

As regards the first question which arises, viz., whether these subjects are [941] heritable or moveable, I have no doubt. The subjects were feudally vested in the agent of the testatrix under an acknowledged trust; and therefore, when she came to deal with them in her settlement she did so as being heritable subjects held by her trustee for her behoof. I see nothing to alter or affect this view in the speciality of the bill for £400.

The second question for consideration is, whether there is room for holding that the co-disponee who survived is entitled to take the other *pro indiviso* half of these subjects. Two arguments were urged in support of the view that she was so entitled,—the first resting upon the doctrine of accretion, and the second upon the footing that there was a substitution in her favour under the destination. In my apprehension, the only argument which had any force in it was that based upon the alleged substitution. If Mrs. Paul has any claim at all upon the succession of her brother Major Home, it must be under the destination clause of the deed. A great deal of difficulty sometimes exists in regard to cases of joint rights. Erskine and Bell both treat the subject at length. Erskine has two sections referring to such cases, one being with regard to the rights of husband and wife and father and son, while the other relates to the right of strangers. In the 36th section of the 8th title of his 3d book he says, "Where an entail is made or any right conceived in favour of two strangers in conjunct fee and liferent and their heirs, the two are equal fiars during their joint lives, as if they had contributed equally to the purchase; but after the death of the first the survivor has the liferent of the whole, and after the survivor's death the fee divides equally between the heirs of both. If the right be taken to two jointly and their heirs, without any mention of liferent, the conjunct fiars enjoy the subject equally while both are alive, as in the former case; but on the death of the first, neither the fee nor even the liferent of his half accrues to the survivor, but descends to his own heir." And then comes the passage which is more directly applicable to the case here,—"In a right taken to two jointly and the longest liver and their heirs, the words 'their heirs' are understood to denote the heirs of the longest liver; and, consequently, though the several shares belonging to the conjunct fiars are affectable by their several creditors while both are alive, yet upon the death of any one of them the survivor has the fee of the whole, exclusive of the heirs of the predeceaser—not only the fee of his own original share, but that of the share belonging to the predeceased in so far as it is not exhausted by his debts." That is not exactly the case here, because the succession is not to the two parties jointly, it is "equally between them, and in case of the death of either of them without heirs of her body, to the survivor and to their respective assignees." Then comes the codicil in which assignees are left out—"equally between them, and in the case of the death of either without heirs of his or her body, to the survivor of them." They take equally between them *pro indiviso* the heritable subjects, and it might be argued that under these clauses there was a substitution of the disponees to each other, and that Mrs. Paul, when her brother died, took the whole as being substitute to him. Had this been a conveyance of a purely heritable subject it would be more difficult to get over this argument, having regard to the passages in Erskine just quoted. But then it is a mixed estate, and the question is whether this is to be treated as conditional institution or substitution. As regards heritable subjects, the presumption of law is in favour of substitution, while as regards moveable, conditional institution—as settled in the case of Greig *v.* Johnston in the House of Lords (6 W. and S. 406). The case we have before us is one of a general succession, and we have to consider the intention of the testatrix; and as the conveyance is of both heritable and moveable estate, under a

deed intended to take effect immediately on her death, I think we must hold it to be a case of conditional institution.

I have said so much upon the question of substitution.

As regards the alternative argument, I hold with your Lordship that there is no room for the doctrine of accretion here. The case of Wright's Executors, quoted to us, does not assist us at all, and the only other case referred to in the argument was that of Bannerman *v.* Bannerman, where the question of *jus accrescendi* arose with reference to the shares of an estate. There the tes-[942]-tator provided by his settlement that the residue of his estate should be divided into 24 equal parts, 13 of these to be left to his wife, 4 to a niece, 1 to each of his brother's children then alive and 3 in number, and he reserved appropriation of the remaining 2 shares, making a provision, however, that these 2 shares, if unappropriated, should be merged in his estate, as if it were only to be divided into 22 shares. One of his brother's children predeceased the testator, but it was held that that child's share could not be viewed as intestacy, but as residue to be divided along with the rest of the estate, making the division to be into 21 equal shares, to be distributed as the settlement directed. The present case is essentially different.

On the whole matter, I concur in thinking that this *pro indiviso* half goes to the heir-at-law of Major Home.

LORD BENHOLME concurred.

LORD NEAVES.—I concur with your Lordship. Two general views have been stated to us as the grounds upon which this point should be decided; the one involves the application of the doctrine of accretion and the other that of substitution. These are two perfectly different grounds, because where accretion applies substitution does not. The *jus accrescendi* is of great importance, and occurs in cases of conjunct rights in the proper sense of the words. Where subjects are given to two persons, upon the disappearance of one of them it is more easy to hold that the other is substituted in the case of a liferent than in the case of a fee.

The readiest illustration of this is in the case of a liferent—say held by two sisters conjointly. While they enjoy the liferent they live together and contribute to each other's maintenance, but if one of them dies, as it is necessary to keep up the establishment the income must not be diminished by one-half, and the whole accordingly accrues to the survivor.

The most ordinary occasion where the doctrine of accretion applies is where the testator would otherwise die *pro parte* intestate. In the case of Bannerman, to prevent intestacy the shares which were unappropriated were divided among the others, and that decision was pronounced as following upon the case where the terms "equally and proportionally" were used. This does not, however, arise in the present case; it is not necessary here to endeavour to prevent the testatrix from dying intestate. She did not do so. Neither is this a case of conjunct right. And as it is not conjunct, it can be explained why there is a conditional institution of each of the disponees to the other in order to prevent lapse.

In a mixed succession, if possession be once got, and the right obtained by the disponee, there is no presumption of substitution. In this case it would be contrary to all probability to hold that this succession, after having been fully taken possession of, was to be left under an entail, because substitution is just an entail.

On the whole matter, I am satisfied that the full right of a *pro indiviso* half of these subjects vested in Major Home, to which his heir-at-law succeeded upon his death. Upon the other point, as to whether these subjects are heritable or moveable, I concur with the rest of your Lordships.

THE COURT pronounced this interlocutor:—"Find that the share of the testatrix's estate to which the deceased Major John Belsches Home had right under and by virtue of her disposition and settlement and codicil, so far as it consists of a right to one-half of the subjects in Hunter's Close and South Union Place, Edinburgh, now belongs to the second party to the special case, and decern."

JOHN M. BELL, W.S.—FERGUSON & JUNNER, W.S.—JARDINE, STODART, & FRASERS, W.S.—Agents.

No. 165. X. MACPHERSON, 943. 6 July 1872. 1st Div.—B.

MRS. MARY ANNE BUTLER OR DOUGLAS, Petitioner.—*Watson—Macdonald.*
THE TRUSTEES OF THE LATE ROBERT DOUGLAS, Respondents.—
Sol-Gen. Clark—Balfour.

Trust—Allowance to Pupil Children—Nobile officium.—By a trust-disposition and settlement trustees were empowered to make such allowance as they might think proper to the truster's children for their proper maintenance and education out of the free interest of their presumptive shares of the residue of his estate. The truster was survived by two children, both in pupillarity, and by his widow, who had a jointure of nearly £500 per annum. The free income of the residue of the estate was about £900 per annum, out of which the trustees allowed the mother annually for each of the children £150. In these circumstances, a petition at her instance craving increased allowances, which it was alleged were required on account of the very delicate health of the pupils, *refused*, the Court holding that there was no sufficient ground for interfering with the discretion of the trustees.

Opinion (by Lord Deas) that to justify such interference a gross case of dereliction or misconception of duty must be presented.

The late Robert Douglas of Douglas Park, afterwards of Orbiston, by antenuptial contract of marriage bound himself to secure £4000 to his widow in liferent and his children in fee. He also bound himself and his representatives to aliment, maintain, and educate his children suitably to their station, until the term of payment of their provisions, or until they should be otherwise provided for.

Mr. Douglas died in 1866, survived by his wife and by two children—a daughter, born in 1861, and a son, born in 1864.

By a trust-disposition and settlement executed in 1862 Mr. Douglas directed his trustees, after payment of debts, &c., to allow his widow £250 per annum in addition to her liferent of the £4000 provided to her by their marriage-contract; to deliver to her his household furniture, &c.; and to hold the residue of his estate for his children, in the proportion of two-thirds to his son and one-third to his daughter, payable to the son at majority, and to the daughter at majority or marriage. The residue was declared not to vest in the children until the term of payment, but the trustees were empowered "to make such allowance as they may think proper to the said children for their proper maintenance and education out of the free interest" of their presumptive shares.

The trustees were appointed tutors and curators to the children.

In the event of both children dying before the term of payment the trustees were directed to make payment to their mother of the free interest and annual produce of the residue during her life.

After Mr. Douglas's death his trustees paid to his widow (1) £80 per annum as rent for the furniture in Orbiston House, which belonged to her; (2) £160, interest at 4 per cent. on the marriage-contract provision of £4000; and (3) £250, the annuity provided under her husband's trust-disposition and settlement.

In addition to these annual payments, amounting in all to £490, the trustees made annual allowances to Mrs. Douglas, rising from £100 to £150, for each of the children.

Conceiving that these allowances were inadequate, Mrs. Douglas applied to the trustees for increased allowances for the children, which the trustees, however, did not consider themselves justified in granting, and accordingly she presented an application to the Court, craving their Lordships to fix the allowance to be made to her for the maintenance and education of the children at £750 per annum, being £500 for the son, [944] who would eventually be entitled to two-thirds of the residue of the estate, and £250 for the daughter, who would eventually be entitled to one-third of the residue.

The petition set forth that the net rental of the estate was not less than £1780, which, after deducting the annual payments to the petitioner on her own account, amounting to £490, left a free surplus revenue of £1290, the whole of which, subject to the expenses of management, was available for allowances to the children.

At the date of the application the son was eight and the daughter eleven years of age.

It was alleged in the petition that "the allowances which the trustees have hitherto made to the petitioner for her children are quite insufficient, having regard to their station and pecuniary prospects, and the state of their health, which has always been and is exceptionally delicate. They require constant medical attendance, change of air, and carriage exercise, the care of separate servants, and a sumptuous diet, to keep them in life. The petitioner cannot afford, upon the allowances which she has hitherto received for her children, to provide all these requirements for them. She is even unable, upon the present allowances, to employ a governess for their education, and she has been obliged hitherto to educate them herself."

Dr. Sieveking, physician to St. Mary's Hospital, London, was consulted by the trustees with reference to the children's state of health. After considering Dr. Sieveking's report, the trustees adopted the resolutions contained in the following extract from a minute of meeting held on 3d June 1872, viz., "that the sum of £300 now paid to Mrs. Douglas annually on account of her two children is an ample allowance for their proper maintenance and education. But they will be prepared to consider, as they have hitherto done from time to time, any application which may be made for an extra allowance, in order to give the children the benefit of such climatic changes as are indicated by Dr. Sieveking, which their physician may from time to time enjoin. It must, however, be understood by Mrs. Douglas that any expense on this account must not be incurred without previous sanction and authority of the trustees. Should the physician of the children be able to point out beforehand the climatic changes which the children may require during any year, or other stated period, the trustees will be ready to consider what, if any, additional allowance the same may render necessary."

In their answers to the petition the trustees explained that the free income of the residue of the estate available for allowances to the children was only £900, and not £1290, as stated by the petitioner. They averred that, "after the most careful inquiry, and repeated and most anxious consideration, the respondents consider that they could not, in the proper discharge of their duty, and having regard to the terms in which they are instructed to act by Mr. Douglas's settlement, make to the petitioner higher fixed allowances in respect of the children, and they are convinced that, with the exercise of ordinary prudence, everything essential or even advantageous for the children could readily be supplied upon the said allowances, and such additional allowances as the respondents have all along been and still are ready to grant for the purpose of meeting special emergencies. These allowances they have expressed their willingness to continue, under such precautions as shall ensure, as far as possible, that the money so given is really applied for the benefit of the children. For the conditions under which these additional allowances are proposed to be made in future the respondents refer to their minute of 3d June. The respondents have read with regret the petitioner's statement that she has [945] not employed a governess for the education of the children, as the allowances which she has hitherto received were made to her on the footing that a governess should be employed."

At advising,—

LORD PRESIDENT.—My Lords, we are asked in the prayer of this petition to interfere with the exercise of discretionary powers in the trustees of the late Mr. Robert Douglas, in so far as regards the allowance to be paid to his widow for the maintenance and education of their two pupil children.

It is almost unnecessary to observe that the Court is not wont to interpose in cases of this kind except upon very strong grounds, and I am of opinion that in this instance no sufficient reasons have been stated to necessitate our interference.

The gross rental of the estate is £2389, and the free income, after deducting burdens and the widow's provisions, including the rent of furniture of which she has the use, does not amount to more than £1000 per annum.

It is of course very desirable, after setting aside a reasonable and sufficient sum for the maintenance and education of the children during their minority, to lay by as much as possible out of the free income of the estate, and it is one of the first duties of the trustees to do so, seeing that this is the only way in which it is in their power to augment the funds in their hands for behoof of the minors when the period of distribution arrives.

Keeping this in view, we are then to consider what is their duty to the children in

had uplifted the money as I had advised him." The widow herself depones that the husband did uplift the money and give it over to her, saying "take that as a gift, for thae devils Macdougalls will be down on you whatever may befall me." This was in March 1870, when the husband was in bad health; and he died in August following.

I cannot have any doubt that the deceased was in this performing an act intended to form a substitute for the execution of the settlement, and that he made to his wife a donation *mortis causa* of this sum. I entirely believe the testimony of the widow, which is confirmed by that of Laurie, and by the real evidence of the case. The effect, as I think, was just to give to his wife this sum by actual delivery, as she would have got it by means of the settlement. This sum, I therefore think, clearly cannot be recalled.

There is more difficulty as to the other sum of £235, which stood on a deposit-receipt in name of Mrs. Hutchison, the wife. It was originally her own money, but came of course to her husband by the legal assignation of marriage; and I think it is sufficiently proved by the evidence of the pursuer's own witnesses that the husband perfectly understood this to be the case. The difficulty on this point lies in the fact that there was no uplifting of the money and formal delivery of it to the wife, as in the other case, and there was no assignation [932] executed in her favour. But the observation at once occurs, that the formal title being in the wife, such an act would naturally appear unnecessary; and it cannot be maintained that a donation *mortis causa* cannot be made of money so situated. It is reasonably, and I think effectually urged, that a distinct declaration of the intention to make the donation ought to be in such a case sufficient. This being so, the evidence of donation is, I think, sufficient in this case. The widow expressly depones that on the very day before he died, and in immediate prospect of death, her husband said to her "Nobody shall touch that money that you earned hard, for it is your own money"; or, as she expresses it in another place, "It belongs to nobody but yourself; it was your own working for." I cannot put on this statement any other construction than that it was an intentional expression of a donation *mortis causa*. The evidence of the pursuer's witnesses as to the husband knowing that the money was legally his own prevents the supposition that he was here enunciating a mere truism as to its being his wife's, and, I think, leaves no other inference than that he was then expressing his wish and purpose that what was legally his should be truly and legally hers. I entirely believe the widow's statement. It is confirmed by the whole course of conduct on the part of the husband during their married life of nineteen years; for he never touched this money from the time of the marriage downwards, and expressed on more than one occasion an intention never to meddle with it. I am clear that it was his purpose to let it go down to his wife as her own property in the event of his predeceasing her, which would in truth have been the result of the intended settlement if it had not proved abortive. It was only to follow out this intention, to make the formal declaration on his deathbed to which the widow depones; and, in the special circumstances, I think that this declaration is sufficient to satisfy the law, and to render this donation also effectual.

I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

LORD PRESIDENT.—I think that the donation of £185 is satisfactorily proved. The witness Laurie says that, when the deceased found that his settlement would not be effectual, and hesitated to have it made effectual by calling in a notary, he suggested that it would be a better way to take out the money lodged in his own name (for that is how I read the proof), and give it to his wife as a present. This was in March 1870. The next piece of evidence is the deposit-receipt of March 1870, and then the fact that when Laurie met him casually at the railway station he said what plainly implied that he had uplifted the money and given it to his wife. This evidence of Laurie and the deposit-receipt go far to prove donation, but it is made quite clear by the statement of the wife herself. While I am quite clear that donation *mortis causa* cannot be proved by the single testimony of the donee, I think there is here as ample corroboration as could be conceived.

The other sum stands in a very different position. The £235 was lodged in bank in the wife's maiden name. She had the ostensible title to it, and could have drawn it out, for, although she had not the legal right, banks are in the custom, as we know, of paying money to those who have lodged it. But it was certainly possible for Hutchison to make a gift of it, though he could hardly do it in the same way as he did in regard to the £185. The fact of its standing in the wife's own name made it

more difficult to preserve evidence of his having gifted it. I do not think that actual delivery is necessary to make a donation *mortis causa* effectual, especially if the money stands in the name of the donee. The existence of the *animus donandi*, and the clear expression of that, as a present intention, are enough, but less is not enough. The question, therefore, is whether here there was an expression of a present intention to transfer the sum to the wife as a donation *mortis causa*. One great difficulty which I feel is, that the only evidence of such intention is the unsupported testimony of the wife herself. It is to be kept in view that the donations alleged were not made at the same time, but the second one was five months later in date than that of the £185, and indeed on the very day before the husband's death. Now, what the wife says is—(His Lordship here read the passages in the evidence above quoted). [933] Now, is there anything to corroborate that, supposing it to be an expression of present intention. I am afraid that there is not. There are indeed some passages in the history of the married life of the Hutchisons which render the wife's statement not improbable, but there are not enough to overcome the presumption against donation. When you admit the sole evidence of the donee as sufficient to rebut the presumption which the law holds to exist against donation you put an end to that presumption altogether.

But I have also a difficulty in arriving at the conclusion that the words ascribed to the husband on his deathbed express a present intention to make a donation of the sum in question. They seem to me rather to be the words of a man who believed that the money belonged to his wife. It is said that he was quite aware that he had power to dispose of that money, and I think that this is quite true as at a certain date, and down to a certain date. He certainly had that belief when in communication in 1866 with Mr. Hunter, the agent who drew the settlement. But was not some change induced by his conversations at a later date with Laurie. He went to this witness about making a settlement,—not a very prudent step to take, seeing that he was an accountant, and not a law-agent. At the first interview he said that his wife had some money.

Now, it seems to me that Laurie's evidence does nothing to corroborate the widow's testimony, when she says, if she does say, that a gift was made to her of the £235 the day before her husband died. But I think it goes far to explain the meaning of the words used by him, and to infer his understanding that the money did not belong to him but to his wife. If it be so, how is it possible to impute to him a present intention to transfer that money to his wife? Unless there was such a gift it belongs to the husband's executry. But how could there be a gift if he thought it was his wife's money? These are the difficulties which meet me in the second part of this case, (1) that the donation alleged is supported only by the testimony of the donee; and (2) that the alleged words of the donor are not words of gift at all. It is the more disagreeable to be obliged to differ from your Lordships, because there was certainly a general intention on the part of the deceased that the money should remain his wife's, but that is an intention to which I think effect cannot be given in law. I am not sorry, however, that your Lordships have been able to arrive at a different result.

The following interlocutor was pronounced:—"Adhere to the interlocutor, and refuse the reclaiming note: Assoilzie the defender from the whole remaining conclusions of the summons, and decern: Find the defenders entitled to expenses since the date of the said interlocutor: Allow an account," &c.

DAVID HUNTER, S.S.C.—GEORGE BEGG, S.S.C.—Agents.

[*Commented upon*, Crosbie's Trs. *v.* Wright, 1880, 7 R. 823; Blyth *v.* Curle, 1885, 12 R. 674.]

No. 163. X. MACPHERSON, 933. 5 July 1872. 2d Div.—I.

ÆNEAS WILLIAM MACKINTOSH AND ANOTHER, First Parties.—*Sol.-Gen. Clark—Mackintosh.*

MADELEINE WOOD AND OTHERS, Second Parties.—*Marshall—Rutherfurd.*

STEWART CLARK, Third Party.—*Sol.-Gen. Clark—Mackintosh.*

Succession—Testament.—Held that a legacy directed to be paid on the marriage or death of a person vests at the death of the testator, the term of payment being postponed until either event happens, but a legacy to be paid on the marriage of a person does not vest until the marriage, as that event may never happen.

Parent and Child—Trust.—Held that testamentary trustees who held a fund for children, to be paid on their attaining majority, were bound to pay to the children's father, out of the income, the sum necessary for their maintenance and education.

This special case was submitted by Æneas William Mackintosh, Esq. of Raigmore, and another, executors of the late Mrs. Boileau, of the first [934] part; Madeleine Wood, and others, children of the late Mrs. Wood, daughter of Mrs. Boileau, and Edward Wood, as administrator-in-law for his children, of the second part; and Stewart Clark, executor-nominate of the late Charles Elliot Boileau, son of Mrs. Boileau, of the third part.

Mrs. Boileau died on 8th October 1856, leaving a last will and testament and two relative codicils. The will contained the following clause:—"I ordain and appoint my executors to invest the free residue of my personal estate and executry either in the best heritable or personal security, and pay over the annual interests, dividends, or proceeds thereof to my daughter, Isabella Ann or Annie Boileau, in liferent during all the days of her lifetime, or until the period of her marriage, whichever of these events shall first happen; and in the event of the marriage of the said Isabella Ann or Annie Boileau, I ordain and appoint my said executors, immediately thereafter, to make payment to Thomas Theophilus and Charles Elliot Boileau, my sons, the sums of £600 sterling each; and the residue and remainder of my said personal estate and executry I ordain them to settle, by such deeds and documents as they may think necessary and requisite at the time, on the said Isabella Ann or Annie Boileau, in liferent during all the days of her lifetime, but for her liferent use only, exclusive of the *jus mariti* of any husband whom she may marry, and not affectable by his debts or deeds, or by the diligence of his creditors, in any way or manner, and to the child or children of the said Isabella Ann or Annie Boileau, in fee, equally and share alike, on their respectively reaching the years of majority or being married, and the respective heirs of their bodies *per stirpes et non per capita*, in the event of any of said children predeceasing their mother and leaving lawful issue, that is to say, the children of the deceased parent taking equally among them the succession that would have opened to said parent had he or she lived to the period of division of the sums hereby bequeathed to them in fee." In the event of Isabella Ann or Annie Boileau dying without leaving issue, certain other provisions were made. The first codicil contained the following clause:—"Having come into the possession of more money than I calculated upon by the will of Miss Maddie Macpherson, I now bequeath the additional sum of £400 to each of my two sons, Thomas Theophilus Boileau, and Charles Elliot Boileau. This additional sum not to be paid to them, but in the event of the marriage of my daughter, Isabella Ann or Annie Boileau, or her death." The second codicil contains this clause:—"It is my intention that the provisions contained in the foregoing codicil, as to take effect in favour of my sons in the event of the death of my daughter, refer only to her death without leaving issue." The testator was survived by her three children, Thomas Theophilus Boileau, Charles Elliot Boileau, and Isabella Ann or Annie Boileau. Thomas Theophilus Boileau is still alive. Charles Boileau died leaving a testament under which the party of the third part was named his executor. Isabella Ann or Annie Boileau was married on 17th August 1858 to Edward Wood. She died on 22d April 1871, leaving four children, the parties of the second part. These children were all in pupillarity. They lived in family with their father, who was their legal guardian, and whose domicile was in England.

The legacies of £600 and £400 bequeathed under Mrs. Boileau's testament and codicils to Thomas Theophilus Boileau were paid to him on the marriage of his sister; but the legacies of similar amount left to Charles Boileau had not been paid. No deed of settlement or other deed was executed by the parties of the first part for the purpose of settling the residue of the estate upon Mrs. Wood and her children.

[935] The following were the questions for the opinion of the Court:—"1. Whether the shares of residue falling to the children of Mrs. Isabella Ann or Annie Boileau or Wood under the testament and codicils of Mrs. Boileau have now vested in the children, parties hereto of the second part? (2) Whether the parties of the first part are bound or entitled to apply the annual income arising from the said residue, or such part of said income as may be necessary, towards the maintenance and education of the said children (parties hereto of the second part), during their respective pupillarities and minorities? (3) In the event of the preceding question being answered in the affirmative, whether the said first parties are entitled or bound to pay over the said income, or such part thereof as may be applicable to said purpose, to Edward Wood, as the legal guardian of his said children? (4) Whether the said legacies of £600 and £400, bequeathed as aforesaid to the said Charles Elliot Boileau, vested in him prior to his death, and now belong to the third party as his executor; or whether the said legacies, or either of them, lapsed, and now form part of the residue of the estate of the said Mrs. May Clark or Boileau?" *

At advising,—

LORD BENHOLME.—The question in this case arises out of the settlement of Mrs. Boileau. She was survived by three children, viz., Theophilus, Charles, and Isabella Ann. Isabella married and left children.

Now, there are two sets of questions presented in this case—first, regarding the special legacies; and, secondly, regarding the residue. There is a distinct leaving of a bequest of £600 each to the two sons. Then there is a second legacy by a codicil in the following terms:—"Having come into the possession of more money than I calculated upon by the will of Miss Maddie Macpherson, I now bequeath the additional sum of four hundred pounds (£400) to each of my two sons, Theophilus Boileau and Charles Elliot Boileau. This additional sum not to be paid to them but in the event of the marriage of my daughter, Isabella Ann or Annie Boileau, or her death."

Regarding the two legacies to Theophilus there can be no doubt, for he survived the two events specified.

It was not so with Charles. He died before the marriage, and consequently before the death of the daughter. The question then arises, is the first legacy to be paid? The marriage of the sister not having in fact taken place during the lifetime of Charles, can we hold that that legacy ever vested? The ordinary rule (founded on the civil law) is, that it did not so vest, and I think that this rule applies to the circumstances here.

But this does not go to settle the question regarding the second legacy of £400. It was left on a different footing, namely, "on the marriage or death of Annie." Here there is a contingency besides marriage. The legacy is not left dependent on that uncertain event. It was left dependent on a certain event, namely death. It is true the marriage might come before the death, but one or other of these events must happen. Therefore, I think Charles's heirs were entitled to his share. The rule derived from the civil law is this—that when a legacy is made dependent on a certain event, and the legatee does not survive that event, the legacy is merely postponed. The certainty of an event happening some time renders the vesting absolute, postponing the time of payment. This rule was well illustrated in the case of Home *v.* Home. The case was this—A legacy was left to a party, half on attaining majority or marriage, the [936] other half on the death of A. B. The lady died before majority or marriage. It was held that there was a good claim by her next of kin for the half depending upon the certain event, namely A. B.'s death. As regarded the other half—depending

* Laing *v.* Barclay, July 20, 1865, *ante*, vol. iii. p. 1143; Ogilvie *v.* Cuming, Jan. 27, 1852, 14 D. 365; Hardman *v.* Guthrie, June 6, 1828, 6 Sh. 920; Home *v.* Home, Jan. 28, 1807, Hume, p. 530; Forbes *v.* Luckie, Jan. 26, 1838, 16 Sh. 374; Halbert *v.* Dickson, March 26, 1853, 16 D. 609; Carleton *v.* Thomson, July 30, 1867, *ante*, vol. v. H. L. p. 151.

upon majority or marriage, which never arrived—the legacy was held to have lapsed. The remarks made by Lord Braxfield appear to me sound, and to rule the present case. "One-half of it clearly lapsed, being left pendent on the condition of majority or marriage, which never arrived. . . . As to the other half, I think it vested in the child, though suspended in point of payment till the mother's death, which is a *dies certus*, that will happen, though uncertain when." This points out the capital distinction between events which *must*, and events which *may*, happen. It is clear that if the legatee does not survive the uncertain event, he does not take. But if he does not survive a certain event that does not interfere with the vesting.

As regards the vesting of the residue of the estate:—The terms of the document give a liferent to the daughter so long as she remains unmarried. Then in the event of her marriage there is a legacy to the sons. The lady died leaving children, and the questions are these—First, "Whether the shares of the residue falling to the children of Mrs. Wood under the said last will and testament and codicils of the said Mrs. Boileau have now vested in the said children, parties hereto of the second part?" This, I think, must be answered affirmatively. The second question is as follows—"Whether the parties of the first part are bound or entitled to apply the annual income arising from the said residue, or such part of said income as may be necessary, towards the maintenance and education of the said children, parties hereto of the second part, during their respective pupillarities and minorities?" This question must also be answered in the affirmative. The question cannot be considered without reference to the fact that these children have a legal guardian. They are English children, and their father is their legal guardian. In regard to the third question, I entertain no doubt. The executors are bound to pay over such part for the maintenance of the said children.

LORD COWAN.—On the first point submitted for the consideration of the Court I am of opinion that the shares of residue falling to the children of Mrs. Wood vested in them, subject, as regards the extent of their interest, to be diminished should other children be born entitled to participate in the bequest. The direction to the executors is to "invest" the free residue of the estate (in their own names), and pay over the annual proceeds for the liferent use of the daughter while unmarried, and in the event of her marriage (which happened), to "settle" the amount by such deeds as might be necessary on the daughter, in liferent, for her liferent use only, and to her "child or children in fee, equally and share alike, on their respectively reaching the years of majority, or being married,"—the issue of predeceasers taking "the succession that would have opened to their parent had he or she lived to the period of division of the sums hereby bequeathed to them in fee." This is a direct disposition of the fee to the children when born, as a class, so that, while the fee until their existence would be in the parent fiduciarily, the beneficial interest vested in them when they were born. There is no ulterior destination of the fee failing the children, assuming the daughter to be married and to have children of the marriage,—so that, upon her death leaving children, which is the case that has occurred, those children are the only parties having interest in the residue of this estate under the deed. This being so, I cannot view the words "on their respectively reaching the years of majority or being married" as a condition failing which, on the predecease of all the children, there would be intestacy. I think any such result would be inconsistent with the intention of the maker of this deed, and it appears to me that the words above recited must be held to have exclusive regard to the period of payment of their respective shares. Meanwhile, as a class, the existing children, in the circumstances which have occurred, are vested with right to the residue of this estate. And there can be no difficulty in carrying into effect the intention of the testatrix, seeing that the executors, in terms of the deed, have invested in their own names the funds, and which are held by [937] them, consequently, for behoof of and to all effects and purposes in trust for these beneficiaries.

2 and 3.—I concur in the views stated by Lord Benholme.

4.—As the testator's son Charles predeceased the event of his sister's marriage, I am of opinion that the legacy of £600 must be held to have fallen. The bequest is "in the event of the marriage" of his sister the executors are appointed "immediately thereafter to make payment" to each of the testator's two sons, Thomas and Charles, of the sum of £600. I do not think it doubtful that the bequest in its terms was conditional, and that the death of Charles, one of the legatees, before the condition

was purified, had the effect of preventing any right vesting in him that can now be claimed by his executors.

The other sum of £400 stands in a different position, inasmuch as by the terms of the codicil which bestows it there is, first, an unconditional bequest of the amount which by its terms would have vested the legacy in the legatee but for the condition which follows; and, in the second place, the condition attached to payment of the legacy is not merely the event of the sister's marriage, but also of her death. This last event, had it been the sole condition attached to the legacy, would not have prevented it vesting in the legatee at the testatrix's death. And I cannot think that the alternative condition should affect this result. As one of the two events could not have prevented the vesting of the legacy *a morte testatoris*, subject to the liferent of the daughter, I hold the better view to take of the intention of the testatrix in annexing the alternative condition was to give right to the legatee to immediate payment on that condition being purified, but not to suspend the vesting.

The LORD JUSTICE-CLERK and LORD NEAVES concurred.

THE COURT pronounced this interlocutor:—"Find, 1st, That the shares of the residue falling to the children of Mrs. Isabella Ann or Annie Boileau or Wood, under the last will and testament and codicil of Mrs. May Clark or Boileau, have now vested in the children, parties hereto of the second part; 2d and 3d, That the first parties are bound to pay over the annual income arising from the said residue to the said Edward Wood, as the legal guardian of his said children, towards the maintenance and education of the children, parties hereto of the second part, during their respective pupillarities and minorities, or such part thereof as may be necessary for such purpose; 4th, That the legacy of £600 bequeathed to Charles Elliot Boileau did not vest in him prior to his death, but lapsed, and now forms part of the residue of the estate of the said Mrs. May Clark or Boileau; and that the legacy of £400 bequeathed to Charles Elliot Boileau did vest in him prior to his death, and became payable on the marriage of Mrs. Wood," &c.

GIBSON-CRAIG, DALZIEL, & BRODIES, W.S.—MACKENZIE & BLACK, W.S.—Agents.

No. 164. X. MACPHERSON, 937. 5 July 1872. 2d Div.—I.

MRS. MARY HEPBURN HOME OR PAUL AND OTHERS.—*Crawford.*
LOUIS OLEAN HOME.—*Rhind.*
MRS. MARY HEPBURN HOME.—*Duncan.*

Succession—Conditional Institution—Substitution.—A testator assigned and disponed to A. and B., "equally between them, and in the case of the death of either without heirs of his or her body to the survivor of them, my whole real and personal effects whatsoever." *Held* that this was a conditional institution and not a substitution; and both A. and B. having survived the testator, the share of one who died intestate without heirs of his body went to his heir-at-law.

Heritable and Moveable—Undelivered Disposition—Bill.—Where subjects [938] stood feudally vested in a trustee for behoof of a beneficiary, and the trustee, with consent of the beneficiary, disponed them to a third party "under the real burden" of the price, taking at same time the disponee's bill for the amount, the bill having never been retired nor the disposition delivered, *held* that the interest of the beneficiary in the subjects was heritable.

Miss Christian Aitchison, by a codicil dated 27th May 1830, assigned and disponed "to John Belsches Home and Mary Hepburn Home, equally between them, and in case of the death of either without heirs of his or her body, to the survivor of them, my whole real and personal estate and effects whatsoever." The granter died in December 1836, survived by John Belsches Home and Mary Hepburn Home, who were both then resident abroad. John Belsches Home died in Texas in October 1851, unmarried and intestate. The personal representatives of John Belsches Home were the first parties to this case. Louis Olean Home, the heir in heritage to John Belsches Home, was the second party.

agree that it is not a question of pure competency, but of sound or unsound judgment. On the whole, I am inclined to sustain the competency of the appeal.

LORD KINLOCH.—I am of opinion that the rule that no interest is given on damages until liquidated by decree or verdict is not an absolute or inflexible rule, and therefore it is not incompetent to conclude for interest from a different date in an action of damages. Whether the pursuer is entitled to get it from that date is a different question. I consider the appeal plainly competent. It is settled that in order to judge of the value of a cause the Court may take into view the interest as well as the principal sought by the pursuer. In some previous cases the sum concluded for was below £25, and the summons did not shew whether the addition of interest would bring the sum above that amount. Hence it was necessary to resort to the decree in evidence. Here there can be no doubt, because the amount concluded for being £25, the very smallest sum of interest that can be arithmetically stated brings the value of the cause above that amount.

On the merits it was argued for the appellants (defenders);—No time having been fixed for delivery of the iron, the contract was a ready money contract for immediate delivery and payment, and it was incumbent on the pursuers to have at once furnished the defenders with a specification, as was the custom in the trade, without which they could neither manufacture nor deliver the article sold. This was a condition precedent to the performance of the defenders' part of the contract, and when it was not performed in due time they were liberated.* In this case there was, moreover, a special demand for confirmation or acknowledgment in writing, which the pursuers did not comply with. The defenders were therefore justified in regarding the proposed bargain as departed from, or rather as never having been completed.

LORD PRESIDENT.—This action is laid on a verbal contract, confirmed, as the purchaser says, by a letter written on the same day by the seller to the purchaser. The defence is that there was no concluded bargain, and that by the letter libelled the defender proposed to conclude a sale, which the pursuer refused or at least failed to do. Then, when the purchaser asked for performance, he was informed by the defender that there was no contract between the parties. Now, looking to the evidence of Robertson, one of the pursuers, on the one hand, and of Martin, one of the defenders, on the other hand, it appears impossible to doubt that a verbal contract was entered into on 7th July. The defenders' [953] account is, not only in substantials but in almost every detail the same as the pursuers'. Now, if the case had stood upon that evidence alone there could have been no question as to the constitution of the contract. But when the seller goes home he writes a letter to the purchaser, which was not answered by the purchaser. He did not comply with the request contained in the letter, and the reason he gives is that he considered the bargain already concluded, and did not think it of the least consequence whether he answered the letter. I confess I agree with him. It might have been as well if he had written and said "All right," but his failure to do so cannot annul the bargain; and most certainly it is not the right of the seller, after concluding a verbal bargain in which there was no stipulation that it should be reduced to writing, afterwards to insist on converting it into a written contract. So that this letter was either superfluous or it was an attempt to do what the seller had no right to do. It might be used as a piece of evidence as to the precise terms of the verbal contract, if there was any dispute about them; but there is none.

That being so, there remains the question, whether the Sheriff-substitute's interlocutor is well founded. He "finds in law that in contracts of this kind time is of the very essence of the bargain, and that the pursuers, by their failure to answer defenders' letter and to forward specifications of the kind of iron wanted, enabled the defenders to cancel the contract in question if they saw fit: Finds that the defenders having cancelled the bargain were justified in doing so, and in refusing to manufacture the iron referred to in the specification of 19th August." The first objection to this finding is that it sustains a defence not pleaded. The defender says there was no contract to cancel, no concluded bargain. That objection alone would be sufficient. But further, assuming that there was a contract, I find no ground for holding that the defender did cancel the contract, or that he was justified in doing so. He certainly did not cancel the contract, because he believed there was no contract. But further, on what ground

* Bell on Sale, p. 26; Chitty on Contracts, 671; Colvin *v.* Short and Co., June 26, 1857, 19 D. 890.

would he have been justified in cancelling it? Because the purchaser did not answer that unnecessary letter, and because he delayed to send a specification? Now, it must be remembered that both parties had an equal right and interest to push on the contract. If the purchasers were delaying too long to send a specification, it was the duty of the seller to remind them of the contract, and to insist on their sending a specification. But they did not and could not do so, because they maintained that there was no contract. So that there is no foundation for the Sheriff-substitute's judgment.

I am not sure that I agree with everything in the Sheriff's interlocutor, but I agree in the main ground of his judgment, that there was a concluded contract between the parties, and nothing to derogate from that concluded contract.

The other Judges concurred.

The following interlocutor was pronounced:—"Find that on the 7th July 1871 the defenders (appellants) by verbal contract sold to the pursuers (respondents), and the pursuers bought from the defenders, 50 tons of common bar iron at £7, 15s. per ton, less 5 per cent. discount: Find that the defenders, when called on to make delivery in terms of their contract on the 19th of August 1871, refused to do so, and thus committed a breach of contract: Therefore refuse the appeal, and decern: Find the appellants liable in expenses; allow an account," &c.

R. P. STEVENSON, S.S.C.—ADAMSON & GULLAND, W.S.—Agents.

No. 168. X. MACPHERSON, 954. 11 July 1872. 1st Div.—Sheriff of Renfrewshire, M.

WILLIAM STEEL AND OTHERS, Appellants.—*Trayner.*
COMMISSIONERS OF POLICE OF GOUROCK, Respondents.—*Sol.-Gen. Clark —Burnet.*

Public Health Act, 1867 (30 & 31 *Vict. c.* 101), *sec.* 73—*Interdict—Nuisance.*—A local authority under the Public Health Act having resolved to carry out a scheme of drainage, certain feuars petitioned the Sheriff for interdict on the ground that the proposed plan of drainage would cause a nuisance and injuriously affect their property. *Held* that as the application was really an attempt to bring the resolution of the Local Authority under the review of the Sheriff it had been rightly dismissed.

Observed that if a nuisance is actually created by the operations of a Local Authority those affected by it have an interest and a right to complain.

Question, Whether the Court would interfere if it were relevantly alleged that the operations of the Local Authority would necessarily cause a nuisance.

William Steel and others, feuars and residenters in Gourock, presented this petition to the Sheriff of Renfrewshire praying for interdict against the respondents, the Commissioners of Police and Local Authority under the Public Health Act, 1867, of the burgh of Gourock, from proceeding "with or carrying out the system of drainage adopted by the Commissioners for draining the burgh of Gourock, and the works proposed to be carried out by them; and also from interfering with the drains or sewers at present laid by the petitioners, and belonging to and used by them for carrying off the sewage from their respective properties. And on again considering this petition, after evidence shall have been led as to the proposed system of drainage, or the report of a skilled party shall have been obtained in regard to same, to find that the respondents have failed to comply with the provisions of the statute in carrying out their operations; and that the said operations and works, if carried out as at present contemplated, will prove injurious and a nuisance to the petitioners, as proprietors foresaid, or residenters in said burgh, or to their tenants and others, and to grant perpetual interdict from carrying out the said system of drainage and work," &c.

The petitioners set forth that they were proprietors and householders within the burgh of Gourock. They stated that the respondents had adopted and proposed to carry out a system of drainage for the burgh within certain limits, and had entered into contracts for carrying out the same under which the contractors (who were also called as respondents) were proceeding with operations; that the petitioners' properties were

already sufficiently drained, but that the respondents proposed to connect their private drains with the main sewer, and otherwise interfere with them; that "the system of drainage adopted by the Commissioners, and the works proposed to be carried out by them, are defective in many important points, and quite insufficient for the present and prospective wants of the burgh, and in particular the same are defective in regard to the fall or inclination of the sewer, the number and position of the proposed outlets, the size or diameter of the sewer, and the means of ventilation; that owing to the very slight fall or inclination in many parts of the proposed sewer, and especially at or near to the property belonging to the petitioner, William Steel, the heavy matter contained in the sewage will accumulate in the sewer; that foul air and noxious gases will in consequence generate and find their way by the side drains into the houses of the petitioners and others, and be the means of propagating fever and other pestilential diseases; that the principal outlet for the sewage from the village being at Church Street between the Steamboat Quay and [955] the Quarry Quay, and almost in the centre of a bay, the sewage from this outlet will in a great measure be deprived of the force of the tidal flow, and cannot be properly carried away, but will, especially when the wind is from the east, north-east, or south-east, be driven back upon the shore and into the centre of the bay, and thus injure the bay as a place for mooring yachts and other vessels, and prove a nuisance to the petitioners and other inhabitants of the burgh; and the principal outlet for the sewage from the houses and buildings west of the Steamboat Quay being intended to be at the west end of the property belonging to the petitioner, the said Mrs. Gamble, being at the extreme point of convergence or the part of the shore opposite the centre of the bay at Ashton, the sewage from this outlet cannot, for the same reason, be properly carried away, but the same, or portions thereof, will be thrown back upon the shore, opposite the petitioners' property, and prove a nuisance, and injurious to the petitioners and other inhabitants of the burgh; that the sewer is insufficient to meet the increasing wants of the burgh, and much expense will be incurred in enlarging and altering the same from time to time; that by the system it is proposed that a certain portion of the foul air from the sewer shall be forced up the rain conductors to the roofs of the houses in the burgh, and there escape; the foul air thus emitted is certain to find its way into the houses through the attic windows which are to be found in almost every house in the burgh, and the same will be most injurious to the petitioners and other inhabitants foresaid."

They asked a remit to a competent person to report whether the plan of drainage was complete and unobjectionable.

The respondents in their answers set forth the course of procedure they had followed in regard to their proposed system of drainage, and pleaded (1) that the Sheriff had no jurisdiction to entertain the present application; (2) that the application was incompetent in respect that the respondents were proceeding with due caution and deliberation in the *bona fide* execution of a statute which they were appointed by Parliament to administer;* (3) that it was incompetent, in respect the entertaining of it, or allowing inquiry under it, would virtually be to review the actings of the Local Authority, contrary to sec. 108 of the Act;† (4) that the allegations in the petition were irrelevant; and (5) unfounded in fact.

The Sheriff-substitute (Tennent), on 19th January 1872, "before answer, and under reservation of all questions, remits to Thomas Stevenson, C.E., to visit the spot and report on the averments of the petitioners, and especially on that part of them that

* The 73d section of the Public Health Act, 1867 (30 & 31 Vict. c. 101), enacts that the Local Authority shall have power to construct within their district, and also when necessary for the purpose of outfall or distribution of sewage without their district, such sewers "as they may think necessary, for keeping their district properly cleansed and drained, and may carry such sewers through, across, or under any turnpike or other road, or any street or place, or under any cellar or vault, provided no nuisance is created by such operations; and if any person is thereby deprived of the lawful use of any sewer, the Local Authority shall provide another sufficiently effectual for his use. The Local Authority shall cause their sewers to be so constructed, kept, and cleansed as not to be a nuisance," &c.

† Section 108 provides, *inter alia*, that "no decree or order or any other proceeding, matter, or thing done in the execution of this Act shall, except as herein provided, be subject to review in any way whatever."

states that the proposed works will constitute a nuisance, injuriously affecting the petitioners' property"; and he granted interim interdict.

The Sheriff (Fraser) on appeal recalled the remit, and appointed a record [956] to be made up. The record being closed, and parties heard, he pronounced an interlocutor, 15th February 1872, in which he "dismisses the petition: Recalls the interim interdict, and decerns: Finds the respondents entitled to expenses, with the exception of the expenses of the remit to Mr. Stevenson; and *quoad* these, finds both parties equally liable; allows accounts to be lodged, and remits the same to the Auditor of Court to tax and report." *

---

* "NOTE.—In dismissing this petition the Sheriff does not do so upon the ground that he has no jurisdiction to entertain it. A petition asking a Sheriff for interdict against a nuisance is a competent proceeding. The Sheriff rests his judgment upon more general grounds.

"The Public Health Act, passed in the year 1867, came in place of the Nuisances Removal Act of 1856, the Sanitary Act of 1866, and certain clauses of the General Police and Improvement (Scotland) Act, 1862. It was found impossible to carry out these Acts into practical working in Scotland, and representations having been made to this effect to the Government of 1867, the Public Health Act of that year was passed. By this Act certain bodies in every parish were charged with the administration of the laws relative to public health, subject to the control of the Board of Supervision for the Relief of the Poor in Scotland. There were also certain cases in which the Sheriff was called upon to decide, and his judgment was declared by the 108th section not subject to appeal, under certain exceptions. Lastly, there is a power given to the Board of Supervision, with the approval of the Lord Advocate, to apply to a Division of the Court of Session by summary petition for the legal remedy necessary, 'in case any Local Authority shall refuse or neglect to do what is herein or otherwise by law required of them, or in case any obstructions shall arise in the execution of this Act.'

"The Sheriff cannot find in the reports of the decisions of the Supreme Court any case, except one, where the Board of Supervision have been under the necessity of applying to the Court of Session for its aid. The case referred to is Board of Supervision *v.* Dull, 9th June 1855, 17 D. p. 827. It is understood that the board has endeavoured to induce Local Authorities, both in the administration of the poor-laws and of the public health, to do their duty, more by persuasion and advice than by legal prosecution, and all the more that to many of these Local Authorities correct ideas upon the matter of public health are imperfectly known. It is so difficult in many cases to get any motion taken at all in villages that have not known what foul drainage is, and who are using wells polluted with the flow from neighbouring midden-steads, that it is satisfactory to find a body like the Local Authority of Gourock taking up the matter of drainage of that village with energy and determination.

"The Sheriff is now called upon to say that this Parlimentary Commission, whose duty it is to provide proper drainage for Gourock, shall be controlled by a Court of law from carrying out a scheme which, in their best judgment, and in all good faith, and after taking the aid of skilled intelligence, they have resolved upon. There is no allegation against them farther than this, that they have made an error in judgment. It is not said that they have any corrupt motive in what they have determined to do, nor that they have come to their resolution without due care and consideration; and the petitioners now ask the Sheriff, upon the allegation that the scheme of drainage is a bad one—supported as they will no doubt do it by their own engineers—to determine the relative value of the conflicting opinions of rival engineers. This jurisdiction was not given even to the Board of Supervision, and the Sheriff is of opinion that it was not given to him. If the Local Authority had not proceeded with a system of drainage, they would, no doubt, have been prosecuted for neglect of duty at the instance of the Board of Supervision under the 97th section. But then the petitioners are not without their remedy, for the 73d section provides for the case of a nuisance created by the operations of the Local Authority. If such a nuisance be created, then is the time for the petitioners to apply for redress [957] to a Court of law. It is a totally different inquiry whether a nuisance exists, from what it is, whether a nuisance will be created. The Sheriff, or any other unskilled layman, could quite fitly determine the former question, and be left at sea in casting the balance of conflicting evidence of engineering witnesses in regard to a mere

[957] The petitioners appealed, and argued;—Section 122 of the statute in question provided that "nothing in this Act shall be construed to impair any right of action in respect of nuisances at common law." They were here seeking the aid of the Courts of law in exercising their common law right of preventing the injury of their property by an intended work, which they were prepared to shew would be a nuisance. The powers conferred on the respondents did not entitle them to commit a nuisance, but the reverse was expressly provided; and the Court was bound to interfere if it were shewn that they were not administering but violating the statute.

At advising,—

LORD PRESIDENT.—If the Act of 1867 had given to the inhabitants, or the proprietors, or the ratepayers, a right to appeal against the decision of the Local Authority with regard to the system of drainage to be adopted in any place, the Court would have been bound to listen to them, and to consider the merits of the question brought before them. But the statute has given no such right of appeal, and has given no power to review the Local Authority's resolutions. This is not, indeed, in form an appeal against a resolution of the Local Authority; but [958] substantially it is an application to us to prevent the Local Authority from carrying a resolution into effect. No doubt it is said that the respondents are violating the statute. Section 73 of the statute enacts that the Local Authority shall have power to construct certain works and sewers, "provided no nuisance is created by such operations," and that the Local Authority shall "cause their sewers to be so constructed, kept, and cleansed as not to be a nuisance." And the allegation is that they are about to commit a nuisance. If it could be demonstrated, or if it were relevantly stated, that the operations of the Commissioners would necessarily have the effect of causing a nuisance, there might be a question for our consideration. But that is not the nature of the allegations. On the contrary, the petitioners say that the respondents propose to adopt a bad system of drainage. They say that "the system of drainage, . . . and the works proposed to be carried out, are defective in many important points, and quite insufficient for the present and prospective wants of the burgh, and in particular the same are defective in

---

matter of opinion. If the Local Authority by their operations create a nuisance, their whole work may require to be undone. But in the meantime the drainage operations in Gourock will go on, in place of their being delayed, it may be, while this case is running the course of appeal from Court to Court.

"The petitioners have mistaken their remedy. If they consider that the scheme of drainage for their village devised by the Local Authority is a bad one they must just turn out their representatives at the local board at the next election, or wait until a nuisance actually exists, and then compel the Local Authority to remove it.

"The Sheriff has disposed of this case without the aid of any direct authority or precedent in the judgments of the Supreme Court. None of the cases which he can find directly rule the present one, and therefore he thinks it unnecessary to analyse those cases where somewhat similar questions have been mooted. They seem to be the following:—Lord Advocate *v.* Police Comrs. of Perth, 7th December 1869, 8 Macph. p. 244; Smeaton *v.* Police Comrs. of St. Andrews, 17th May 1865, 30th May 1867, and 10th December 1868, and also in House of Lords, 20th March 1871, 9 Macph. p. 24, H. L.; Blantyre *v.* Trustees of Clyde Navigation, 3d March 1871, 9 Macph. p. 6; Bremner *v.* Huntly Friendly Society, 4th December 1817, F. C.; Dunbar *v.* Levack, 10th February 1858, 20 D. p. 538; Guthrie *v.* Miller, 25th May 1827, 5 Sh. 711; Nicol *v.* Magistrates of Aberdeen, 20th December 1870, 9 Macph. p. 306; Douglas *v.* Dundee and Newtyle Railway Company, 22d December 1827, 6 Sh. p. 329.

"It was shewn to the Sheriff, by letters produced at the discussion, that the respondents acquiesced in the remit to Mr. Stevenson. It would have been a very satisfactory thing to have got the opinion of so eminent an engineer upon the facts if it were competent for the Sheriff to inquire into them. It is understood that Mr. Stevenson has returned, on the instructions of one of the parties, a report which is in process, but sealed up. His inspection not having been made in presence of both parties, the report has not the authority it otherwise would have, and the Sheriff has declined to look at it for the reasons above assigned. But entertaining the opinion which he does as to the incompetency of this process, the Sheriff saw it to be his duty to recall the remit to Mr. Stevenson. As, however, it was agreed to by the respondents, they have been made liable in one-half of the expenses connected with it."

regard to the fall or inclination of the sewer," &c.; that owing to the slight fall or inclination, the heavy matter contained in the sewage will accumulate in the sewer; that "foul air and noxious gases will in consequence generate and find their way by the side drains into the houses of the petitioners and others, and be the means of propagating fever and other pestilential diseases." Then there is a particular statement about a certain outlet which is said to be of such a nature and in such a situation that in certain states of the wind the sewage will be driven back upon the shore, "and thus injure the bay as a place for mooring yachts and other vessels, and prove a nuisance to the petitioners and other inhabitants of the burgh"; and it is also said with regard to the principal outlet that the sewage cannot be carried away, but "will prove a nuisance and injurious to the petitioners and other inhabitants of the burgh; that the said sewer is insufficient to meet the increasing wants of the burgh, and much expense will be incurred in enlarging and altering the same from time to time"; and so forth. That, therefore, is really an application to the Sheriff to consider the question how Gourock ought to be drained, and in that respect to consider and review the resolution of the Local Authority. That is the ground on which the Sheriff has properly and discreetly proceeded. If a nuisance is created by the operations of the respondents there is no doubt that those who are affected by it will have an interest and a right to complain.

The other Judges concurred.

The following interlocutor was pronounced:—"Refuse the appeal, and decern: Find the appellants liable in expenses; allow an account," &c.

W. MASON, S.S.C.—L. M. MACARA, W.S.—Agents.

No. 169. X. MACPHERSON, 958. 12 July 1872. 1st Div.—Lord Ormidale, B.

HENRY BUDGE (Trustee in A. G. Smith's Sequestration), Pursuer.—*Scott—Watson—Strachan.*

THE TRUSTEES OF THE LATE LAURENCE BROWN AND THOMAS BALFOUR, Defenders.—*Sol.-Gen. Clark—M'Laren.*

MISS AGNES MUIR AND OTHERS, Compearers and Defenders.—*Marshall.*

Bankruptcy Act, 1856 (19 & 20 *Vict. cap.* 79), *sec.* 118—*Right in Security—Preference.*—A heritable creditor holding a decree of maills and duties, but who has not charged on it sixty days before the sequestration of his debtor, is entitled, under sec. 118 of the Bankruptcy (Scotland) Act, to draw from the rents of the heritable estate only the interest of his debt for the half-year current at the date of the sequestration, and the arrears of interest for the year immediately preceding; and if he has entered into possession under his decree, he is bound to account to the trustee in the sequestration for the rents, under deduction of such interest and arrears of interest, and of the necessary expenses of repair and burdens, payable in respect of the subjects during his possession.

[959] By bond and disposition, dated 13th May 1863, Mr. Alexander Gordon Smith, in security of a debt of £6000, conveyed certain house property in Edinburgh to Thomas Dall, C.A., as guardian of the children of the late John Blair.

The property was subsequently burdened with three other debts of £282, 14s. 11d., £250, and £550 respectively due to Miss Agnes Muir and others, whose claims were secured by postponed bonds and dispositions in their favour.

The interest due on the first-mentioned bond not being paid at Whitsunday 1867, Mr. Dall, on 29th October following, raised an action of maills and duties, in which he obtained decree in absence on 19th November, and thereupon entered into possession of the subjects, which yielded a gross rental of about £600 per annum, The decree was extracted on 4th December 1867, and within sixty days thereafter, on the 23d January 1868, Mr. A. G. Smith's estates were sequestrated, and Mr. Henry Budge, C.A., was elected and confirmed as trustee in the sequestration.

Thereafter, by assignation dated 8th and recorded 10th February 1868, Mr. Dall conveyed the bond and disposition in security in his favour, along with the decree of maills and duties which he had obtained, to the trustees of the late Laurence Brown, and Thomas Balfour, writer in Edinburgh.

The rents of the property which fell due at Martinmas 1867 were uplifted and intromitted with partly by Mr. Dall and partly by his assignees, and the subsequently accruing rents, down to the term of Whitsunday 1870 inclusive, were drawn by the assignees.

In April 1871 Mr. Budge, the trustee in the sequestration, raised an action of count, reckoning, and payment against Dall's assignees, calling upon them to account for their whole intromissions with the rents of the property.

The pursuer, founding on the 118th section of the Bankruptcy Act, 1856,* pleaded;—Their decree of maills and duties is, under the Bankrupt Act, not available to the defenders in a question with the pursuer, or otherwise at least is only available to the defenders in a question with the pursuer for the interest on their bond for the half-year from Whitsunday to Martinmas 1867, and any arrears for the year immediately preceding.

The defenders pleaded;—The provisions of the Bankruptcy (Scotland) Act, section 118, only limit the defenders' security under their decree of maills and duties, in so far as regards arrears of interest, and do not prevent it from operating as a security for interest accruing after the date of the decree.

The Lord Ordinary pronounced this interlocutor:—"Finds that the accounting in this case must proceed on the footing that the rents in question are chargeable under the defender's decree of maills and duties with (1) the interest resting owing to them, in virtue of the bond founded on by them for the half-year from Whitsunday to Martinmas 1867; (2) any arrears of interest resting owing to them under said bond for the year preceding said half-year; and (3) the necessary expenses of keeping [960] the subjects yielding the rents in question in repair; as also the feu-duties, rates, taxes, or other burdens payable in respect of said subjects during said year and a half; and with this finding, remits to Mr. James Howden, chartered accountant in Edinburgh, to examine the proceedings, and to report *quam primum* to the Lord Ordinary on the intromissions of the defenders with the rents in question, and as to what sum is due by them under the present action, with power to the accountant to hear the parties, and to call for all accounts, vouchers," &c.†

---

* 19 & 20 Vict. c. 79, which provides "that no decree of maills and duties on which a charge has not been given sixty days before the sequestration shall (except to the extent hereinafter provided) be available in any question with the trustee, provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee, shall be prevented from obtaining a decree of maills and duties after the sequestration; but such decree shall, in competition with the trustee, be available only for the interest of the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term."

† "NOTE.—In the debate before the Lord Ordinary the discussion was confined entirely to the subject of the finding in the preceding interlocutor, it having been stated to the Lord Ordinary by both parties that, *quoad ultra*, a remit to an accountant, such as has now been made, was the proper course.

"The matter which has now been disposed of by the Lord Ordinary is regulated by section 118 of the Bankruptcy (Scotland) Act, 1856. It appears to the Lord Ordinary that, having regard to the terms of that section and to the state of the facts, and, in particular, to the fact that no charge was or could have been given under the defenders' decree of maills and duties sixty days prior to the sequestration in question, the finding in the interlocutor now pronounced is in accordance with the true meaning and construction of the statute, the general object of which, and the rights of a trustee in a sequestration, so far as the present dispute is concerned, are well explained by Mr. Bell, in the Commentaries published by him in 1840, for although these Commentaries related to the Bankruptcy Act of 1839 (2 & 3 Vict. cap. 41), and not that of 1856, they are, as regards the matter in question, equally applicable. And it further appears to the Lord Ordinary that the construction of the statute contended for by the defenders, as referred to in their pleas in law, especially their second and third pleas, is inadmissible. The Lord Ordinary thinks it only necessary further

The defenders having reclaimed, the Court, on 24th November 1871, before answer, appointed both parties to "lodge in process a state of the debt due to the defenders as heritable creditors, giving effect to the sums received or alleged to be received by them out of the rents of the estate under the decree of maills and duties or otherwise."

From the states lodged it appeared that the sum of £7150 for which, after the action was raised, the property had been sold by Miss Agnes Muir, one of the postponed bondholders, would be more than sufficient to extinguish the debt, principal and interest, due to the defenders, and that if they were entitled to impute the rents drawn by them towards payment of their debt, the price of £7150 would be sufficient to meet not only the balance of their claim, but also to pay the postponed bondholders in full, or nearly so; but, on the other hand, if the pursuer was entitled under the 118th section of the Bankruptcy Act to the surplus rents, after deducting the interest due to the defenders, during the period specified by the statute, the balance of the price available to meet the claims of the postponed bondholders would be of small amount, and they would have to rank as unsecured creditors for the greater part of their claims.

In these circumstances, the Court having indicated an opinion that Miss Agnes Muir and the other postponed bondholders should be made parties to the action, they were sisted as defenders.

On renewing the discussion the defenders argued;—The right of a heritable creditor to the rents of the estate over which his security extends is not dependent on his obtaining a decree of maills and duties. It is true that he cannot without such decree compel the tenants to pay their rents to him. But though a decree of maills and duties is necessary to give [961] him an active title to uplift the rents, his right to the rents, so far as not uplifted, is equally good without such decree,* and a heritable creditor, in virtue of his infeftment alone, has been held preferable to an arrester of the rents.† The right of the heritable creditor to the rents being created by his infeftment and not by the decree of maills and duties, the limitation of the effect of a decree of maills and duties by section 118 of the Bankruptcy Act cannot affect the creditor's right to the rents. The only object of that section is to prevent an heritable creditor from interfering with the management of the trustee, except to a certain limited extent. The right of administration of the heritable estate may often be a very valuable one, and it is the policy of the Act that this shall be in the direction of the trustee. But that does not affect the right of the heritable creditor to the rents, by whomsoever they are drawn. The trustee holds the estate, subject to such preferable securities as existed at the date of the sequestration (sec. 102). In this case the creditor has a power of sale. But in determining the meaning of the statute this specialty must be set aside, and the case of an heritable creditor considered who has no power of sale. According to the interpretation contended for by the trustee, such a security-holder could be kept for an indefinite period, at the pleasure of the trustee, out of all benefit of his security, if the trustee chose not to sell. Assuming the defenders' contention to be right, the preferable security-holders were not only entitled, but bound, in justice to the postponed bondholders, to apply the rents in extinction of their debt, and not to hand them over to the trustee.

Argued for the pursuer;—It is conceded by the defenders that a heritable creditor cannot compel payment of the rents without a decree of maills and duties, and therefore the trustee has the right to uplift the rents, except to the extent provided by section 118. As soon as rents come into the possession of the proprietor, they are funds available for all his creditors; there is no *nexus* in favour of the creditor who holds a security over the subjects from which they are drawn. And the same holds good when the trustee is substituted for the proprietor. The rents that come into the hands of the trustee, except as otherwise provided, are funds available for the whole creditors. If the defenders' interpretation of the statute were correct the result would be very singular.

---

to remark that both parties were agreed that the 'current half-yearly term' referred to in the statute must be held to be the half-year current at the date of the service of the summons of maills and duties."

* Bell's Com., vol. i. p. 757 (M'L. 793).

† Kelhead *v.* Wallace, 1748, Dict. 785; Webster *v.* Donaldson, 1780, Dict. 2902; Ersk. iii. 5, 5.

For a certain period the heritable creditor would have the right to draw the rents and pay himself the three half-years' interest allowed by the statute. For any surplus he would have to account to the trustee; but this very surplus, according to the defenders' contention, falls to be paid back by the trustee to him. In regard to securities without a power of sale, the unfortunate result which the defenders have mentioned is merely the consequence of the creditor having taken an imperfect security. In the cases of Kelhead and Webster, cited by the defenders, the question was between competing creditors, and there was no bankruptcy.

At advising,—

LORD KINLOCH.—The parties before us are, on the one hand, certain heritable creditors of Mr. Alexander Gordon Smith, holding bonds and dispositions in security, with the usual clause of assignation of maills and duties; and on the other hand, Mr. Henry Budge, trustee on Mr. Smith's sequestrated estate. The question raised regards the effect of an action of maills and duties at the instance of the first heritable creditor (in the settlement of whose claim the postponed creditors are materially interested), in competition with the sequestration. This [962] question involves a consideration of the right of an heritable creditor holding such an assignation.

I think it cannot be doubted that the right to the rents, on the part of such a creditor, is constituted by his bond and infeftment. It has been sometimes said that the effect of the infeftment is to operate an intimation of the assignation in the bond; and this in a certain sense is true. But the expression is misleading. The right of the heritable creditor under his bond and infeftment is not *eo ipso* that of full proprietor of the rents, so that any one uplifting the rents is taking what belongs to the creditor, and must restore it. The creditor's right is that of an incumbrancer, not a proprietor. And in order to its full evolvement and enforcement it requires judicial steps on his part. These are generally taken by raising a summons of maills and duties, the effect of which, duly followed out, will maintain the creditor's preference. But the cases of Lady Kelhead *v.* Wallace, Mor. 2785, and Webster *v.* Donaldson, Mor. 2902, shew that this step is not indispensable, but that, so long as the rents are *in medio*, the judicial appearance of the creditor, as in a process of multiplepoinding, will suffice for his success in competition. This proceeds on the simple ground that what the creditor could at once do in the way of raising a summons of maills and duties may be reasonably supposed to be done, so long as the rents are *in medio*. If, however, before any steps are taken by the heritable creditor, the proprietor by whom the bond was granted uplifts the rents, there is, as I conceive, no legal bar to the tenants paying him, and the heritable creditor will have no legal claim against them for a second payment. In the same state of things the personal creditors of the landlord may, as I think, arrest the rents; and if, by means of a decree of furthcoming, the rents are carried off before the heritable creditor comes forward, they will not be liable to be reclaimed at the instance of the heritable creditor. But if the creditor has once raised his summons of maills and duties, no one can come into effectual competition with the right created by his bond and infeftment.

Such I conceive to be the general principles applicable to the case, and I think these principles supply an easy solution to the question touching the right of such an heritable creditor in a competition with a sequestration under the Bankrupt Statute. Independently of the special provisions introduced by the statute, which I shall immediately consider, I think it necessarily follows that the raising a summons of maills and duties at any time anterior to the date of sequestration will preserve the creditor's right of preference over the rents. It will do so by virtue of the principle that such a step maintains the preference created by the bond and infeftment over every assignation or diligence not carried into full completion by appropriation of the rents. There might be more difficulty as to a summons of maills and duties raised after sequestration, in respect of the strong vesting clauses in favour of the trustee,—a question not necessary to be considered. But I think it beyond all doubt that, independently of special provision, the raising of a summons of maills and duties the very day before sequestration would be sufficient to give the heritable creditor a right to the rents then due, and to all accruing afterwards, to the exclusion of the trustee in the sequestration.

But the Bankrupt Statute provides, by sec. 118, "that no poinding of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration, and no decree of maills and duties in which a charge has not been given sixty days before the said date shall, except to the extent hereinafter provided, be available in any question with the trustee; provided that no creditor who holds a security

over the heritable estate, preferable to the right of the trustee, shall be prevented from executing a poinding of the ground or obtaining a decree of maills and duties after the sequestration; but such poinding or decree shall, in competition with the trustee, be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for the year immediately before the commencement of such term."

I can put only one construction on this provision, viz., that it was intended to limit the preference, otherwise competent, of the heritable creditor. Independently of such a provision, the creditor would carry off the rents from the trustee by a maills or duties raised at any time anterior to sequestration. The [963] statute enacts that, except to a qualified extent, this privilege shall cease sixty days before sequestration; or, as more precisely put in the statute, unless a charge on the decree of maills and duties shall have been given sixty days previous. Any summons of maills and duties, where the decree has not been charged on sixty days before sequestration, and every action of maills and duties raised subsequently to sequestration, will be only available to secure the half-year's current interest, and previous arrears to the amount of one year's interest. This seems to me to be the plain import of the provision. The only counter-interpretation presented to us was that it merely imported a regulation as to possession, viz., that the creditor should be entitled to enter into possession, to the effect of helping himself to eighteen months' interest, but that for all besides he must go against the trustee,—his right to the rents, however, being exactly the same in both cases. I consider this interpretation to be altogether inadmissible, and to imply a most unmeaning arrangement as intended by the Legislature,—the arrangement, namely, that, although having right equally to all the rents due at any term, the creditor was to levy them to the extent of eighteen months' interest himself, and *quoad ultra* through the hands of the trustee. I think the clause was intended to regulate and qualify legal rights. The declaration is that, except to the limited extent of eighteen months' interest, the action of maills and duties shall not "be available in any question with the trustee"; or again, "shall, in competition with the trustee, be available only for the interest on the debt for the current half-yearly term, and for the arrears of interest for one year immediately before the commencement of such term." These words are unsusceptible of any other than one meaning.

There can be no doubt that, notwithstanding this provision as to the rents, the heritable creditor is entitled, on a sale of the subjects, to realise out of the price the full amount of his claim, both principal and arrears of interest. He therefore sustains no injury by the provision, except a postponement of payment, and the imposition of the risk that the price on a sale may fall short. It is not easy to give precise expression to the policy which dictated this provision in the statute as to the rents. It may be that these rents having, after falling due, the nature of personal estate, the Legislature intended to admit the personal creditors to a larger participation in these, and to throw the creditor back, to a larger extent, on the capital of the property. Or the intention might possibly be to quicken the diligence of the heritable creditor in effecting a sale, and so enabling the bankrupt's affairs to be wound up, which would be much less likely to be active if the creditor should have the power of postponing a sale and continuing to draw the rents for an indefinite period. But the policy of the statute is mere matter of speculation, into which I would think it out of place to enter at large. The words of the statute I consider explicit, and hold that they must be given effect to according to what I think their clear import.

I therefore agree with the Lord Ordinary in point of principle, holding with his Lordship that the heritable creditor in this case, who had not given a charge on his decree of maills and duties before sequestration, was only entitled to the limited preference of the statute. But I think his Lordship and the parties wrong in taking the date of service of the summons of maills and duties as the date at which the current half-year's interest is to be struck, and from which a year's arrears are to be retrospectively calculated. I think the true date is that of the sequestration. The clause is intended to regulate the competition between the sequestration and the individual diligence, and the date of the sequestration must be held the moment of time at which the conflict arises. It never could be intended to give the heritable creditor the power of delaying his diligence after the sequestration had issued, so as to embrace a year's arrears not due at the time of the sequestration but accruing subsequently. A fixed point of time for the occurrence of the competition must have been contemplated, and this could be no other than the date of sequestration. Correcting this error, I am of opinion that

the Lord Ordinary's interlocutor should be adhered to, and the rights of the parties interested adjusted on this footing.

LORD ARDMILLAN concurred.

[964] LORD DEAS.—The estates of the bankrupt Smith were sequestrated on 23d January 1868, and the pursuer, Mr. Budge, was elected on the 3d and confirmed on the 7th February as trustee in the sequestration. The bankrupt was proprietor of certain houses in Edinburgh, which were affected by four different heritable securities,—the first to Mr. Dall, for behoof of the late Mr. Blair's children, for £6000; the second to Sutherland's trustees for £282 odds; the third to Miss Johnston for £250; and the fourth to Miss Muir for £550.

The interest due at Whitsunday 1867 having been unpaid, Mr. Dall raised an action of maills and duties against the bankrupt and the tenants on 29th October 1867, and obtained decree in absence on 19th November, and extracted it on 4th December 1867. In virtue of this decree he and the defenders, Brown's trustees, as his assignees, uplifted the greater part of the rents from Martinmas 1867 to Whitsunday 1870, both terms inclusive.

Mr. Budge, the trustee in the sequestration, instituted this action against Brown's trustees to recover, for behoof of the general creditors, the rents drawn by these trustees and their cedent, and which were proposed to be applied by them towards payment of their debt and interest. After the action had been brought, the heritable subjects were exposed to sale by Miss Muir, one of the postponed bondholders, for £7150. As this sum was more than sufficient to pay the debt due to Brown's trustees, their contention came virtually to be a contention for the benefit of the postponed bondholders, and the case having accordingly been delayed that these bondholders might be called, they sisted themselves as parties, and having been heard for their interest we have now to decide what effect is to be given to the decree of maills and duties, and possession following upon it by the first heritable creditors, Brown's trustees,—in other words, to what extent are the rents drawn by them legally applicable to the reduction of their debt and interest in competition with the trustee in the sequestration.

To solve this question we must attend to the position in which an heritable creditor stood prior to the Bankruptcy (Scotland) Act, 1856, and to the change which that Act has made in his position.

Prior to the passing of that Act the heritable creditor had a real right over the heritable estate for the principal sum and whole interest which might accrue thereon till payment. In order, however, to make that right effectual for the interest against the rents or beneficial use of the subjects, it was necessary that he should either obtain a decree of maills and duties or execute a poinding of the ground, the former being a real petitory action, and the latter a real diligence adapted (according to circumstances) to attain that object. The only decisions which might seem to indicate that the right in question could be made effectual without either a decree of maills and duties or a poinding of the ground are decisions pronounced in certain processes of competition holding the heritable creditor preferable to an arresting creditor. But the explanation of these decisions is, that as the heritable creditor could still have taken these steps, and so made his preferable right effectual, it was thought unnecessary to compel the incurring of useless expense by insisting on these forms being gone through. These decisions, therefore, are not to be regarded as inconsistent with the general rules referred to.

The Bankruptcy Act, 1856, does not take away the right of an heritable creditor to resort to an action of maills and duties or a poinding of the ground, either before or after sequestration has been awarded. But it provides (sec. 118) that if a sale has not followed on a poinding of the ground sixty days before sequestration, or if a charge has not been given upon a decree of maills and duties sixty days before sequestration, such poinding or decree "shall, in competition with the trustee, be available only for the interest on the debt for the current half-yearly term, and the arrears of interest for one year before the commencement of such term."

I have no doubt that "the current half-yearly term," referred to in this enactment, is the half-yearly term current at the date of the sequestration, and not, as the Lord Ordinary held, the half-yearly term current at the date of service of the summons of maills and duties. It follows that the year for which unpaid arrears of interest can be claimed preferably is the year preceding Martinmas [965] 1867, and not (as the Lord Ordinary held) the year preceding Whitsunday 1867.

The effect of the statute upon the present case is thus to limit the preference

vindicated by the extracted decree of maills and duties to the interest for the half-year between Martinmas 1867 and Whitsunday 1868, and any arrears of interest due for the year from Martinmas 1866 to Martinmas 1867. The rights of an heritable creditor are thus so far changed for the worse. To make these rights effectual as regards interest he must resort to the same proceedings as formerly; but the effect of these proceedings, when resorted to, is more limited than formerly. That is obviously the policy of the statute, and we must enforce it according to its terms.

As regards the position of the trustee, it is enough to say that the various clauses of the statute very amply confer on him all the rights in relation to the heritable subjects and the rents thereof which are not vested in the heritable creditors.

LORD PRESIDENT.—I entirely agree with Lord Kinloch, and particularly in his exposition of the rights of an heritable creditor to the rents of the estate over which his security extends, and on that matter I have nothing to add. The only additional observation I have to make is, that even if there were any doubt in regard to the principles of law applicable to the powers of an heritable creditor, section 118 of the Bankruptcy Act is so clear in its expression as to be incapable of any other interpretation than that which has been given. It declares—taking the latter part first—the heritable creditor to be preferable to the trustee, although nothing has been done by him effectual till within sixty days of the sequestration, to the extent of the interest of the debt for the current half-year, and for the arrears of interest for one year preceding. His right to the rents is to be preferable to that of the trustee to that extent, but to no other extent shall a decree of maills and duties, on which a charge has not been given sixty days before sequestration, be available in any question with the trustee. Now, I cannot imagine that the one part of the statute means anything different from the other. By the phrases "shall be available in any question with the trustee," and "shall in competition with the trustee be available," the same thing is meant. If the right of the heritable creditor is not available in any question with the trustee, that leads us to consider what is the position of the trustee. When we look at the vesting clause (section 102), we see that the trustee is thereby placed in the position of the proprietor of the estate. The heritable estate is to be vested in him "as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, has been pronounced in his favour." In short, he is the singular successor of the bankrupt. Now, if it were provided by the statute that the right of the heritable creditor shall not be available in any question with the proprietor, or in competition with the proprietor, surely there could be no doubt as to the meaning of the provision. Taking the vesting clause (section 102) and section 118 together, I think the meaning of the statute is too clear for doubt.

I also concur as to the term. The half-year is the half-year current at the date of the sequestration.

The following interlocutor was pronounced:—"Recall the interlocutor reclaimed against: Find that the accounting in the case must proceed on the footing that the rents in question are chargeable under the original defenders' decree of maills and duties, with (1) the interest resting owing to them in virtue of the bond founded on by them for the half-year from Martinmas 1867 to Whitsunday 1868; (2) any arrears of interest resting owing to them under said bond for the year preceding said half-year; and (3) the necessary expenses of keeping the subjects yielding the rents in question in repair, as also the feu-duties, rates, taxes, premiums of fire insurance, or other burdens payable in respect of said subjects during the period of the said defenders' possession of the subjects: Finds Sutherland's Trustees and Others, the compearing defenders, [966] named and designed in the minute, No. 356 of process, liable to the pursuer in expenses since the date of their compearance on 15th December 1871: Find no other expenses hitherto incurred due to or by any of the parties: Remit to the Lord Ordinary to proceed with the accounting, with power to his Lordship to decern for the expenses now found due."

WATT & ANDERSON, S.S.C.—MILLAR, ALLARDICE, & ROBSON, W.S.—T. J. GORDON, W.S.—Agents.

No. 170. X. MACPHERSON, 966. 13 July 1872. 1st Div.—Lord Mackenzie, B.

CHARLES ROBERTSON, Esq. of Kindeace, Petitioner.—*Asher.*

Entail—Confusion—Entail Amendment Act, 11 & 12 *Vict. cap.* 36, *sec.* 21.—The 21st section of the Entail Amendment Act enacts that where an heir of entail in possession "shall be liable to pay or provide by assignation of the rents and proceeds of such estate" for any provisions granted to younger children under the Aberdeen Act or the deed of entail, he may charge the fee and rents of the estate with the amount thereof, by granting a bond and disposition in security over the estate. *Held* that where the heir in possession had himself paid such provisions, and obtained assignations of them, he was entitled to grant a bond and disposition to himself charging the entailed estate with the amount.

This petition was presented by Charles Robertson, Esq., heir of entail in possession of the entailed estate of Kindeace, under the 21st section of the Rutherfurd Act, 11 & 12 Vict. cap. 36, to charge the fee and rents of the entailed estate with the amount of the provisions of £600 contained in a bond granted by the petitioner's father in 1841 in favour of his younger children, which had been paid by the petitioner and assigned to him. The Lord Ordinary reported the case with reference to the question, stating in his note:—

"The petitioner is heir in possession of the entailed estate of Kindeace.

"His father, the late Major Robertson, to whom the petitioner succeeded as heir of entail in 1868, granted in 1841 a bond of provision for £2400 under the Aberdeen Act (5 Geo. IV. cap. 87), in favour of his younger children; and by the respective marriage-contracts of his two daughters, Mrs. Hamilton and Mrs. Gillanders, he assigned to each set of trustees respectively mentioned in these contracts the sum of £600 as the share settled upon each daughter of the said provision of £2400.

"The petitioner's father, Major Robertson, died on 17th October 1868, and was thereupon succeeded in the entailed estate by the petitioner. The petitioner, on 20th January 1870, paid to the sole surviving trustee under Mrs. Hamilton's marriage-contract the sum of £600, being her share of the provision of £2400; and he also paid on 14th February 1870 to the trustees under Mrs. Gillanders' marriage-contract the like sum of £600 as her share of the said provision. But, instead of taking discharges for the said two payments, the petitioner took assignations in his own favour from these trustees, on the dates above mentioned, of the foresaid bond of provision, to the extent of these two several provisions of £600.

"At the date when the petitioner made these payments and took these assignations, he had been two years in possession of the entailed estate, the free rental of which available for payment of such provisions, as reported by Mr. Campbell, amounts to £1434. The said two sums of £600 were the only sums payable by the petitioner, as heir of entail, in respect of the foresaid bond of provision for £2400.

"The present application is made under the 21st section of the Rutherfurd Act (11 & 12 Vict. chap. 36). By this section it is enacted, 'That in all cases where an heir of entail in possession of an entailed [967] estate in Scotland shall be liable to pay or provide by assignation of the rents and proceeds of such estate' for any provisions granted to younger children under the Aberdeen Act, or the deed of entail, he may charge the fee and rents of the estate with the amount thereof, by granting bond and disposition in security for the same over the estate.

"When the petition was presented the petitioner was not 'liable to pay or provide by assignation of the rents and proceeds' of the estate for the two provisions of £600 to the trustees of each of his two married sisters. He had already paid them. And he has now been in possession of the entailed estate for upwards of three years and a half, so that he has received rents one-third of which are more than sufficient to pay or satisfy these provisions. It is no doubt provided by the 9th section of the Aberdeen Act that the heir succeeding to the entailed estate may be required to make payment of the provisions and interest thereof from the date of his succession, 'after receiving a proper discharge thereof or assignment to the same'; and that, if the money is not paid within

three months after such requisition, payment may be compelled by action, and every kind of diligence or execution on the decree except adjudication. But it is provided by the next section (sec. 10) that the heir, if sued, shall be discharged from such suit upon assigning one-third of the clear rents of the estate payable to such heir during his or her life, or until the provisions shall be paid off. There do not appear to be any direct provisions with reference to the assignment mentioned in section 9. And it appears to the Lord Ordinary, on consideration of sections 9 and 10, that such an assignment could, under the Aberdeen Act, only be effectual to the heir in possession in the event of his decease before he had been sufficiently long in possession of the entailed estate as to have enabled him, with one-third of the free rents, to pay off the provisions, and that then it would be only effectual to the extent of the balance of the provisions which such one-third of the free rents had proved insufficient to satisfy.

"The question on which the Lord Ordinary has reported the case to the Court is, whether the petitioner can be held in the circumstances above set forth to be an heir of entail 'liable to pay or provide by assignation of the rents and proceeds' of the estate in his possession for the provisions to his sisters granted by his father, and is as such entitled to exercise the powers conferred by the 21st section of the Rutherfurd Act."

Argued for the petitioner;—There was no anomaly and no difficulty in an heir of entail granting bond to himself as an individual for a debt due by the entailed estate. He held two characters, which were quite distinct; so that in the event of his acquiring in his individual character a debt due by him in his character of heir of entail, it was not extinguished *confusione*, if he chose to keep it up against the estate.* It was made clear by 16 & 17 Vict. cap. 94, sec. 7, that the bond might in such cases be conceived in favour of any assignee of the younger children.

At advising,—

LORD PRESIDENT.—The late Major Robertson, as heir of entail of the estate of Kindeace, made a provision for his younger children in 1841, nominally to the extent of £2400, but which was really available only to the extent of £1200. The eldest son, succeeding to the estate in 1868, paid the shares of this provision payable to his sisters, taking assignations in his favour from their marriage-contract trustees. He now proposes under this petition to charge the fee and rents of the entailed estate, under section 21 of 11 & 12 Vict. cap. 36, with the amount of these provisions, by granting a bond and disposition in [968] security. The only peculiarity of the case is that the petitioner is to grant this bond and disposition in security in favour of himself. But the apparent anomaly disappears when we consider that Mr. Robertson is here in two capacities, first, as heir of entail, and secondly, as creditor *qua* assignee in this sum due to his sisters by the bond of provision of 1841. That is a case under the 21st section of the Act, for the heir of entail is at this moment "liable to pay or provide by assignation of the rents and proceeds" of the estate for the provisions in question. No doubt he is liable to himself; but that does not matter, for he has this right in his own person as an individual, while he is debtor in his character of limited fiar in an obligation which he is entitled to lay upon the entailed estate. There might have been, and indeed there was, a doubt whether, under this 21st section, it was competent for an heir of entail to grant bond for the amount of such provisions to any one except to the younger children for whom they were made; and to remove that doubt section 7 of the subsequent statute was passed. That section throws a good deal of light on the subject, for it authorises the heir in possession to grant bond, not only to the younger children, but "to any other party in right of such provision, or to any party or parties advancing the amount thereof in order to the payment of such younger child." Supposing that the heir of entail here, instead of taking an assignation, had advanced the money, he would have been entitled to grant bond in terms of section 21 to any one advancing the money, on condition that the child had formally discharged the provision, or that its amount had been paid or consigned or invested at the sight of the Court. I cannot doubt that he could have granted bond to himself as creditor in the sum advanced, and so it follows that, having taken an assignation, that is to say, having purchased the younger child's right, he comes in his own right within the 21st section of the Act. For these reasons I do not see any difficulty in authorising the Lord Ordinary to proceed with the petition.

The other Judges concurred.

---

* Welsh *v.* Barstow, Feb. 11, 1837, 15 S. 537.

The following interlocutor was pronounced:—"Find that, in the circumstances disclosed in the petition and report of Mr. Arthur Campbell junior, W.S., the petitioner, as heir of entail in possession of the entailed estate of Kindeace, is entitled, under the provisions of the 21st section of the 11th & 12th Vict. cap. 36, and the 7th section of 16th & 17th Vict. cap. 94, to grant bond and disposition in security over the said entailed estate for the amount of the provisions settled by the last heir of entail in possession on his younger children, in favour of himself, as assignee of the said provisions."

T. & R. B. RANKEN, W.S.—Agents.

No. 171. X. MACPHERSON, 968. 13 July 1872. 2d Div.—I.

THOMAS FERGUS (Assignee of James and John M'Intyre), of the First Part. —*Mair.*

MARGARET CONROY AND OTHERS (Children of Elizabeth M'Intyre), of the Second Part.—*Rhind.*

MRS. ELIZABETH M'INTYRE OR M'ILWHAN (Daughter of John M'Intyre), of the Third Part.—*Mair.*

JAMES M'INTYRE AND JOHN M'INTYRE, of the Fourth Part.—*Mair.*

ANDREW CLARK (Thomas M'Intyre's Judicial Factor), of the Fifth Part. —*Rhind.*

Testament—Survivorship.—A testator in his settlement disponed his whole property (which consisted entirely of heritage), to his wife in liferent, and "after her death to and in favour of his three children *nominatim*, and any future children he might have," and the survivors and survivor of them equally [969] share and share alike, also in liferent, for their several and respective liferent uses allenarly, and to and in favour of the lawful issue of the children named, and future children, equally in fee. *Held*, that on the death of a liferenter his share of the liferent accresced to the surviving liferenters, and no share of the property passed to the fiars till the death of the last liferenter.

By deed of settlement dated 7th November 1845 the deceased Thomas M'Intyre, fruit merchant, Glasgow, disponed "to and in favour of Mrs. Margaret Dunlop, otherwise M'Intyre, my wife, in liferent, for her liferent use allenarly, . . . and after her death, to and in favour of Elizabeth M'Intyre, James M'Intyre, and John M'Intyre, children procreated of the marriage between her and me, and of any other child or children that may be hereafter lawfully procreated of my body, whether of my present or any future marriage, and the survivors and survivor of them, equally share and share alike, also in liferent, for their several and respective liferent uses allenarly, and to and in favour of the lawful issue of the said Elizabeth, James, and John M'Intyre, and of any other child or children that may be hereafter lawfully procreated of my body as aforesaid, and the survivors and survivor of them, *per stirpes* and not *per capita*, equally share and share alike, in fee and property, all and sundry lands," &c.

The testator died in 1858, and his wife in 1861. They left the three children mentioned in the deed, Elizabeth M'Intyre, James M'Intyre, and John M'Intyre. Elizabeth M'Intyre died in 1865.

The testator's property, after his debts had been paid, consisted solely of a small property called Rosebank.

In 1860 James M'Intyre and John M'Intyre assigned their liferent interest in that property to Thomas Fergus, the first party hereto.

Elizabeth M'Intyre was twice married, first to John Conroy, and second to Robert Gallacher. She left families by both marriages, viz., Margaret Conroy and others, the second parties hereto.

John M'Intyre had three children, Mrs. Elizabeth M'Intyre or M'Ilwhan and others, the third parties hereto.

James M'Intyre was married, but had no family.

The heritable estate was sold and the proceeds were paid to Andrew Clark, judicial factor on Thomas M'Intyre's, the testator's estate, the fifth party hereto.

In these circumstances Thomas Fergus, the party of the first part, claimed the whole free annual profits and produce of Thomas M'Intyre's estate, and that so long as either of the said James M'Intyre or John M'Intyre may survive.

Margaret Conroy and others, parties of the second part, claimed that one-third of said estate should be instantly paid them by the judicial factor.

Mrs. Elizabeth M'Intyre or M'Ilwhan and others, parties of the third and fourth parts, claimed that the judicial factor should retain in his hands, until the death of the longest liver of James M'Intyre and John M'Intyre, the whole capital of the estate.

The questions for the opinion and judgment of the Court were:—"(1) Whether the first party, as assignee of the two surviving liferenters hereto, was entitled, until the death of the longest liver of them, to the whole free profits of the sum of money forming the estate under the judicial factor's management? (2) Whether the judicial factor was presently entitled and bound to make payment of one-third of the free capital of the estate equally between and among the said Margaret Conroy, and the other children of Elizabeth M'Intyre? (3) Whether the right to any, and if so to what part of the estate of the said deceased [970] Thomas M'Intyre, had vested (1) in the said Margaret Conroy, and the other children of Elizabeth M'Intyre; and (2) in the children of John M'Intyre?"

LORD COWAN.—The questions presented for our opinion in this special case depend on the construction to be put on a clause of survivorship occurring in the deed of settlement of the deceased Thomas M'Intyre. By that deed he conveyed his entire estate to his wife in liferent, for her liferent use allenarly, and after her death to Elizabeth, James, and John M'Intyre, his children, and any other children that he might thereafter have, "and the survivors and survivor of them, equally share and share alike, also in liferent, for their several and respective liferent uses allenarly," and to their lawful issue in fee. There is thus a liferent constituted in favour of the testator's children, to commence on the death of their mother; and the question is whether the words "survivors and survivor" mean those children who survive their mother, ceasing then to be operative, or continue to be operative after the death of the mother, so that, on the death of any of the children after the liferent interest has vested in them, the remaining survivors or survivor shall take the share of the liferent thus set free. I feel a good deal of difficulty in adopting the latter construction; and were it not for the deference which I have for the opinions entertained by your Lordships, I should have hesitated to affirm the proposition that the clause of survivorship referred to any period other than the lapse of the prior liferent, but such clauses have been generally construed by the Court in a manner favourable to liferenters, and here the expression "survivors and survivor" points to the survivorship being intended to have effect even after the mother's death, and this view may, I think, be held to be consistent with the testator's intention.

The question whether the fee of the estate has vested in the testator's grandchildren does not require to be decided at present.

LORD BENHOLME.—The question involved in this case is by no means easy to answer; but I concur in the conclusion at which I understand Lord Cowan has arrived. One obvious reason for adopting the construction which we propose to put on this clause is this, that where a liferent has been constituted in favour of two or more persons, the fee being in some other party, it would be extremely awkward that on the death of one of the liferenters his share should pass to the fiar,—that A. B., for example, should be a liferenter to the extent of one-half of the property, and C. D. the fiar of the other half. It is more natural to hold that where there is a joint liferent all the liferent interests must have come to an end before the fiar is entitled to take any benefit. It is not to be presumed that a testator intends the fiar to come into possession piecemeal, as the various liferenters die out. In the present case, however, there is not merely a clause of survivorship, but the words employed, viz., "survivors and survivor" seem to point to the construction which I am of opinion we ought to adopt.

As to the fee of the property we can at present decide nothing, since we do not know into how many shares it may ultimately fall to be divided. And that is an additional reason for holding that the liferenters must be totally extinguished before the fiar's right comes into operation.

LORD NEAVES concurred.

LORD JUSTICE-CLERK.—I entirely concur in the view which your Lordships have taken. When a joint right is conferred in the fee of a heritable subject the presumption is that each fiar has a *pro indiviso* right which transmits to his heirs. But, on the other hand, when a conjunct right to a heritable subject is given to two persons and the survivor it has been decided that the right of the predeceaser accresces to the survivor. No doubt, the presumption in favour of accretion is not so strong in the case of a joint liferent as in the case of a joint fee. But where there is a clause of survivorship like the one now [971] before us, referring to the survivors and survivor of the liferenters, I think it must be construed as conferring on the last survivor the shares of the liferent held by the predeceasers.

This interlocutor was pronounced:—"The Lords, having heard counsel on the special case, are of opinion, and find (1) That the first party is entitled, until the death of the longest liver of the said James M'Intyre and John M'Intyre (senior), to the sole free profits and produce of the sum of money (less the expense payable therefrom) forming the estate under the judicial factor's management: (2) Find it premature to decide the third question, and decern."

WILLIAM OFFICER, S.S.C.—Agent.

No. 172. X. MACPHERSON, 971. 16 July 1872. Lord Gifford.

THOMAS LOCKERBY, Pursuer.—*Shand—J. C. Lorimer.*

THE CITY OF GLASGOW IMPROVEMENT TRUSTEES, Defenders.—*Sol.-Gen. Clark—Balfour.*

Lands Clauses Acts—Notice to take Lands—Arbitration—Reduction of Decree-arbitral—Proof—Examination of Arbiters.—Statutory trustees gave notice of their intention to purchase and take subjects held by A. in lease for a term of years, and afterwards intimated that they withdrew the notice. They never took possession of the subjects. A. insisted that the amount of compensation should be assessed by arbiters under the Lands Clauses Acts. Arbiters having been appointed, and proof led, a decree-arbitral was issued finding that A. had "failed to establish the claim for compensation as made by him against the promoters (trustees), under and in terms of the Lands Clauses Consolidation (Scotland) Act, 1845." In an action brought by A. against the trustees to reduce the decree-arbitral as *ultra vires* of the arbiters, averments that the arbiters had adjudicated on the question of the pursuer's legal right to compensation *held* relevant, and proof allowed. A proof having been led, in which the arbiters were examined, *held* (by Lord Gifford, and acquiesced in), (1) that the statutory notice to take the subjects constituted a valid and binding contract from which the defenders could not resile without the pursuer's consent; (2) that the pursuer was entitled to have any compensation due to him assessed upon the footing that the contract was to be carried out, and the pursuer removed from the subjects; (3) that the sole duty of the arbiters was to assess the compensation on that footing, and that they had no power to decide any question of law affecting the pursuer's right to compensation, or to his right to enforce payment of the amount assessed. *Question,* whether, and how far, the option given to the pursuer of remaining in possession affected his claim for compensation of the subjects.

D. J. MACBRAIR, S.S.C.—J. & R. D. Ross, W.S.—Agents.

No. 173. X. MACPHERSON, 971. 16 July 1872. 1st Div.—Whole Court, Sheriff of Fifeshire, M.

GEORGE ABERDEEN, Petitioner and Appellant.—*Dundas Grant.*
ROBERT WILSON, Respondent.—*Rhind.*

Process—Appeal—Competency—Sheriff-court Act, 16 *&* 17 *Vict. cap.* 80, *sec.* 22.—A summary petition to the Sheriff craved decree for delivery of certain fleeces, or, failing delivery, for payment of £20, or such other sum as should be ascertained to be their value. *Held* (by a majority of the whole Court, *diss.* Lords President, Benholme, Ardmillan, Kinloch, Ormidale, and Gifford), that as decree was craved *ad factum præstandum*, an appeal against the [972] Sheriff's judgment, disposing of the merits of the case, was not rendered incompetent by reason of the sum alternatively demanded being under £25.

Opinions, that under the prayer of the petition a larger sum than £20 could be decerned for.

This case originated in a summary petition to the Sheriff of Fifeshire at the instance of George Aberdeen, farmer, Pitkinnie, against Robert Wilson, cattle-dealer, Lochgelly, setting forth that the respondent had wrongfully carried away from the petitioner's farm-steading certain fleeces, which he refused to return. The prayer of the petition was—"To decern and ordain the respondent instantly to deliver to the petitioner the fleeces of forty Leicester ewes or sheep, and the fleece of one Leicester tup or sheep, the property of the petitioner, and carried off by the respondent from the petitioner's premises at Pitkinnie farm-steading, upon the 24th day of June 1871, as before-mentioned; and failing the respondent doing so within such period as your Lordship shall appoint, to decern and ordain the respondent to pay to the petitioner the sum of £20 sterling as the price or value of the said fleeces of wool, or such other sum as shall be ascertained to be the price or value thereof, in the event of appearance being entered, reserving the petitioner's claim for loss or damage already sustained, or which he may yet sustain, in consequence of the respondent wrongously and unwarrantably withholding or refusing delivery of the said fleeces of wool."

The Sheriff, after a proof, dismissed the petition, with expenses, and the petitioner appealed.

The respondent objected that the appeal was incompetent, in respect that the value of the cause was below £25.

The Court, considering the point to be of general importance, appointed short minutes of debate to be laid before the whole Judges.

The following opinions were returned:—

LORD JUSTICE-CLERK, and LORDS COWAN, NEAVES, JERVISWOODE, and MACKENZIE.—The question in the present case is, whether the appeal is incompetent in respect of the provision contained in the 22d section of the Sheriff-court Act of 1853, that it shall not be competent to bring under the review of the Court of Session "any cause not exceeding the value of £25 sterling." And it is to be kept in view, in order that the application of some of the decisions to be referred to may be appreciated, that the same question frequently occurred to be considered by the Court under the provisions in the Act of George II. limiting the power of appeal to the Circuit Court of Justiciary in civil cases to causes not exceeding £25 in value.

It has been settled by a series of decisions following upon the cases of Taylor *v.* Purves, 17th November 1824, 3 S. 286, and Giffen *v.* Orr, 19th November 1824, *ib.* 301, that the only rule for determining the value of the subject-matter of the cause as to appeals is the sum concluded for in the summons. The present case originated by a petition to the Sheriff, which concludes for delivery of the fleeces of forty-one Leicester sheep as the property of the petitioner, and failing the respondent doing so within a period to be fixed by the Sheriff, that the respondent should be ordained to pay to the petitioner "the sum of £20 sterling as the price or value of the said fleeces of wool, or such other sum as shall be ascertained to be the price or value thereof, in the event of appearance being entered."

The primary conclusion is *ad factum præstandum*, and had no appearance been

made for the defender decree to that effect could have been obtained by the pursuer, on which diligence might have followed to enforce delivery. This is of the very essence of such an action. No doubt the defender may appear and shew that he cannot implement the demand for delivery, and thus the pursuer must have recourse to the alternative pecuniary conclusion, which, how-[973]-ever, when expressed as in this case, cannot be held to fix the value of the action.

We are of opinion that, under a conclusion expressed as in this case, a petitioner, "in the event of appearance being entered," and a larger price or value being proved in the course of the litigation, would be entitled to obtain decree for that larger value. The petitioner, however, may enforce delivery of his property *in forma specifica*. In the event of delivery being impossible, or, where possible, the demand for delivery not being complied with, he is, we think, entitled, according to our forms of process, to conclude for a modified sum in the event of no opposition being made, and alternatively, in the event of opposition, which may lead to protracted litigation, for such larger sum as in the course of the cause he may prove to be the true value of his property. That litigation may last for some time, and the property may rise in value. A pursuer is entitled to recover such rise in the value of his property wrongfully withheld from him by the defender, and we think that he may competently recover the same under such an indefinite conclusion as we find in the petition. Were this not the case great injustice might be done, because the amount recovered at the close of a long litigation might, owing to the rise in value of the property, be quite insufficient to enable the pursuer to replace it by purchase.

In the case of Lamb *v.* Henderson, 4th October 1844, 2 Broun, 311, the conclusion in a summons of count and reckoning was for £25, "or such other sum, more or less," as should appear on an accounting; and the Lord Justice-Clerk (Hope), after advising with Lord Wood, found an appeal incompetent to the Circuit Court, such appeal being by statute limited to causes not exceeding in value the sum of £25. In Wilson *v.* Addison, 11th October 1845, 2 Broun, 519, the petitioner prayed for interdict prohibiting the respondent encroaching upon his property, and further, that the respondent should be found "liable in the sum of £10 sterling, or such other sum, less or more, as may be modified in name of damages to the petitioner," on account of the alleged encroachments. The Lord Justice-Clerk (Hope) and Lord Wood dismissed an appeal to the Circuit Court as incompetent, in respect that the competency of the appeal fell to be regulated by the prayer of the petition, and that the pecuniary conclusions were not limited within the statutory sum of £25, so that the Sheriff might competently have awarded a larger sum as damages. In the case of Stott *v.* Gray, 26th June 1834, 12 Shaw, 828, a summons in the Sheriff-court set forth that Stott had been engaged to manage a spirit-shop for Gray, and that when his engagement ceased "there remained due by him to the pursuer the sum of £21, 0s. 5d., being a balance unaccounted for of the goods committed to his charge in the said management, and cash arising from the ready-money sales thereof," and that the pursuer had often required payment of the said sum of £21, 0s. 5d. The summons concluded that Stott and his cautioners should be ordained to make payment to the pursuer of the said sum of £21, 0s. 5d., "or such other sum, less or more, as, on a fair and accurate state of accounts, shall appear to be the just and true balance of the said Alexander Stott's intromissions as manager foresaid, with interest thereof since the 2d of December last." The Sheriff, after a remit to an accountant, gave decree for £21, 1s. 10d., and the defenders took an appeal to the Circuit Court, which was objected to as incompetent in respect of the indefinite nature of the conclusions of the summons. The case was certified to the Second Division of the Court, who found the appeal incompetent, being of opinion, as the report bears, "that the terms of the conclusions of the summons formed the text for determining whether, in the words of the statute, 'the subject-matter of the suit did not exceed in value the sum of £25 sterling'; and that as a sum of indefinite amount had been concluded for, the action did not admit of being appealed to the Circuit Court."

We are of opinion that these decisions ought to regulate the present case, and that in respect of the indefinite nature of the prayer of the petition, the cause exceeds the value of £25, and is not struck at by the 22d section of the Sheriff-court Act of 1853. The prayer of the petition in the case of the Shotts Iron Company *v.* Kerr, 6th December 1871, *supra*, p. 195, which has led to the present question being submitted for the opinions of the consulted Judges, is in [974] similar terms to the prayer of

the petition in the present case. That decision is thus a direct precedent, not to be departed from unless it were clearly inconsistent with the statutory provision or with the prior authorities. The very opposite, however, is in our opinion the correct view.

We would add that the question as to the competency or incompetency of an appeal does not merely affect the party who is pursuer of the original action. The appeal may be at the instance of the defender, who had not the framing of the summons raised against him. Now, if that summons contains a conclusion which the defender may be entitled to consider as exceeding the value of £25, it is hard upon him that he should be deprived of his remedy of obtaining review of the judgment in the Supreme Court. If a summons therefore contains a conclusion *ad factum præstandum*, which may be insisted on *in forma specifica*, the risk of such a decree being pronounced seems to give the action a value to the defender far exceeding any pecuniary amount that the pursuer chooses to put upon it in an alternative or subsidiary form. A demand for delivery of a certain ring or picture without any pecuniary conclusion would be liable to review; and the possibility of such a conclusion being given effect to is equally formidable, although a pecuniary conclusion follows for a small sum of money in a certain event. Here we think it clear that a decree *ad factum præstandum* could have been insisted on in the first instance, and that demand makes it impossible to say that the action in one of its contingencies does not exceed the statutory sum. The rule must be the same as to the power of appeal competent to either party; and therefore, as it appears to us, any action such as that here in question, where an inappreciable decree may be pronounced, must be subject to appeal at the instance of either party.

LORDS ORMIDALE and GIFFORD.—We are of opinion that the appeal in this case is incompetent, being prohibited by the provision contained in the 22d section of 16 & 17 Vict. cap. 80 (the Sheriff-court Act of 1853).

The words of the statute are (section 22), "It shall not be competent, except as hereinafter specially provided for, to remove from a Sheriff-court, or to bring under review of the Court of Session, or of the Circuit Court of Justiciary, or of any other Court or tribunal whatever, by advocation, appeal, suspension, or reduction, or in any other manner of way, any cause not exceeding the value of £25 sterling, or any interlocutor, judgment, or decree pronounced, or which shall be pronounced, in such cause by the Sheriff."

The exception in this provision does not apply here, and the sole question is, whether the present cause is, in the sense of the statute, a cause "exceeding the value of £25 sterling." It appears to us that the value of the present cause is less than £25 sterling, and therefore appeal is incompetent.

The difficulty arises not so much from the construction of the statutory provision itself as from the course of previous decisions, and from the rules which have been fixed by previous decisions not only in regard to the statute in question, but also in regard to the statutes regulating appeals to the Circuit Court of Justiciary, and the bringing of actions of less value than £25 sterling, in the first instance, before inferior Courts.

A very stringent interpretation has been applied to the statute of 1853, so as to admit review wherever it does not appear on the face of the summons or petition in the inferior Court that the value of its conclusion is under £25. In short, the rule seems fixed, that unless the Court can say, from simple inspection of the summons or petition and its conclusions, that the value of the cause is under £25, review is competent. Thus, in actions where the conclusion is merely *ad factum præstandum*, without any pecuniary conclusion, review is admitted, however clearly it appears from the proof, or even from statements or admissions on record, that the value is really under £25. The object of this rule of construction is to avoid the expense of a double inquiry, first into the value of the suit and then into its merits; but the rule has led to the admission into the Court of Session of many trifling causes, upon which it was the clear intention of the statute that the judgment of the inferior Court should be conclusive. We cannot help regretting the rule, but we think it is too late to go back upon it.

[975] It appears to us, however, that the pecuniary value of the present action has been measured and stated by the appellant himself in the petition which he presented in the inferior Court. The petition first prays that the respondent be ordained to

deliver to the petitioner the forty fleeces mentioned, and then it proceeds, "And failing the respondent doing so within such period as your Lordship shall appoint, to decern and ordain the respondent to pay to the petitioner the sum of £20 sterling, as the price or value of the said fleeces of wool, or such other sum as shall be ascertained to be the price or value thereof, in the event of appearance being entered, reserving the petitioner's claim for loss or damage already sustained, or which he may yet sustain."

Now we read this as a direct statement that £20 sterling is "the price or value of the fleeces." The petitioner is content to take that sum as the price or value; and beyond all doubt, if the respondent had failed or declined to enter appearance, the petitioner could have got no more. The conclusion for "such other sum as shall be ascertained to be the price or value" only comes into operation "in the event of appearance being entered." The value of a suit may be fairly taken to be the utmost sum for which decree in absence may be taken, when such pecuniary decree exhausts the suit.

No doubt litigation may cause great expense, and perhaps, by delay or otherwise, great damage; but it has been solemnly decided by a majority of the whole Court that expenses of a suit are not to be taken into account in estimating value—Hopkirk *v.* Wilson, 21st December 1855, 18 D. 299. Damages are not included in the present action, being expressly reserved.

Supposing decree in absence had passed, and then review had been sought by way of suspension, it would have been clear that the value of the suit was only £20, because the Court of review could not in a suspension enlarge the sum in the decree, but could only find the letters and charge orderly proceeded. We do not think it makes any real difference as to the value of the cause that the litigation took place at once in the inferior Court, instead of after a decree in absence.

At all events, regarding the statutory provision excluding review as a most beneficial one, intended to cut short and prevent litigation about trifles, and therefore a provision to be liberally, or at all events fairly, interpreted, we are not disposed to extend the very stringent rule above referred to further than it has already gone.

We are also disposed to think—although on this point we have great hesitation—that where, in a simple petitory action, a specific sum is demanded, the addition of the words, "or such other sum," or even of the words, "or such other sum, more or less," as may be ascertained, will not entitle the pursuer to recover more than the specific sum demanded. It is quite different in a count and reckoning, for in such action the conclusion is not for a specific sum, but for a settlement of accounts; and it is only on the settlement of accounts that a balance can appear. In all other cases, at least in all cases of simple pecuniary demand, it rather appears to us that a pursuer is bound to make up his mind and to state the highest limit of his claim. If this view is well founded, it would also be conclusive of the point that the present cause does not exceed in value £25.

The decision in the case of the Shotts Iron Co. *v.* Kerr, 6th December 1871, is adverse to the result at which we have arrived in this case; but we understand that in consulting the whole Court the decision in that case is not to be held as establishing a rule, but that the point is to be taken as still an open one.

Lord Benholme.—I concur in this opinion. I have come to be of opinion that the case of the Shotts Iron Co., mentioned above, which in principle is identical with the present, was erroneously decided. With respect to myself, I believe the desire of both parties to that case, that the jurisdiction of the Court should be sustained, prevented my considering the question with so much deliberation as I have since been constrained to give to it, under the solemn discussion before the whole Court which has recently taken place.

[976] Lord Mure.—As the leading conclusion of this action is one *ad factum præstandum*, it belongs to a class of cases in which advocation has generally been held to be competent, unless where there is also a pecuniary conclusion which distinctly fixes the money value of the cause at a sum below that at which advocation is competent. And it appears to have been settled by a series of decisions—(1st) That questions of the present description fall to be disposed of with reference to the conclusions of the original summons or petition under which they are raised (Taylor, 17th November 1824; Robertson, 3d March 1857); and (2d) that where the definite money value of the cause cannot be ascertained from those conclusions, or, in other words, where the conclusions include prospective claims of an indefinite amount, which if given effect to may bring up the value above £12 or £25, as the case may be, advocation is competent

(Brown, 29th January 1822; Mitchell, 10th March 1855; and Tennent, House of Lords, 3d March 1864, 2 Macph. p. 22).

Decisions based upon the same grounds have also been pronounced, in a class of cases relative to the competency of appeals to the Circuit Court of Justiciary, under the clause in the Act 20 Geo. II. c. 43, which gave a right of appeal in civil causes "where the subject-matter of the suit did not exceed in value the sum of £12," or of £25, as extended by the 55th Geo. III. c. 67—Stott, 26th June 1834, 12 Sh. p. 828; Lamb, October 4, 1844, 2 Broun, p. 311; Wilson, October 11, 1845, 2 Broun, p. 519; in all of which cases it appears to have been very deliberately decided, that where the conclusions of the action were so indefinite as to admit of a sum larger than the specific sum mentioned being recovered under them the appeal was incompetent. The two former of these cases were questions of accounts; the other was a petition for interdict, with a petitory conclusion for £10, which was within the statutory limit, but in which it was held notwithstanding, that, as the petitory conclusion contained an alternative of "such other sum, less or more, as may be modified in name of damages to the petitioner on account of the alleged encroachment," the appeal was incompetent.

It having thus been for long authoritatively settled as a rule of practice, that where in any action of accounting, or of damages, the pecuniary conclusions of the summons or petition contain a demand for a specific sum, with an alternative of "such other sum, less or more," as shall appear to be the true balance due upon an account, or as shall be modified in name of damages, the alternative conclusion of this indefinite character is to be the measure of the competency of the advocation or appeal. The question, as I understand it, on which the opinion of the consulted Judges is now required, appears to resolve into this, whether any different rule is to be laid down with reference to a case in which the prayer of the petition concludes, not for an account or for damages, but for delivery of some fleeces of wool, and failing delivery to have the respondent ordained "to pay the petitioner the sum of £20 as the price or value of the said fleeces of wool, or such other sum as shall be ascertained to be the price or value thereof in the event of appearance being entered."

On first considering this question I was much impressed with the weight due to the argument founded on the assumption that, if decree had passed against the respondent in absence, the petitioner could not have insisted for payment of more than £20 as the alternative for failure to deliver the fleeces, and that the value of the cause seemed thus to be fixed by the petitioner himself at £20. On further consideration, however, I have come to be satisfied that this is not a ground of judgment which can be adopted, consistently with the decisions in the previous cases, and more particularly in that of Wilson v. Addison, already referred to, in which the petition concluded for "£10 sterling, or such other sum, less or more, as may be modified in name of damages to the petitioner." Because in that case also, had no appearance been entered, decree would have passed for £10; but the decision, nevertheless, proceeded expressly upon the ground that under that conclusion "the Sheriff might competently, though erroneously, have awarded £100."

In this view the question now raised for determination appears to me to depend upon whether, under the alternative conclusions of the present application, which [977] is not strictly one of damages, it would have been incompetent for the Sheriff to have pronounced decree for more than £25, if the evidence as to the value of the fleeces had been sufficient to warrant a decree for that amount; and I have come to the conclusion that it would not. Because, although this form of alternative conclusion may not be very common, it appears to be recognised as a proper style in the Sheriff-court in applications for delivery of goods wrongously withheld—Soutar's Styles, p. 127. It is the same form as that used in the case of the Shotts Iron Company, 6th December 1871; and in neither case does any objection appear to have been taken to the competency of the conclusion, which seems to be suited to the nature of a case which proceeds on the assumption that the petitioner is entitled to vindicate his property, and, failing this, to decree for the highest value which he may be able to shew that he could have realised for it, had possession not been improperly withheld; and for this I think that it was competent for the petitioner to insist.

Being therefore of opinion that there is, in the circumstances of the present case, no incompetency in the petitioner seeking redress in terms of the indefinite conclusions of the petition, I am further of opinion that the decision in the case of the Shotts Iron Company proceeded upon a sound application of the rules laid down in the earlier

cases, and that the objection to the competency of the present appeal ought to be repelled.

At advising,—

LORD KINLOCH.—I am of opinion that the appeal is incompetent, on the simple ground that the pursuer of the action has, in his petition to the Sheriff, fixed the value of the case at less than £25. He concludes, failing delivery of the fleeces, for "the sum of £20 sterling as the price or value of the said fleeces of wool." It is true that he adds—"or such other sum as shall be ascertained to be the price or value thereof, in the event of appearance being entered." But I think this alternative incompetent. I conceive that there cannot be competently two conclusions in an action,—one for the case of appearance, the other for that of non-appearance of the defender, but that the conclusion must be one and the same in both cases. But, besides this, I am of opinion that, according to the law and practice of our Courts, there must always, except in the case of an accounting, be a conclusion for a definite sum, as importing the maximum of the demand. I do not doubt that decree may be obtained for a sum increasing during the progress of the case, as for a growing value. This may happen any day in regard to damages, which may be sought and recovered down to the date of the verdict. And growing value is in substance just growing damage. But I do not think that this would be sustained as a reason for not concluding for a definite, though it may be an unliquidated, sum of damages. The damage even when sought down to the date of verdict must still be scheduled at a specified sum; and beyond this sum I think the jury could not go, on a vague conception of growing damage. In short the policy of our law—and I think a wise policy—is, except where the thing is impracticable, as in an accounting, to oblige the pursuer to set forth the maximum of his demand in a distinct and definite sum. If there had been no conclusion *ad factum præstandum* in the present case, but a mere conclusion for the value of the fleeces, as in a case where restitution was impracticable, I conceive that the alternative conclusion would have been clearly incompetent. But I do not think the case varied in principle by the conclusion *ad factum præstandum* being prefixed.

LORD ARDMILLAN.—This is an appeal from a judgment of the Sheriff of Fife, pronounced in an action in which the pursuer or petitioner, now the appellant, craved delivery of forty fleeces of wool said to have been carried off from his premises, and, failing such delivery, craved decree for payment of £20 sterling as the price or value of said fleeces, of such other sum as shall be ascertained to be the price or value thereof in the event of appearance being entered, reserving the petitioner's claim for damages. We have now the opinion of the consulted Judges.

The question now before us is, whether this appeal is competent under the [978] Sheriff-court Act of 1853? In other words, whether this cause exceeds in value £25 sterling? If it does not, the appeal is not competent.

The value of the cause must be ascertained from the conclusions of the action—whether summons or petition.

I am of opinion that in a proper petitory action the sum concluded for is the measure of the value of the cause, and that sum must be held as the maximum of the pursuer's claim. Whether the words "or such other sum as shall be ascertained," or even the words "or such other sum, more or less, as may be ascertained," are or are not added, I think that in such an action, with such a conclusion, no sum can be recovered beyond the sum concluded for. The conclusion furnishes the measure of the value of the cause; and the conclusion must be definite. It is only in an action of accounting, with demand for payment of a balance to be ascertained on adjusting accounts, that a general conclusion for such sum less or more as may be ascertained can receive effect in extending the pursuer's claim beyond the sum expressly concluded for. I am not aware that a departure from this rule has ever been sanctioned. No instance has been cited to us from the bar, and I have not been able to discover any instance where, in a petitory action with pecuniary conclusions, a sum exceeding what is stated in the conclusion has ever been awarded. In such a case, accordingly, an appeal to this Court cannot be competent where the summons concludes for less than £25. This rule in proper petitory actions is, I think, sound and well settled. I am not prepared to disregard it or to alter it.

But the question now before us is not precisely the same. In the present case the primary conclusion of the action in the Sheriff-court is for restoration or delivery of certain fleeces of wool, of which, in the event of failure to restore, the value is

estimated by the pursuer at £20, or such other sum as shall be ascertained to be the price or value thereof. I think that the appellant rightly represents this as primarily an action *ad factum præstandum*. I agree with Lord Ormidale and Lord Gifford in the opinion that where the conclusion is merely *ad factum præstandum*, without any pecuniary conclusion, then review on appeal is competent, because the jurisdiction of the Court is open so far as not excluded, and can only be excluded on grounds appearing on the face of the summons. But then there is here a further conclusion in the event of failure to restore the fleeces—a conclusion for £20 as the price or value thereof, or such other sum as may be ascertained to be the price or value thereof. This, it has been observed, is not the same as a mere petitory conclusion. Nor is it the same as a conclusion merely *ad factum præstandum*. There is a primary conclusion *ad factum præstandum*, and then there is added a petitory conclusion for a certain sum, which sum is less than £25. It is here that the point arises on which the present question of competency turns.

I cannot say that the question of the competency of this appeal in such an action, with such a primary conclusion *ad factum præstandum*, is free from difficulty. The opinions which we have received from the consulted Judges make it sufficiently manifest that there is difficulty, and difference of opinion.

Had the question been quite open—had there been no decision by the Second Division of the Court—my opinion would been against the competency of the appeal. The leading view pressing on my mind would have been that the value of the cause must be found within the conclusions, whenever there is a petitory conclusion for a pecuniary value. Nothing more than £20 could, I think, have been here recovered under the conclusion for payment. That was the value put by the pursuer on the fleeces; that was the sum at which the pursuer estimated the pecuniary value of what he sought to have restored, that is, of the fact of restoration, that of which he primarily craved performance. In my opinion, therefore, this appeal is not competent. I am satisfied by the reasoning in the opinions of Lord Ormidale and Lord Gifford.

But the question is not thus open. There stands in the way a judgment which I think we are bound to respect.

The Judges of the Second Division have pronounced a decision which is quite in point. In the case of the Shotts Iron Company *v.* Kerr, 6th December 1871, the Judges of the Second Division pronounced a decision in favour of the com-[979]-petency of the appeal where the conclusion was primarily for delivery of certain lambs, and thereafter for payment of £10 sterling as the price or value of the lambs, "or such other sum as shall be ascertained to be the price or value thereof." That was a unanimous judgment, given after careful consideration; and I must say that it appears to me to be quite in point, the words being nearly the same as here, and the primary conclusion being for a sum smaller in amount. I am unable to find any sufficient distinction between that case and the present. Indeed no distinction has been urged, and scarcely any distinction has been suggested. We have been called on to decide, and we must resolve whether we ought to decide, this question according to, or directly and clearly contrary to, the recent judgment of the Second Division.

The construction of the statute, in so far as applicable to the nature and structure of this action, is plainly a matter on which there is not only doubt but much doubt, and reasonable room for doubt, and for diversity of opinion.

I am much impressed by the delicacy of the position which we occupy in regard to this recent judgment of the Second Division, and I am not quite satisfied that there is a *nodus vindice dignus*—a ground sufficient to sustain a disregard of that judgment.

It is important that there be a settled rule of practice on the subject of such appeals. It does not appear to me equally important that the rule be laid down according to my view and not according to the view of the Judges of the Second Division. The question whether the rule of practice should be for or against the competency of this appeal is not so important as that a rule of practice in the matter shall be settled and well understood. Therefore, though my own opinion is against the competency of this appeal, I do not at all regret that a majority of the Judges are in favour of the view taken by the Second Division.

LORD DEAS.—I agree with Lord Ardmillan that the case of the Shotts Iron Company is precisely in point, and that being so, unless it had appeared to be altogether contrary to previous decisions, I should have been for adhering to it as a precedent. It was said, as a reason for reconsidering that judgment, that all the prior authorities were

adverse. But the very reverse is the fact, in proof of which I need merely refer to the cases cited in the opinions of the majority of the consulted Judges; and on the whole matter I have no difficulty in concurring with them in the conclusion at which they have arrived.

LORD PRESIDENT.—I have arrived at an opposite opinion from that of your Lordship, and agree with Lord Ardmillan and Lord Kinloch, and have nothing to add to what they have said. The authorities are, I consider, all on the other side, with the exception of the case of the Shotts Iron Company. When that case was first mentioned to us it was unreported, and it was difficult to ascertain what had passed before the Court. But undoubtedly the decision arrived at was contrary to my opinion. The question was, however, fully deserving of reconsideration, as we find one of the Judges of the Second Division who decided the Shotts case changing his views. I regret that I cannot agree with the majority, but it is at any rate satisfactory to have a point of practice like this definitely decided.

The following interlocutor was pronounced:—"The Lords having resumed consideration of the cause, with the revised minutes of debate, and having taken the written opinions of the Judges of the Second Division and of the permanent Lords Ordinary, they, in respect of the opinion of the majority of the whole Judges, sustain the competency of the appeal, reserving all questions of expenses; and appoint the cause to be put to the roll.

The case was then heard on the merits, after which the appeal was refused, with expenses.

JAMES BARTON, S.S.C.—D. CRAWFORD & J. Y. GUTHRIE, S.S.C.—Agents.

[*Distinguished*, Cunningham *v.* Black, 1883, 10 R. 441.]

No. 174. X. MACPHERSON, 980. 17 July 1872. 1st Div.—Sheriff-substitute of Edinburgh, M.

THOMAS S. LINDSAY (W. J. Tod's Trustee), Appellant.—*Traynor.*
WILLIAM OFFICER, S.S.C., Respondent.—*Scott.*

Bankruptcy (Scotland) Act, 1856, *sec.* 90—*Examination of witnesses relative to Bankrupt's estate—Law-agents—Confidentiality.*—In the examination of the law-agent of a bankrupt who had failed to appear at the statutory examination, *held* that the bankrupt's law-agent was not bound to answer the question, "Do you know where the bankrupt is now," on the ground that it had no relation to the bankrupt's affairs.

William James Tod, builder, Edinburgh, having been sequestrated, failed to appear for examination on the 13th June 1872, the day appointed by the Sheriff.

The Sheriff, on the petition of the trustee, ordered the examination of certain parties who were stated to be able to afford information relative to the bankrupt's estate. By the 90th section of the "Bankruptcy (Scotland) Act, 1856," it is, *inter alia*, provided, that "the Sheriff may, at any time, on the application of the trustee, order an examination of the bankrupt's wife and family, clerks, servants, factors, law-agents, and others, who can give information relative to the bankrupt's estate, on oath, and issue his warrant requiring such persons to appear," &c. The 91st section enacts that "the bankrupt and such other persons shall answer all lawful questions relating to the affairs of the bankrupt; and the Sheriff may order such persons to produce for inspection any books of accounts, papers, deeds, writings, or other documents in their custody relative to the bankrupt's affairs, and cause the same, or copies thereof, to be delivered up to the trustee." In the course of the examination of Mr. William Officer, S.S.C., under this order, on 25th June, the witness stated that the bankrupt, who first consulted him on 10th April previous, called on him on 3d May along with the concurring creditor, and instructed him to apply for sequestration of his estates; and he gave particulars as to what occurred at several subsequent interviews. The examina-

tion then proceeded as follows:—"When did you see the bankrupt last? I saw him about the beginning of June current. Where? In London. Do you know where he is now? I decline to answer that question on the ground of confidentiality, unless directed to do so by the Sheriff. (The Sheriff-substitute sustains the declinature, in respect the question has no reference to the bankrupt's affairs.) Depones—At the meeting in London the bankrupt did not speak to me specially about his affairs. He called upon me there, having heard that a warrant had been issued for his apprehension, and consulted me as to what he should do in the circumstances. He stated that the warrant was upon a criminal charge, connected with the sequestration. I know the district where the bankrupt is, but I do not know the place. I heard from him a fortnight ago. Have you any letters from the bankrupt relative to his affairs? No. Have you received any letters from the bankrupt since he left Edinburgh? The witness stated that he had received no letters from the bankrupt relative to his affairs, and declined to answer the question upon that ground, and also on the ground of confidentiality. (The Sheriff-substitute sustains the objection, and disallows the question)."

The trustee in the sequestration appealed against these deliverances of the Sheriff-substitute; and argued that the bankrupt statute superseded the common law, and deprived the bankrupt of the benefit of confidentiality.* Here it was necessary to know where the bankrupt was in order to get the requisite information as to his estate.

[981] The respondent argued;—It was to be observed that the respondent here was law-agent of the bankrupt previous to the sequestration, and never was agent of the trustee. A criminal warrant was issued against the bankrupt, and the respondent had also been employed by him with regard to that matter. The Sheriff-substitute's reason was enough to justify the deliverance appealed from; but it might also be rested on the ground of confidentiality.†

At advising,—

LORD PRESIDENT.—In this sequestration the bankrupt has not yet been examined. In these circumstances the trustee thinks it necessary to examine, as he states in a petition to the Sheriff for that purpose, certain persons named, including the respondent, "who can give information relative to the bankrupt's estate." Under the Sheriff's warrant in the petition Mr. Officer is brought for examination. He had been agent for the bankrupt previous to the sequestration. He was also his agent in applying for the sequestration; but he was not agent in the sequestration. The character in which he acted was that of agent for the bankrupt before his sequestration. In the course of the examination he was asked, "When did you see the bankrupt last? I saw him about the beginning of June current. Where? In London. Do you know where he is now? I decline to answer that question on the ground of confidentiality, unless directed to do so by the Sheriff. The Sheriff-substitute sustains the declinature, in respect the question has no reference to the bankrupt's affairs." I think that the Sheriff-substitute was quite right, and that he assigned the true reason for refusing to allow the question. The 90th section of the Bankruptcy Act empowers the Sheriff to order an examination of "the bankrupt's wife and family, clerks, servants, factors, law-agents, and others who can give information relative to the bankrupt's estate, on oath; and the 91st section enacts that "the bankrupt and such other persons shall answer all lawful questions relating to the affairs of the bankrupt; and the Sheriff may order such persons to produce for inspection any books of accounts, papers, deeds, writings, or other documents in their custody relative to the bankrupt's affairs." The scrutiny here permitted is a very stringent measure, and compels these persons to answer questions in which they themselves have no interest, and which they could not be compelled to answer but for the statutory provision. It appears to me to confine the examination to the estate and affairs of the bankrupt, so that if it appears that a person who has been brought up for examination can give no information as to the bankrupt's affairs, his further examination becomes at once incompetent. Now, in this case a person is asked where the bankrupt is now. That is not a question relative to the affairs of the bankrupt, but an attempt to discover

* Mackersie *v.* Mackenzie, March 1, 1823, 2 S. 256; Sawers *v.* Balgarnie, Dec. 17, 1858, 21 D. 153.

† Dickson on Evidence, sec. 778, and cases there cited.

whereabouts he is,—a matter which may be of great importance in a sequestration, and one in which the creditors may have a deep interest, but which they have no right to inquire into under these clauses. I think, therefore, that the Sheriff-substitute was right in refusing to allow that question. The examination then proceeded, and in the course of it the witness is interrogated, "Have you any letters from the bankrupt relative to his affairs? No. Have you received any letters from the bankrupt since he left Edinburgh? The witness stated that he had received no letters from the bankrupt relative to his affairs, and declined to answer the question upon that ground, and also on the ground of confidentiality. The Sheriff-substitute sustains the objection, and disallows the question." Now, if the witness's answer, that he had received no letters from the bankrupt relative to his affairs be taken as an accurate statement, then I think the Sheriff-substitute was right, but if there were any question as to whether letters received by the witness contained matter relative to the bankrupt's affairs I am not sure that the witness should be the sole judge of that. I should be disposed to make the Sheriff rather the judge of that, and to allow an inspection of the letters by him, for the purpose of determining the question. But I believe that is not re-[982]-quired in this case, and therefore it is not necessary to decide the point. I am for dismissing the appeal.

The other Judges concurred.

The following interlocutor was pronounced:—"Refuse the appeal, and affirm the deliverances complained of, and decern: Find the appellant liable in expenses; modify the same to the sum of £8, 8s.," &c.

LINDSAY, PATERSON, & HALL, W.S.—J. M'MILLAN, S.S.C.—Agents.

No. 175. X. MACPHERSON, 982. 18 July 1872. 2d Div.—B.

LIEUTENANT JOHN DUNBAR.—*Watson—Marshall.*
WILLIAM ALLASON CUNINGHAME AND OTHERS (Scott's Trustees).—*Sol.-Gen. Clark.—Muirhead.*

Legacy—Condition—Purpose.—By a trust-settlement the trustees were directed to settle £18,000 on the truster's nephew in liferent and his children in fee; and further, "in case of my not having advanced money during my lifetime to purchase a captain's commission in his regiment for the said John Dunbar, I direct my trustees to make payment to him of a further sum of £2000 sterling for that purpose." She did not advance money for the purchase of a commission, and purchase in the army was abolished before the truster's death. *Held* that although a commission could not be purchased the sum of £2000 was payable.

This was a special case presented by Lieutenant John Dunbar, of the first part, and William Allason Cuninghame, Esq. of Logan, and others, trustees of the late Mrs. Scott, of the second part. By trust-disposition and settlement, dated 14th June 1869, Mrs. Jane Cuninghame or Scott, of No. 8 Ainslie Place, Edinburgh, gave, granted, disponed, and assigned to William Allason Cuninghame, Esq. of Logan, and others, as trustees and executors for executing the trust, the whole heritable and moveable estates which should belong to her at the time of her death, in trust. By the second purpose of Mrs. Scott's trust-disposition it was directed "that my said trustees shall make payment at the first term of Whitsunday or Martinmas after my death" of the legacies to the persons therein named, and, *inter alia*, "to John Dunbar, my nephew, the sum of £18,000, and this in consideration of his having little or no patrimony; and failing the said John Dunbar, to his child or children; and further, in the case of my not having advanced money during my lifetime to purchase a captain's commission in his regiment for the said John Dunbar, I direct my trustees to make payment to him of a further sum of £2000 sterling for that purpose." Mrs. Scott died on 8th February 1872, leaving a succession of fully £90,000, and the trustees entered upon the administration of her estates. By a codicil to her settlement, dated 10th May 1871, she directed her trustees "to invest and settle the legacy of

£18,000 sterling provided to my nephew John Dunbar in said settlement, in such manner as to secure the liferent of the said sum to the said John Dunbar, and the fee to his children equally; and for that purpose I empower my said trustees and their foresaids to act as trustees themselves in regard to said legacy, or to appoint other two trustees for that special purpose: And I also empower my said trustees to appoint tutors and curators to said children during their minority in regard to their interest in the said sum of £18,000, and failing the said John Dunbar and his children, the capital of said legacy to revert to my own next of kin." Since the date of Mrs. Scott's settlement no opportunity had occurred for purchasing a captain's commission for Lieutenant Dunbar in his regiment; and purchase in the army having been recently abolished by a royal warrant, issued 20th July 1871, to [983] take effect on the following 1st November, a captain's commission could not be purchased for him. The question of law on which the opinion and judgment of the Court was desired was, "Whether Lieutenant Dunbar is entitled to receive payment of the said sum of £2000 directed in the second purpose of Mrs. Scott's trust-deed to be paid to him?"

Lieutenant Dunbar argued;—The testatrix in bequeathing £2000 directed that the money should be used for a special purpose. The legacy was not left under a condition, but under a direction, as to the purpose for which it should be applied. The legacy had not lapsed by the purpose having failed, as the testatrix intended her nephew should have the money. Now that he could not apply the money in the purchase of a commission he was entitled to it absolutely.*

At advising,—

LORD JUSTICE-CLERK.—In this case the question is whether the legacy of £2000, which was left under certain expressions in the trust-deed, is to be paid to Lieutenant Dunbar. The legacy proceeds upon this inductive statement,—"In the case of my not having advanced money during my lifetime to purchase a captain's commission in his regiment for the said John Dunbar." Now, it is stated in the case that a royal warrant for the abolition of purchase was issued on 20th July 1871, to take effect on 1st November 1871. The testatrix died on 8th February 1872. It was argued that although the money was left to Lieutenant Dunbar for the purpose of purchasing a commission that that was not a condition of his receiving the legacy, or, at all events, that if it was a condition, it was now impossible to fulfil the condition, which must therefore be held *pro non scripto*. It was further maintained that no party had a patrimonial interest in the condition being carried out, and the case of Skinner's Trustees was referred to. On the other hand it was contended that the money was only to be paid by the trustees for a certain purpose, and should not now be paid, as that purpose could not now be fulfilled.

In deciding this case I am not disposed to proceed on any general principle. I can understand that a case might arise in which, trustees being bound to pay money for a particular purpose, the legacy might fail because the purpose failed, and the benefit could no longer be taken by the legatee. But the circumstance which is conclusive to my mind is that the testatrix executed a codicil so late as 10th May 1871. At that time there was a bill in Parliament for the purpose of abolishing purchase in the army, and the royal warrant abolishing it was issued in July of that year. We may presume that she intended that the legacy should be paid whether she survived the abolition or not.

But I have considerable doubt if the legatee could have said before the abolition of purchase that he would take the legacy and not fulfil the condition attached to his receiving her money.

LORD COWAN.—This case radically depends upon the intention of the testatrix, and the words of bequest which she has used, keeping in view the rules of legal construction which have been recognised by the Court. The words used here are peculiar. A great deal of argument was advanced to shew that the legacy was not made under a condition, but was intended merely to be paid for a certain purpose. Viewed either as a condition or a purpose I do not think that the argument of the trustees should prevail.

Viewed as a condition, if the condition becomes impossible, the legacy is good and the condition flies off.

---

* Skinner's Trustees, 1860, White and Tudor's Leading Cases, vol. ii. p. 266; Kippen *v.* Kippen's Trustees, Nov. 24, 1871, *supra*, p. 134; Erskine's Institute, ii. 2, 6.

Viewed as a purpose, it raises a more delicate question. The purpose may be so wrought into the substance of the bequest that, unless it can be carried out, the bequest fails. If the purpose be such that the legatee only is concerned in [984] it, then the purpose ceases to have any effect. It was on this principle that the case of Kippen was decided. If in that case there had been attached a condition that the annuity was to be alimentary, we would not have sanctioned the principle. But we held that, as it was in the power of Miss Kippen to sell her annuity as soon as she had got it from the trustees, she was entitled to get from them the purchase-money of an annuity. Here I would have said that the trustees were bound to pay the legacy even if the legatee had obtained a captain's commission before the testator's death. But the abolition of purchase took place in the lifetime of the testatrix, and she allowed her settlement to remain untouched. I think we may therefore presume that her intention was that she wished her legacy to be paid by her trustees.

LORD BENHOLME.—I am of the same opinion. If the trustees had been directed to purchase a commission, and it had become impossible for them to do so, it might have been different. But what they are directed to do is, to pay the £2000 to the legatee to be applied to a certain purpose. The question arises whether this application was not intended entirely for the benefit of the legatee. I think the tendency of our law is to hold that if such a purpose has become impossible the legatee is to get the benefit in some other way which circumstances will allow. Here there is no destination over, and the legacy if it does not subsist must form part of the residue. I do not think it is of much importance whether or not the lady when she made her last codicil adverted to the fact that purchase was to be abolished. What she directed her trustees to do was to pay the money.

LORD NEAVES concurred.

THE COURT pronounced this interlocutor:—"Find that Lieutenant Dunbar, claimant of the first part, is entitled to receive payment from Mrs. Scott's trustees, the representatives of the second part, of the sum of £2000 directed in the second purpose of Mrs. Scott's trust-deed to be paid to him, and decern: Find Lieutenant Dunbar entitled to expenses, and remit," &c.

RUSSELL & NICOLSON, C.S.—A. STEVENSON, W.S.—Agents.

No. 176. X. MACPHERSON, 984. 19 July 1872. 2d Div.—Lord Mure, I.

JOHN MACDONALD AND JAMES BALFOUR (Duncan's Trustees), Pursuers.—*Traynor.*

ISABELLA SHAND, Defender.—*Campbell Smith.*

Bill—Promissory-Note—Act 1696, *c.* 25.—A holograph writing, promising to pay a sum of money on demand, but not containing the name of a payee, (1) is not a valid promissory-note, and (2) is null under the Act 1696, c. 25.

Process—Summons—Relevancy—Proof.—A summons concluded for payment of a sum of money "for which the defender granted a promissory-note." The Court *held* that the promissory-note was null, but sustained the action as to the debt, and allowed a proof by writ or oath.

This was an action at the instance of John Macdonald, treasurer of the Free Church, and James Balfour, W.S., trustees of the late John Duncan, LL.D., against Isabella Shand. The pursuers averred—(Cond. 1) "The pursuers are the trustees and executors of the late John Duncan, LL.D., Professor of Hebrew and Oriental Languages in the New College, Edinburgh, nominated and appointed by his trust-disposition and settlement, dated 8th November 1869." (Cond. 3) "On 2d February 1869 the said Dr. John Duncan advanced and lent to the defender £100. For this sum she granted to him a promissory-note, dated 2d February 1869, payable [985] on demand. The said promissory-note was in possession of the said Dr. Duncan at the date of his death." The document was in these terms:—"Edinburgh, 2d February 1869.—I promise to pay on demand the sum of one hundred pounds sterling, value

received. ISABELLA SHAND." (Cond. 4) "The said principal sum of £100, and interest at the rate of 5 per cent. per annum from 2d February 1869 till paid, are due and resting owing to the pursuers."

The conclusions of the summons were, "to make payment to the pursuers, as trustees and executors foresaid, of the sum of £100 sterling, and for which sum the defender granted a promissory-note to the said Dr. John Duncan, dated 2d February 1869, payable on demand, with interest at the rate of 5 per centum per annum from the date of said promissory-note until paid."

The defender pleaded;—(1) The document founded on not being in law a promissory-note, or other valid document of debt, the defender is entitled to absolvitor. (2) The document having been taken possession of by the pursuers, or one or other of them, without lawful cause, and being improperly in their custody, the action ought to be dismissed. (3) The defender not being indebted to the pursuers, is entitled to absolvitor, with expenses.

The Lord Ordinary pronounced this interlocutor:—"Before answer allows parties a proof of their averments applicable to the possession by the late Dr. Duncan of the promissory-note in question, and to each a conjunct probation." *

The defender reclaimed, and argued;—The promissory-note is invalid as there is no payee. The object of the proof being to fill up the name of the payee, it ought not to have been allowed. The action being laid on a document which is invalid, the defender is entitled to absolvitor.† The note was a mandate to Dr. Duncan which fell at his death.

The pursuers answered;—The holder of a promissory-note, blank in the payee's name, may fill up the blank. But the pursuers do not found on the document as a promissory-note or a bill entitling them to use summary diligence, but simply as an obligation to pay.‡

At advising,—

LORD NEAVES.—This is a case of nicety and importance. The action was brought at the instance of the trustees of the late Dr. Duncan against Isabella Shand. It is founded on what is called a promissory-note, said to have been granted by the defender, and to have been delivered as a document of debt in favour of the late Dr. Duncan, in these terms:—"Edinburgh, 2d February 1869.—I promise to pay on demand the sum of one hundred pounds sterling, value received. ISABELLA SHAND." It is not said that this document is holograph, but it appears to be so, and that statement, if necessary, might be added to the record. The question is, whether that statement would avail the party founding on the document. It appears to me that the document, as it stands, is not a [986] promissory-note. It is a writing in which Isabella Shand promises to pay £100 on demand, but it is not said to whom the money is to be paid, so that there is no creditor's name. It is thus quite different from a common promissory-note. I take it to be the law that the name of the promisee must be set forth in the document, which is not done here. Whether it can be supplied is another question. The document, as it stands, is incomplete and inconclusive. A separate objection is, that being blank in the creditor's name, it is null under the Act of Parliament as to blank writs.

The answer attempted to these objections is, that there are cases in which bills of exchange, though not complete, have been allowed to be completed. But bills of exchange and promissory-notes are different things. A promissory-note is a promise by the maker of the note to pay, and ought to be to pay to somebody. Bills have been sustained in which the drawer's name was blank, but the bill, when this was filled up,

---

* "NOTE.—Until the facts relative to the possession of the document in question by the late Dr. Duncan are ascertained the case will not, it is thought, be in a position for disposing of any of the pleas raised in defence, or to enable the Court to decide whether the rules on which the decision in the case of Fair, 24th June 1801, Hume, p. 47, Mor. p. 1677—Ogilvie, 24th June 1804, M. App. Bill, No. 17—and Macdonald, 13th June 1817,—proceeded, admit of being here applied."

† Thomson *v.* Philip, March 25, 1867, *ante*, vol. v. p. 679; Cowie *v.* Stirling, May 1, 1856, 25 L. J. (Q. B.) 335; Brodie *v.* Muirhead, Feb. 1, 1870, *ante*, vol. viii. p. 461; Act 1696, c. 25.

‡ Thomson on Bills (Wilson's ed.) pp. 48 and 49; Hume, *voce* Bill; Fair and following cases.

was quite regular, being merely an inchoate obligation before this was done. The law says that what was intended to be done in order to put the bill in proper form may be carried out in accordance with the intention of the parties. Hence the drawer or intended drawer may fill in his name, and then there is the signature of the drawer and the acceptance of the drawee.

It appears to me that the power so to complete a bill is not an authority in the present case. In the case of a promissory-note the payee does not write upon the note at all. Here it is proposed to supply the want of Dr. Duncan's name in the body of the note by appending his address after his death, but it is not by means of an address that a promissory-note is completed, but by the promise to pay to a particular party. It seems to me that the filling up of an address would be entirely to change the character of the document as it came from the hands of the promissor. To put in Dr. Duncan's name would be to alter the document in its character, and we must take it as it stands, as all that the defender meant to promise. The document has been produced in process, and the defect cannot now be filled up.

It is a question whether the action should be allowed to proceed at all, but the tendency of our practice is, if possible, to allow an action to proceed, if we can by so doing get at the real matter in dispute between the parties. I recommend that we should find that this is not a valid promissory-note, and that the debt can only be established by the writ or oath of party.

LORD BENHOLME.—I concur. I cannot for a moment doubt—(1) that this is not a valid promissory-note, and (2) if it is to be regarded as an ordinary obligation, that it is struck at by the Act of 1696, cap. 25. The question then is, whether this summons is so libelled that if this document be withdrawn it can still be sustained. Does the action not fall in consequence? I am rather inclined to take the view that the summons may stand as regards the sum concluded for, and may be supplemented by proof,—a reference to the writ or oath of the defender being the only competent mode of proof. While we hold the document which is mentioned in the conclusion not to be a promissory-note or a valid obligation, we might still sustain the debt, which does not depend on the validity of the document. I therefore agree with Lord Neaves, and think that the Lord Ordinary's interlocutor should be recalled, and that we should allow a proof by writ or oath of the debtor.

LORD JUSTICE-CLERK.—Upon the first point, namely, as to the legal effect of the writing, I concur in the opinions delivered. I was a good deal struck with the case in Hume quoted to us. But I am satisfied that this document does not fall within that class of cases. This document is not blank in the creditor's name. It has no creditor and no blank, and does not contain a promise to any one. Even if it had, having been produced in judgment and founded on in this action, it is doubtful whether it could be amended by filling in the address. The address will not make what was not an obligatory right into a good document of debt. I concur therefore in the view that the action, so far as laid upon this writing, cannot be sustained.

It may be a question whether the summons is relevant should the reference [987] in the conclusions of the summons to the document be withdrawn. I quite concur in the view that the summons may be sustained. We must accordingly find that this is not an obligatory document, and that the pursuer can only prove the alleged debt by the writ or oath of the defender.

LORD COWAN was absent when the case was argued and gave no opinion.

THE COURT pronounced this interlocutor:—"Recall the Lord Ordinary's interlocutor reclaimed against, and find that the debt sued for can be proved only by the writ or oath of the defender, reserving questions of expenses."

D. T. LEES, S.S.C.—THOMAS SPALDING, W.S.—Agents.

No. 177. X. MACPHERSON, 987. 19 July 1872. 1st Div.—Sheriff of Ayrshire, M.

ALEXANDER PICKEN, Appellant and Defender.—*Guthrie.*
ARUNDALE & CO., Respondents and Pursuers.—*Scott.*—*Hall.*

Proof—Admission—Qualification.—Where a pursuer allows his case to depend entirely on the admissions of the defender, these admissions must be taken with all the adjected qualifications, and there is no room for the distinction of intrinsic and extrinsic qualifications. Hence, where a pursuer brought an action for the balance upon a debit and credit account, and the defender admitted all the items in the pursuer's account, but averred that he had furnished certain goods in addition to those credited to him by the pursuer, as shewn in an account lodged by him, and both parties renounced probation, it was *held* that the pursuer was bound to prove his account, and that, as his only evidence consisted of a reference to the account of the defender, he must take that account with all its entries whether for or against him.

Process—Additional Proof—Court of Session Act, 1868, *sec.* 72.—Proof having been allowed by the Sheriff, both parties afterwards renounced probation. In an appeal one of the parties moved to be allowed to lead additional proof. Motion *refused*, on the ground that the parties by their actings had entered into a contract to renounce probation.

Arundale & Co., hat manufacturers, Glasgow, sued Picken, a bonnet manufacturer in Kilmarnock, in the Sheriff-court of Ayrshire, for "£83, 14s. 4d., being the sum due to them for advances made to the defender by bills and in cash, and for returned goods, and over-charges on goods, to the amount of £503, 15s., whilst the defender sold to them goods to the value only of £420, 0s. 8d., leaving due to the pursuers the foresaid sum of £83, 14s. 4d., per debit and credit account between the parties, commencing the 4th day of February 1868, and ending the 23d day of February 1869, annexed hereto, with the interest," &c. The pursuers alleged that they had made advances to the defenders in bills, cash, and return goods to the amount of £503, 15s., while the defender had sold to them goods of the value only of £420, 0s. 8d., as shewn in the account annexed to the summons, extending from February 4, 1868, to February 23, 1869. The defender produced an account agreeing in every particular with that of the pursuers, except that it contained on the credit side three items of goods supplied by him to the pursuers, which did not appear in their account at all; and that it claimed credit under date 13th December 1868 for £13, 9s. 6d., instead of £10, 13s. It also omitted a sum of £5, 5s., with which the pursuers credited themselves for goods returned.

Bills bearing to be "for value received" were admitted to have been accepted by the pursuers and discounted by the defender as drawer to the amount of £465, 4s. 1d.

A record was made up in the inferior Court by condescendence and [988] defences, in which specific averments were made as to the different items in the account, and, *inter alia*, the pursuers denied that in point of fact full value was given for the bills; and stated that they were granted to the defender, as he required money, and in anticipation that goods to the amount thereof would be supplied, but the defender did not do so. The defender explained that at the request of the pursuers he had, towards the end of their dealings, furnished them with a statement of the accounts between them and him, in which, through inadvertence, the three sums above mentioned were omitted by the person who made up the statement, although the defender's books contained due and regular entries thereof. The pursuers admitted that this statement had been made, although, as it had fallen aside, they could not speak to its terms.

The defender's account shewed a balance against him of £2, 18s. 3d., which he consigned.

The pursuers pleaded;—The defender being justly indebted to the pursuers in the sum sued for, they are entitled to decree in terms of the conclusions of the libel.

The defender pleaded;—(1) The bills founded on by the pursuers being bills drawn by the defender upon and accepted by them, the presumption is that the

pursuers received value for the same, and the latter can only prove that the said bills, or any of them, were not granted for value by the writ or oath of the defender. (2) The action is incompetent, the same being essentially an action for repetition of alleged over-payments by the pursuers to the defender, which are not averred to have been made in error, and which, on the contrary, were made in the full knowledge by the pursuers of the state of accounts between them and the defender. (4) In the circumstances above narrated the defender is not due the sum sued for, but only the amount which he has consigned in the hands of the clerk of Court.

The Sheriff-substitute (Anderson) gave effect to the defender's contention, that the bills proved value received to the extent of £465, 4s. 1d., and found (25th October 1871) that the pursuers' averment to the contrary could "be proved only by writ or oath; and, unless so proved, that credit must be given for the whole amount in ascertaining the balance of account still due."

The Sheriff (Campbell), on 13th January 1872, recalled this interlocutor, and before answer allowed both parties a proof *prout de jure* of their respective averments, and to the pursuer a conjunct probation.

Thereafter, on 12th February 1872, the pursuers and defender respectively lodged minutes renouncing probation.

The Sheriff pronounced an interlocutor (28th February 1872) finding "that the account sued for, and the account No. 14 of process, produced and founded on by the defender, are practically at one in regard to all the items, with the following exceptions, viz.:—1st, The item of £5, 5s., charged by the pursuers against the defender, of date 15th October 1868, in the account sued for, which item has not been proved, and is accordingly disallowed; 2d, The items of 6s., £40, 10s., and £31, 18s. 6d., charged in the defender's account, No. 14 of process, against the pursuers for goods said to be furnished on the following dates, viz., 4th and 25th February, and 19th June 1868, which are disallowed, in respect that the furnishings are not proved; and, 3d, The item of £13, 9s. 6d., charged by the defender against the pursuers, of date the 17th December 1868, which, in so far as it exceeds the sum of £10, 13s. admitted by the pursuers, is disallowed as unproved: Finds that, after giving effect to these findings, there remains a balance due by the defender to the pursuers of £78, 9s. 4d. upon the account sued for; for which balance decerns against the de-[989]-fender, with interest thereon from the date of citation till payment: Finds the pursuers entitled to the expenses," &c.*

---

* "NOTE.—The pursuers and the defender appear to have had mercantile dealings with each other in the years 1868–9, the pursuers purchasing and receiving goods from the defender, and in return accepting and retiring bills drawn by the defender.

"Founding on these dealings, the pursuers libel on the account attached to the summons. The items on the debit side amount *in toto* to £503, 15s., and those on the credit side amount to £420, 0s. 8d., leaving a balance in favour of the pursuers of £83, 14s. 4d., which is sued for.

"On the other hand, the defender produces and founds on an account, No. 14 of process, which he avers to be correct.

"These two accounts only differ in regard to five items. In other respects they substantially agree. The points of difference are as follows:—

"The pursuers in their account charge a sum of £5, 5s. against the defender as of 15th May, which does not appear in the defender's account, and is objected to by the defender. The Sheriff has disallowed the charge. But subject to that deduction he has given decree against the defender for the amount of the account sued for.

"The remaining four items in regard to which the accounts differ are contained in the defender's said account, but do not appear in the pursuers'. Three of them are for parcels of goods said to have been furnished by the defender to the pursuers of the following dates, viz.:—

"February 4, 1868	£0 6 0
" " 25, "	40 10 0
"June 19, "	31 18 6
"And amounting in whole to	£72 14 6

"These furnishings the pursuers deny, and this denial is supported by the

[990] The defender appealed, and argued;—The Sheriff has erred in point of law in taking the defender's admission on record, and by his own account of the correctness of certain items of the pursuers' account, without the qualifications annexed to these admissions. Where a pursuer adduces no evidence, but rests his case on an account given in by the defender, it is settled law that the Court must look at both sides of the account. The distinction of intrinsic and extrinsic qualities is not applicable to such cases, because it was in the power of the pursuer to lead evidence to disprove the quality attached by the defender to his admission.* In any view the Sheriff was wrong in allowing parole proof to overcome the presumption raised by the bills, which are conclusive proof in this case of the fact that value was given by the defender to the amount which they bear. Value in account, even if that were the expression used, means that value was received in account; and there is no necessity that the value should have been given at the time the bills were granted.†

The pursuers (respondents) argued;—There was no doubt as to the propriety of allowing parole proof where the value was plainly value in account, and the admissions

---

defender's own writ; for according to his judicial statement he rendered a state of accounts to the pursuers sometime previous to the raising of the present action, which does not contain, and does not claim credit for, these three items. Now, the accounts of a party, like his books, are not evidence in his favour, but are, *prima facie*, evidence against him,—evidence, however, which may be overcome. And accordingly the defender avers that the account he so rendered was inaccurate, and that, *de facto*, he furnished to the pursuers the three parcels of goods charged for.

"This being disputed by the pursuers, proof became necessary.

"The defender resisted a proof *prout de jure*, and pleaded that the proof should be restricted to his own writ or oath. He put his case thus, viz.,—that the pursuers charged against him four bills, amounting together to £465, 4s. 1d.; that these bills were drawn by the defender upon and accepted by the pursuers; that they were then discounted by the defender, and retired at maturity by the pursuers, as the proper debtors therein; that the bills which covered the disputed items of account, and bore to be for value received, could not be contradicted but by the writ or oath of the defender.

"Now, if there had been nothing in the record and relative account to shew that the bills were not granted for value this contention might have received effect. It appears, however, from the record and relative documents that there was an account-current between the parties, and that the bills were not granted for value but only to account, and, to a considerable extent, by way of cash advance to the defender. The defender's own account, No. 14 of process, which is averred to be correct, shews that none of the bills was granted for full value. The first, according to that account, was accepted for £65 less than value; the second, for upwards of £20 less than value; the third (for £98), entirely without value, and the last for upwards of £45 less than value. In such circumstances it is impossible to hold that the bills were granted for value received at [990] the time. They were, to a large extent, granted per advance, and it was quite open to the defender to prove that he had furnished the three parcels of goods above referred to towards extinction of the pursuers' advances.

"Accordingly, the Sheriff allowed a proof to both parties, it being incumbent on the pursuers to prove the item of £5, 5s. above referred to. But both parties, however, having renounced probation, the case comes back to be dealt with as it stands. Accordingly, the Sheriff has disallowed the disputed item of £5, 5s., which the pursuers decline to prove, and also the three disputed items which the defender declines to prove, amounting, as above mentioned, to £72, 14s. 6d. He has further refused to allow the defender more than the pursuers admit of the charge under date 17th December 1868.

"In regard to all the other items, the accounts of the pursuers and defender, as already mentioned, agree, and the Sheriff has allowed the pursuers the balance that arises in their favour on the items as they so agree."

* Campbell *v.* Macartney, June 23, 1843, 14 D. 1087; Milne *v.* Donaldson, June 10, 1852, 14 D. 849; Mackay *v.* Ure, Nov. 13, 1847, 10 D. 89; Dickson on Evid., sections 1487, 1488.

† Wilson *v.* Loder, Feb. 1, 1848, 10 D. 560; Wallace *v.* Barrie, 1793, Mor. 1483; City of Glasgow Bank *v.* Jackson, May 12, 1869, *ante*, vol. vii. p. 757.

of the drawer himself proved that the liability really contracted was different from that appearing to have been contracted on the face of the document of debt. Here, on the defender's own shewing, the presumption was not in accordance with the fact.* Where bills are retired and dealt with as items in an accounting the usual presumption does not hold. In an accounting, moreover, such as occurs here, there is a mutual onus. This is different from the cases of Milne and Campbell, because here there is a dispute only as to certain items, the onus in each case being with the party who avers the payment or furnishing in question.

At the end of the debate, the pursuers (respondents) asked to be allowed to lead additional proof under sec. 72 of the Court of Session Act, 1868.

LORD PRESIDENT.—The question is, whether we are to allow the pursuers a proof, the defender not consenting. There is no doubt of the powers of the Court; and if we thought necessary for the interests of justice that a proof should be allowed we should not care much for the desire of either party. But this case stands in a different position. After the Sheriff allowed both parties a **[991]** proof they entered into a contract to renounce probation. Then they come here, and one of the parties to that contract asks to be relieved from it, and to be allowed to lead proof. I am for refusing to allow further evidence.

Their Lordships then made avizandum with the merits.

At advising,—

LORD PRESIDENT.—The summons concludes for payment of £83, 14s. 4d., as a balance arising on a debit and credit account between the parties, commencing 4th February 1868, and ending 23d February 1869. An account is produced with the summons. On one side the pursuers credit the defender with the price of goods furnished by him. On the other they debit him with bills accepted and retired by the pursuers, and also with certain returns and over-charges. The defender has also produced an account, in which he brings out a balance of £2, 18s. 3d. as due by him. The difference between the two accounts consists of a variety of items on both sides. The Sheriff, on 13th January 1872, allowed both parties a proof *prout de jure* of their respective averments; but after that interlocutor was pronounced minutes were lodged for both parties renouncing probation, and the case therefore fell to be disposed of on the statements and admissions on record; and the Sheriff, by an interlocutor on 28th February 1872, disposed of the case in this way: He took the undisputed items in the pursuers' account, and gave effect to them, and decerned against the defender for the balance arising on these undisputed items. Now, the defender says that is just in effect to take one side of an account and leave out the other side, or a considerable proportion of it, which is against all principle and justice. He further says that what are called undisputed items are so in respect of admissions on record, which admissions are made subject to qualifications; that the Sheriff has taken them without qualification; and that, if they are taken with their qualifications, the result must be to bring out the balance stated by the defender.

I have considered the case with a good deal of anxiety, because it belongs to a class of cases of great practical importance, and the result is that I am quite unable to distinguish it from the case of Milne *v.* Donaldson, June 10, 1852. In that case the pursuer stated that the defender had owed £200 to her, and had paid £100 to account, and she claimed the balance. The answer was, "Admitted that the defender was owing £200 originally, and that he had only paid £100, but the balance is subject to compensation as afterwards stated." The claim of compensation which was stated was one by no means necessarily connected with the claim sued for by the pursuer. Lord Wood decided the case in favour of the defender, on the ground that the admission was with a qualification, and that the pursuer was not entitled to avail himself of it without the qualification. His Lordship had been Judge in the case of Campbell *v.* Macartney, nine years before, in which he said, "The authorities appear to go to this, that where it is not a case of prescription, and the pursuer founds on the admission of the defender for the support of his claim, he must take the admission as a whole, and cannot cull out such parts of it as are favourable to himself. If a case is to be allowed to stand exclusively upon the admission of the defender, the pursuer cannot take one side of an account given in by the defender without taking the other, although it may be competent to him, while he takes the admission, to rebut the qualifications by evidence.

* Newlands *v.* Brock, Nov. 11, 1863, *ante*, vol. ii. 71; City of Glasgow Bank, *cit.*

But if he offers none, and makes no reference to oath (which is the case here), so that the case is left on the admission of the defender alone, then the admission must be received with all its adjected qualifications, and the pursuer cannot, by rejecting them, supersede the necessity of leading further proof on his part." But in this case of Milne *v.* Donaldson, Lord Wood says—"In conformity with the doctrine as thus explained (in Campbell *v.* Macartney) the result is, that in the case of a qualified admission a qualification which in an oath on reference might be excluded as extrinsic is not excluded, but is to be taken along with or as a part of the admission, if the opposite party allows his claim to stand exclusively upon the admission. One reason of the distinction seems to be, that, in the case of a reference to oath, no contrary or rebutting [992] proof is allowed to the opposite party, whereas, in the case of a qualified admission, the qualification may be rebutted by contrary proof. In the first, rebutting evidence of an adjected qualification not being competent, the admission may be separated from everything which accompanies it that is not clearly an intrinsic quality, and may be founded on *per se* against the party admitting; while in the last, rebutting evidence of an adjected qualification being competent, things not amounting in law to what in an oath would form an intrinsic quality, must be taken as qualifying the admission, and available to the party admitting against the party founding on the admission." The Court, in reviewing Lord Wood's judgment, adopted his reasoning, and gave full effect to the propositions stated by him. The Lord President, among others, said—"He must take the admission with this qualification. It is a substantial part of the statement. It is an answer to the pursuer's demand, good in law if it be true in fact. It is a plea of compensation, and is part of the quality of the admission. I do not go into the question whether this would be a relevant statement in an oath of reference. We are not here dealing with a deposition under a reference, but with a judicial admission. I hold that the admission comes to no more than this—'I owe you £200, under deduction of what I have already paid.' I think it is the same thing as if the party had said—'I admit I got £200 from you at one time, but this is the state of our accounts now.' And so, having made out an account in figures, the admission would be on one side of the account, and the qualification on the other, and the balance would be all that was really admitted to be due."

Now, I apprehend that it is too late to call in question the soundness or expediency of this rule in practice. It is now firmly settled, and it is our duty to give effect to it wherever it is applicable. It appears to me that this is a stronger case for its application than that of Milne *v.* Donaldson. Let us look at the record. The pursuers aver (Cond. 2) that certain bills entered on the debit side of the account amount to £465, 4s. 1d., but they also claim for goods returned to the defender, and for certain over-charges made by him, to the amount of £38, 10s. 11d. Now, the answer for the defender is—"Admitted that the said bills amount in value to £465, 4s. 1d. Admitted that there were returns and some trifling over-charges. Denied that these amount to £38, 10s. 11d.; and explained and averred, that the £5, 5s. charged in the account on the debtor side, under date 15th October 1868, is erroneously charged, and is not due, and that the pursuers have admitted this to the defender, and have agreed to withdraw it. *Quoad ultra* denied." Abstracting the matter about the £5, 5s., which is immaterial, the admission here is simply that the bills amount in value to £465, 4s. 1d., and *quoad ultra* the statement is denied. On the other side, in reference to this matter of bills, the defender states—"The several sums specified in the debtor side of the account annexed to the summons, under dates 4th February, 30th July, 7th October, and 31st October 1868, are the amounts of four several bills for the said sums, dated respectively 4th February, 27th March, 5th June, and 31st October 1868, drawn by the defender upon and accepted by the pursuers, which were discounted by the former, and retired successively by the pursuers when they fell due. The said bills bear to have been granted for value, and were so in point of fact." The pursuers answer that by saying—"Admitted that the bills here specified were granted. Denied that, in point of fact, full value was given for them, and, as explained by pursuers, they were granted to the defender as he required money, and in anticipation that goods to the amount thereof would be supplied, but the defender did not do so." Now, then, in regard to the question, whether full value was given for these bills, amounting to £465, 4s. 1d., the parties are distinctly at issue. The pursuers say that full value was not given; the defender says that full value was given.

Now, we come to the other side of the account. The pursuers aver (Cond. 3)—

"On the other hand, the defender sold to the pursuers goods to the value of £420, 0s. 8d., as detailed in said account, which being deducted from said amount of £503, 15s., leaves £83, 14s. 4d. due to the pursuers, being the sum concluded for." The answer is—"Admitted that the defender sold goods to the pursuers. *Quoad ultra* denied, and reference made to the defender's statement of facts." Now, that imports into the defence the defender's statement in so far [993] as it refers to the amount of goods furnished; and in stat. 2 we find—"In the beginning of January 1868 the parties commenced dealing with each other, and from that period down to the month of February 1869 the defender supplied considerable quantities of goods to the pursuers. The goods so supplied amount in whole to £495, 11s. 9d.,—instead of £420, 0s. 8d., as stated by the pursuers.

Now, here we have a record made up with reference to two accounts, one produced by the pursuers, and the other by the defender. One brings out the amount of the goods as £420, 0s. 8d., and the other as £495, 11s. 9d. Parties are agreed as to the amount paid by bills, but they are totally at variance as to the other side of the account; and the rule established by Milne *v.* Donaldson and other cases is that you cannot take one side of an account and leave out the other, and that you cannot take an admission without its qualification.

The result is that the pursuers have failed to instruct their averments to the extent of the difference between the balance as brought out by them and the balance as brought out by the defender. In other words, they can only obtain decree for the balance brought out by the defender.

LORD DEAS.—I agree with Lord Wood's remark in the case of Campbell *v.* Macartney, that there is not the same distinction between intrinsic and extrinsic in dealing with admissions on record as in an oath of reference; and I also agree that, when both parties produce accounts, the pursuer is not entitled to take the defender's account as an admission of articles claimed in his account, without taking the account as a whole. But I am of opinion, at the same time, that the defender in such an action may so state his defence as to reduce the questions between him and the pursuer to certain specified points; and I am disposed to think that that is what was done in this case. I read the statements for the defender on record as an admission of the whole items charged against him by the pursuers, with the single exception that he claims credit for those specific quantities of goods, which he says were sent to the pursuers on certain specified days. In statements 3, 4, and 5 he mentions the dates and the sums, and then he says (Stat. 6), "These several sums, for which the defender has not received credit, amount, *in cumulo*, to £72, 14s. 6d." I read these statements as coming to this, that if he gets credit for these items, all is right between him and the pursuers. Now, I quite admit the rule about admissions being taken with their qualifications. But I do not think it was ever meant to go the length that a defender cannot limit the question between him and the pursuer; that though the dispute is about a few items only, he must go into a long and expensive proof, involving an account of perhaps several thousand items, and take his chance of being found liable in the whole expenses incurred in proving things which he had admitted. The whole question is, whether the litigation was so limited in this case, and I think it was. I think the case of Milne *v.* Donaldson went far enough,—perhaps too far. But I am of opinion that in this case the defender limited the questions between him and the pursuers to these specific items, with the admission otherwise of their claim.

LORD ARDMILLAN.—I have only to say that if it were not for the case of Milne *v.* Donaldson I should concur with Lord Deas that the justice of the case and general expediency of procedure would lead to an opposite conclusion from what your Lordship has proposed. But I do not think that a judgment so recently pronounced, and so well considered as that of Milne *v.* Donaldson, can be set aside, and therefore, with some reluctance, I concur with your Lordship in the chair.

LORD KINLOCH.—The nature of the action raised in this case by Messrs. Arundale and Co. against Mr. Picken is, I think, very obvious. It is simply to this effect, that Picken supplied them with goods to the extent of £420, 0s. 8d.; that there were payments by bills and otherwise to a certain extent; and returns and overcharges to a certain further extent; and that, on the whole, they had overpaid Picken to the amount of £83, 14s. 4d. They therefore conclude for this amount as (to quote the words of their summons) "the sum due to them [994] for advances made to the defender by bills and cash, and for returned goods and overcharges on goods, to the

amount of £503, 15s., whilst the defender sold them goods to the value only of £420, 0s. 8d., leaving due to the pursuers the foresaid sum of £83, 14s. 4d." This was an unquestionably relevant case; but the burden of proving it lay on the pursuers.

The pursuers produced with their summons an account shewing this result. The defender produced a counter account, shewing only £2, 18s. 3d. due, which he consigned and offered to pay.

The Sheriff allowed to both parties a proof *prout de jure*. But both parties lodged minutes renouncing further probation. They did so, no doubt thinking, each of them, that he thereby acquired some advantage over the opposite party. The Court has held that neither party can now, without consent of his opponent, undo this proceeding, and, merely because he now doubts whether the proceeding was so advantageous as he fancied, go back to the allowance of proof made by the Sheriff.

The case must therefore now be determined on the footing on which the parties themselves have placed it. And the point for consideration is, whether, and to what extent, if any, the pursuers have established their demand.

I think it plain that they have no other evidence on which to support their case than the admissions of their antagonist. They have no extraneous documents on which to rest it. They produce, indeed, certain bills; but these are all their own acceptances, bearing to be granted for value, and retired by themselves. These plainly form no vouchers of debt against the defender. On the contrary, they shew a debt once due to him, though now extinguished. They are admittedly bills granted for the price of the goods furnished by the defender. If it be said that to any extent they were granted beyond the amount of the furnishings, and to this extent were without value, and the means of raising money for the defender's behalf, this allegation is one which, in the face of the statement on the bills themselves, could only be proved by the writ or oath of the defender. No evidence of this description is tendered.

The pursuers must rely exclusively on the admissions of the defender. And to what do these admissions go? Simply to this, that whilst the account of the pursuers is, generally speaking, admitted to be accurate, this is said under the express qualification that it omits certain furnishings by the defender, which, if added to his credit, and correcting some small admitted errors, reduce the balance to the sum of £2, 18s. 3d. I am clearly of opinion that the defender's admission cannot be taken without taking this qualification. I by no means accede to the doctrine that a pursuer cannot take any admission by the defender, however separate and isolated, without thereby assuming for true the whole statements contained in the defender's record. I can conceive many cases in which an isolated admission may be taken as evidence, without this implying any adoption of the defender's other statements. But when the statement and qualification are directly and naturally connected, the one cannot be taken without the other; and if they are so connected, it does not matter whether the qualification is contained in the answer to the pursuers' averment, or in the defender's own statement. Here the qualification goes to the very essence of the case. The pursuers say that the defender received from them certain payments and returns where he had sold them goods to the extent of £420, 0s. 8d. The defender admits the payments and returns, but says the amount of goods furnished was not £420, 0s. 8d., but £492, 15s. 2d. Hence the alleged overpayment is not £83, 14s. 4d., but £2, 18s. 3d. I cannot imagine a more direct connection than here exists between the admission and the qualification. It is impossible to take the one without the other. To do so would be contrary to every principle of equity and fair dealing. The case is the simplest imaginable. A pursuer says to a defender, I got from you £400 of goods, but I paid you £500, so I have overpaid you £100. The defender answers, You paid me £500, but the goods you got amounted to £500, so I am owing you nothing. How is it possible that the pursuer can take the admission of the payments without taking also the qualifying statement of the amount of furnishings which these payments went to [995] settle for? The pursuer may of course prove his case otherwise; but if he has no other evidence than the admission of the defender, he must of necessity fail.

The Sheriff has proceeded in the following manner. He has compared the two accounts lodged by the parties respectively, and where he finds them to agree he holds the matter so far settled. Where entries in the one account are not found in the other, he holds the party making these entries bound to prove them; and, no proof being led, he holds they must be struck out. This looks at first sight plausible, but it involves, with all deference, the complete overturn of established legal rules of evidence. The

pursuer is bound to prove his account. If his only evidence consists of a reference to the account lodged by the defender, he must take that account with all its entries, whether for or against. He cannot strike out entries in that account merely because these entries are not in his own account. To say that he can appears ludicrous on its bare statement. Yet this is what the Sheriff has actually done. He has disallowed entries in the defender's account, and called on the defender for proof of these entries, simply because these entries are not contained in the pursuers' account. This, with deference, is altogether inadmissible.

I am of opinion that the judgment of the Sheriff should be recalled, and that in respect of the pursuers adducing no other evidence of their claim but the defender's statement and account, they are bound to take these as given, and cannot have their demand farther sustained than to the extent of the admitted £2, 18s. 3d.

This interlocutor was pronounced:—"Recall the interlocutor of the Sheriff complained of: Find that, both parties having renounced probation, the pursuers (respondents) have failed to establish by the admission of the defender (appellant) on record that any balance is due to the pursuers on the account libelled beyond the sum of £2, 18s. 3d., admitted and consigned by the defender: Grant warrant and authority to the Sheriff-clerk to pay over to the pursuers the said consigned balance of £2, 18s. 3d.; dismiss the action, and decern: Find the defender entitled to expenses, both in this and the inferior Court: Allow accounts," &c.

JAMES MASON, S.S.C.—J. & R. D. Ross, W.S.—Agents.

No. 178. X. MACPHERSON, 995. 19 July 1872. 1st Div.—B.

JOHN GEORGE CHANCELLOR (Mrs. Chancellor's Heir-at-Law and Executor), First Party.—*Marshall.*

HUGH MOSMAN (Hugh Mosman's Tutor and Administrator-in-Law), Second Party.—*Adam.*

MRS. MARY CATHERINE BEDINGFIELD COLLYER OR STEWART AND HUSBAND, Third Party.—*Fraser.*

Dispositive Clause—Succession—Conditional Institute—Conditio si sine liberis.—The inductive clause of a *mortis causa* disposition declared it to be the desire of the granters that a certain tenement should after their decease belong to *C.* their niece, for her life, and at her decease to her daughters *D.* and *E.*, *nominatim*, in fee; but by the dispositive clause the subjects were disponed "to *C.*, *D.*, and *E.*, or the survivors or survivor of them." *D.* predeceased the longest liver of the granters, leaving a daughter; *C.* and *E.* survived the granters. *Held* (1) that the dispositive clause could not be controlled by reference to the inductive; (2) that on the death of the last of the granters the fee vested in equal *pro indiviso* shares in *C.* and *E.*, as the survivors at that date of the three disponees; and (3) that the daughter of *D.* was not entitled to any share of the subjects conveyed under the *conditio si sine liberis.*

Misses Elizabeth, Marianne, Henrietta, Jane, and Helen Robertson, daughters of the late David Robertson, Esq., were vested equally in the house No. 46 George Square, Edinburgh. On October 23, 1845, they granted a disposition in the following terms:—"We, . . . having [996] love, favour, and affection for our niece, Helen Hamilton Chancellor, her daughters Mary Forbes Chancellor and Helen Barbara Chancellor, and being anxious that the said tenement, and all its parts and pertinents, should, after the decease of the longest liver of us, belong to the said Helen Hamilton Chancellor for her life, and at her decease in fee to her unmarried daughter or daughters, and if both her said daughters, Mary Forbes Chancellor and Helen Barbara Chancellor, should marry, then to be sold, and the proceeds to be equally divided between them, or in any other way divided they may decide upon: Therefore we do now and hereby give, grant, alienate, and dispone to and in favour of the said Helen Hamilton Chancellor, Mary Forbes Chancellor, and Helen Barbara Chancellor, or the

survivors or survivor of them, all our said property and respective shares in the tenement No. 46 George Square, Edinburgh, with all parts and pertinents thereunto belonging, heritably and irredeemably, but reserving always to ourselves, separately and collectively, our liferent interest therein."

The last survivor of the Misses Robertson died on February 3, 1864. She was survived by two of the disponees, Mrs. Chancellor, and her daughter Helen Barbara Chancellor, wife of Hugh Mosman, Esq.

Mary Forbes Chancellor or Collyer had predeceased the testators, leaving a daughter, who married Colonel J. H. Maxwell Shaw Stewart.

Mrs. Mosman died in 1866 leaving five children. Mrs. Chancellor died in 1872.

A special case was presented by (1) John George Chancellor, Mrs. Chancellor's eldest son and general representative (first party); (2) Mr. Mosman, as administrator-at-law for his eldest son (second party); (3) Mrs. Shaw Stewart and husband (third party).

Neither Mrs. Chancellor nor either of her daughters was infeft in the house in George Square, and none of them executed any disposition or other deed disposing of their interest therein. Mrs. Chancellor drew all the rents till her death, but it was agreed that, for the purposes of this case, the rents should be regarded as having been drawn by her for the behoof of the party or parties legally entitled to them.

The following questions of law were submitted for the opinion and judgment of the Court:—"(1) Whether, on the death of the last of the granters of the disposition of 1845, Mrs. Shaw Stewart, as representing her mother, the deceased Mary Forbes Chancellor or Collyer, or otherwise in her own right, became entitled to a share of the fee of the subjects thereby disponed? (2) Whether, on the death of the last of the granters of the aforesaid disposition, a right to a liferent of the said subjects vested in Mrs. Chancellor, and a right to the fee thereof in Mrs. Shaw Stewart and Mrs. Mosman equally, or wholly in Mrs. Mosman? (3) Whether, on the death of the last of the granters as aforesaid, a right to a fee of the said subjects vested in equal *pro indiviso* shares in Mrs. Chancellor, Mrs. Shaw Stewart, and Mrs. Mosman, or only in Mrs. Chancellor and Mrs. Mosman;—and whether the said first parties to this case, as representing Mrs. Chancellor, are now in right of the fee of the whole of the said subjects,—or whether all of the parties to this case, or the first and second parties only, are in right of equal *pro indiviso* shares of the said subjects?"

The first party (Mr. John George Chancellor) argued;—On a sound construction of the disposition, the share which would have fallen to Mrs. Collyer, if she had survived the granters, lapsed by her having predeceased. The *conditio si sine liberis* could not apply to the case, and Mrs. Stewart had no claim. It was not enough to bring that rule into operation that the granters of the deed were her grandaunts, the bequest not being to the children of Mrs. Chancellor as a class. On the death of [997] the longest liver of the granters, an immediate fee in one-half of the property vested in each of the two disponees then in life, with an eventual fee to the longest liver, so that at Mrs. Mosman's death the fee of the whole became vested in Mrs. Chancellor, and passed to the first party as her heir-at-law.* At all events, the fee of one-half then vested in Mrs. Chancellor, and passed to the first party.

The second party argued;—Under the disposition only a liferent of the subjects was given to Mrs. Chancellor. On the death of the longest liver of the granters the fee of the whole subjects vested in Mrs. Mosman, subject to her mother Mrs. Chancellor's liferent, and had passed to her son, the second party.†

The third party (Mrs. Shaw Stewart) argued;—The inductive clause of the disposition clearly shewed that it was intended that Mrs. Chancellor should only have a liferent. It was competent to supply from another part of the deed words obviously omitted.‡ As representing her mother Mrs. Collyer, or otherwise in her own right as only child of Mrs. Collyer and great-grandniece of the makers of the deed, she was

* Ersk. iii. 8, 35; Riddels *v.* Scott, *ibi cit.* and M. 14,878; Bisset *v.* Walker, 1799, M. App. Deathbed, 2.

† Hamilton *v.* Hamilton, Feb. 8, 1837, 16 S. 478; Douglas's Executors *v.* Scott, &c., Feb. 5, 1869, *ante*, vol. vii. 504; M'Call *v.* Dennistoun, Dec. 22, 1871, *ante*, vol. x. p. 281; Aitken's Trustees *v.* Wright, Dec. 22, 1871, *ib.* p. 275.

‡ 1 Ross' L. C. 45; Sutherland *v.* Sinclair, Feb. 26, 1801, *ibi cit.* and Mor. App. Tailzie, 8.

entitled to one-half of the fee. It was settled by a series of cases, from Wallace, in 1807,* to Scott, in 1869,† that the *conditio si sine liberis* applied in settlements by one who was *in loco parentis*, as an aunt is to nieces. The case of Hamilton was special, and did not establish the general rule contended for, that the maxim takes effect only where the children are called as a class.‡

At advising,—

LORD PRESIDENT.—By the disposition of 1845 the Misses Robertson did "dispone to and in favour of the said Helen Hamilton Chancellor, Mary Forbes Chancellor, and Helen Barbara Chancellor, or the survivors or survivor of them, all our said property and respective shares in the tenement No. 46 George Square, Edinburgh, with all parts and pertinents thereunto belonging, heritably and irredeemably, but reserving always to ourselves, separately and collectively, our liferent interest therein." Now, that is the whole of the dispositive clause of this disposition, and if the expression of that clause in the deed is clear and unambiguous it is not allowable to go to any other parts of the deed in order to contradict or explain that clause. Now, it appears to me that the expressions in the clause are not ambiguous, unless in one trifling particular. I think the legal effect and meaning of the clause is to give Mrs. Chancellor and her two daughters, Mary and Helen, a joint fee, and conditionally to institute the survivor or survivors, if any one or more of the three should predecease the granters. The words upon which the effect of the clause turns are the words "or the survivors or survivor." If the destination had been to the three ladies "and the survivor" of them, it would have been different; that would have been a joint fee to them and the longest liver of them; but the word "or" plainly points to this, that the fee is given to those of the three ladies who are in existence at the time [998] when the deed takes effect—that is, at the death of the longest liver of the granters. If there were ambiguity about the matter it might be competent to go to other parts of the deed to see if any particular destination were to be presumed. But I do not think that is necessary, and I cannot therefore look to other parts of the deed for a contradiction of the dispositive clause, in order to find that there is only a liferent given to Mrs. Chancellor, when it expressly gives a fee.

The result therefore is, that Mrs. Chancellor and her daughter, Mrs. Mosman, having survived all the granters, and Mrs. Collyer having predeceased all the granters, the fee of the property, on the death of the longest liver of the granters, vested in Mrs. Chancellor and Mrs. Mosman, equally between them, and belongs now to their heirs.

That being the construction of the deed, it seems hardly necessary to enter on the question raised as to the application of the principle *si sine liberis*. It is not a case for its application at all. These three ladies do not form a class; I never heard of a mother and her two daughters forming a class, and the whole deed is against that construction. I therefore think that the first and second parties are each entitled to one-half of the subjects.

LORD ARDMILLAN.—On the first and most important point I agree entirely with your Lordship in the chair, that we must give entire effect to the dispositive clause, and that, unless it is defective or dubious, we are not entitled to go further. The dispositive clause, therefore, regulates the succession. So dealing with it, the words "survivors or survivor" must be held to mean the survivors or survivor of the last of the granters. The parties to whom the subjects are conveyed are Mrs. Chancellor and her two daughters, "or the survivors," that is, any two of them, "or the survivor," that is, any one of them. Now, Mrs. Chancellor's daughter Mary predeceased all the Misses Robertson, and there is no room in this case for the rule *si sine liberis*; and the result therefore is, that Mrs. Chancellor and her daughter Helen were, at the death of Miss Marianne Robertson, entitled to the estate equally between them, and that their representatives are now jointly entitled to it.

LORD DEAS.—I agree with your Lordship in the chair that the result of this case must depend entirely upon the construction of the dispositive clause, and it seems to me clear enough that the dispositive clause must have one of two meanings—either (1) that there is a destination to the survivors or survivor of the disponees, whether they live after the granters or not, or (2) that the "survivors or survivor" means the

* Wallace *v.* Wallace, 1807, M. App. Clause, 6.

† M'Gowan's Trustees *v.* Robertson, Dec. 17, 1869, *ante*, vol. viii. 369.

‡ Thomson's Trustees *v.* Robb, July 10, 1851, 13 D. 133 (*per* Lord Pres. Boyle).

survivors or survivor of the last of the granters of the deed. I think with your Lordship that that question depends much on the very narrow ground whether the word "or" is here used, as it sometimes is, as meaning "and." But, although the question depends entirely upon the construction of the dispositive clause, I am not disposed to say that if there is an ambiguous word in that clause it is not allowable to look at the other clauses in the deed to see if they throw light upon the dispositive clause; and, in the present case, looking at the whole deed, I think that the most probable meaning of the dispositive clause is, that the property is to go to the survivors or survivor of the granters. The result is that the fee vested in Mrs. Chancellor and Mrs. Mosman.

LORD KINLOCH.—I find it difficult, indeed impossible, to construe satisfactorily the deed of 1845, executed by these five ladies. In the narrative clause they declare it to be their intention that Mrs. Chancellor should have the liferent of the property, and her two daughters the fee, the result of which would be that Mrs. Chancellor would enjoy during her lifetime the whole annual proceeds of the property. Yet in the dispositive clause, literally construed, Mrs. Chancellor is made a joint fiar along with her two daughters, with the benefit of survivorship, the granters expressly declaring that they "grant, alienate, and dispone to and in favour of the said Helen Hamilton Chancellor, Mary Forbes Chancellor, and Helen Barbara Chancellor, or the survivors or survivor of them, all our [999] said property." The effect of this is to give Mrs. Chancellor only one-third of the proceeds during the joint lives. If I could read the dispositive clause as importing, by a retrospective reference, a liferent to Mrs. Chancellor and a fee to her daughters or the survivor, I would willingly give it this effect. But I feel I cannot take such a liberty with this primary and leading clause of the deed. As it stands it imports by clear language a joint fee to the mother and daughters. I cannot insert the words as regards the mother, "in liferent for her liferent use allenarly." To do so would be against all principle, and would form a perilous precedent in conveyancing. I am therefore forced to the conclusion, that, however inconsistent the dispositive clause may be with the narrative of the deed, I can give to that clause no other than its own legal interpretation—that is to say, hold it to import a joint fee to the mother and daughters, with the benefit of survivorship.

The question remains, what is the legal scope and extent of the benefit of survivorship? I am of opinion that the words have reference to the period of the death of the last deceasing Miss Robertson, and that their effect is to give the fee to the survivors or survivor at that date. The destination is not a general one to the three ladies "and the survivor," or, according to the phrase in our older deeds, "and the longest liver of them." It is to the three ladies, "or the survivors or survivor of them." This, I think, does not mean the ultimate individual survivor of the three disponees; it means the survivors or survivor, either one or more, at the death of the last Miss Robertson. If two then survived, the fee, I think, vested absolutely in these two, and went in equal shares to their heirs. There was no second survivorship provided for as regards these two. In legal character the clause as to survivorship was not one of substitution at all. It was one of conditional institution,—that is to say, it embodied a conditional institution of the survivors at the last Miss Robertson's death. When these survivors were fixed by this event, the conditional institution was satisfied—there was no legal right beyond—and the fee became absolute in the individuals jointly, and descended to their respective heirs.

In this view, as Mrs. Chancellor and Mrs. Mosman both survived the last Miss Robertson, the property vested in them jointly, and the first and second parties, as their heirs respectively, are entitled to it in equal proportions.

I am clearly of opinion that there is no room for the application of the principle *si sine liberis*, so as to bring the children of Mrs. Collyer into their mother's room.

The following interlocutor was pronounced:—"Find and declare that on the death of the last of the granters of the disposition of 1845 the fee of the subjects thereby disponed vested in equal *pro indiviso* shares in Mrs. Helen Hamilton Chancellor, and her daughter, Mrs. Helen Barbara Chancellor or Mosman, as the survivors at that period of the three disponees: Find that the party of the third part, as heir of the second disponee, Mrs. Mary Forbes Chancellor or Collyer, who predeceased the last of the granters of the said disposition, is not entitled to any share of the subjects thereby conveyed: Find, therefore, that the party of the first part and the party of the second part are now entitled to the said subjects in equal *pro indiviso* shares, and decern."

MACALLAN & CHANCELLOR, W.S.—J. S. TYTLER, W.S.—M'EWEN AND CARMENT, W.S.—Agents.

No. 179. X. MACPHERSON, 1000. 19 July 1872. 1st Div.—Lord Mackenzie, M.

THE UNIVERSITY OF GLASGOW AND OTHERS, Pursuers.—*Watson—Balfour.*
JAMES DUNLOP KIRKWOOD (Inspector of Poor of the Parish of Govan), Defender.—*Shand—Lancaster.*
THE COMMISSIONERS OF POLICE OF THE BURGH OF PARTICK, Defenders.—*Sol.-Gen. Clark—Brand.*
THE COMMISSIONERS OF SUPPLY OF THE COUNTY OF LANARK, Defenders.—*Sol-Gen. Clark—Asher.*

Public Burdens—Exemption.—A series of royal grants, ratified by Acts of the Scottish Parliament, expressly conferred upon the University of Glasgow, its principal, professors, and members, an immunity from taxation of all kinds. *Held*, in a declarator, that this immunity must be controlled and explained by usage, and that usage had confined the grant of immunity to an exemption from local taxation only, imposed in respect of heritable property possessed by the University, and occupied for University purposes; that the exemption was further confined to the original site of the University, and property acquired contiguous thereto for University purposes, and had never been extended to property afterwards acquired discontiguous to the original site; therefore, that when the University was removed from the original site in the city of Glasgow to one in the burgh of Partick its immunity from taxation did not extend to the new site, in respect of a new set of taxes, and at the expense of a new body of taxpayers.

This was an action at the instance of the University of Glasgow, and the principal and professors thereof, against the parochial board of the parish of Govan, the Commissioners of Police of the burgh of Partick, the Commissioners of the county of Lanark for the purposes of the Acts 6 Will. IV. c. 24, 19 & 20 Vict. c. 35, and 31 & 32 Vict. c. 89, and the Commissioners of Supply of the county of Lanark. The object of the pursuers was to have it found and declared that "neither the University of Glasgow, nor the principal, professors, members, or officials of the said University resident in the precincts of the said University, have been or are liable, in respect of the lands and heritages belonging to and occupied by the University of Glasgow, and by the principal, professors, members, and officers resident therein, situated at Gilmorehill, in the parish of Govan, and county of Lanark, in any poors-rates or other assessment, taxation, or burden imposed or to be imposed for or in connection with the relief of the poor in the parish of Govan, or in any assessment, taxation, or burden imposed or to be imposed for police purposes in the burgh of Partick," &c., "and that the said University of Glasgow, and the principal, professors, members, and officers of the said University and college resident therein, have been, are now, and shall be hereafter exempt from all liability for any such assessments, taxations, and burdens as aforesaid, imposed or to be imposed in respect of the ownership or occupation of the said lands and heritages belonging to and occupied by them as aforesaid." And further, to have the defenders interdicted from imposing and levying any assessment, taxations, and burdens upon the said University, and principal and professors thereof, under any of the above-mentioned Acts, in respect of the occupancy or ownership of the said lands and heritages, and to obtain repayment of certain assessments already imposed or levied under protest.

The pursuers set forth in their condescendence that the University of Glasgow was founded in 1451 by a bull of Pope Nicolas V. issued at the suit of King James II. That bull erected a *studium generale* in the city of Glasgow, as well for theology, canon and civil laws, as for arts and any other lawful faculty, and conferred on the doctors, masters, and students all privileges, honours, and immunities enjoyed by the Univer-[1001]-sity of the Pope's city of Bologna. The University of Bologna then enjoyed, as alleged by the pursuers, an immunity from all taxation. By letter under the Great Seal, dated 20th April 1453, James II. granted the King's firm peace and protection to the rectors, deans of faculties, procurators of nations, regents, masters, and scholars of his well-beloved daughter the University of Glasgow, and exempted the same rectors,

deans, procurators, regents, masters, beadles, scribes, stationers, parchment sellers, and resident scholars (prelates only excepted), "ab omnibus tributis, muneribus, exactionibus, taxationibus, collectis, vigiliis custodiis et pedagiis amodo infra regnum nostrum statuendis leuandis seu quomodolibet percipiendis." Letters under the Great Seal and charters of confirmation were granted in similar terms by James III. in 1472, James IV. in 1509, James V. in 1522, and Queen Mary in 1547 and 1556.

By letter under the Great Seal, dated 26th May 1579, James VI., King of Scots, took the whole members and supposts of the College of Glasgow, with their lands, tenements, and other goods, under his firm peace and protection, and confirmed the University's exemption from taxation, and from watch and ward. The clause of exemption in the letter is in the following terms:—"Necnon eximimus dictos magistros doctores regentes scolasticos studentes bursarios bedallos et alios suppositos lie supposites dicti nostri collegii quoscunque (qui prelatiis promoti non sunt) ac omnes et singulos eorum redditus possessiones terras et beneficia minora prelatiis ab omne solutione cujuscunque census tributi vectigalis taxationis collectionis exactionis infra regnum nostrum pro quacunque occasione impositi aut imponendi ac etiam ab omnibus excubiis seu vigiliis onerationibus quibuscunque omni tempore affuturo imponendis: Firmiter igitur precipiendo omnibus et singulis nostris liegiis et subditis nequis eorum presumat aut tentet quicquam quoad violare aut adversari possit privilegiis libertatibus et exemptionibus per nos dicto nostro collegio concessis sub omni pœna et oneratione quæ inde sequi poterit."

In 1587 James VI. granted to the College of Glasgow a charter of confirmation, further confirming the privilege and immunities already conferred, and in the same year an Act of the Scots Parliament was passed, "ratifying and confirming the charter and whole rights above-mentioned, including the immunity from taxation granted by His Majesty by the said letter of 26th May 1579, 'togider with all and sundrie liberties and privileges granted to the said college of auld, by quhatsomever person.'"

Lastly, King Charles I. in 1630 granted to the University and College of Glasgow a general charter of confirmation and novodamus, containing a similar clause of exemption, quoted in the opinion of the Lord President, and which was in 1633 ratified by Act of the Scots Parliament.

As averred by the pursuers, "the immunity and exemption from all taxes and assessments, conferred and confirmed by the letters, charters, and Acts of Parliament above-mentioned, have never been abrogated or recalled, but, on the contrary, not only have they existed in full force from the times when the same were conferred as aforesaid, but the said immunities and exemptions have been always enjoyed by the University, and the various members and officials thereof, in the successive properties and buildings possessed and occupied for University purposes as aforesaid. Neither the said University, nor the members and officials thereof occupying the said properties and buildings, have ever paid in respect thereof any taxes or impositions whatever; and, in particular, they have never paid any rates or assessments for the maintenance or relief of the poor, or for burgh or police purposes, or any land-tax, or for county rates, or any other public or parish burdens. The pursuers, in respect of such exemptions, are not liable in any assessments made or to be made by the [1002] defenders, or any of them, in virtue of the statutes empowering them to assess, which are referred to in the conclusions hereof, or other statutes. The pursuers thereby, or by other rights, followed by inveterate and prescriptive usage of exemption, are freed from payment of assessments for public, county, parochial, and municipal burdens, in respect of the lands belonging to and occupied by them for the exercise of their academical functions."

The origin of the present action was the transference of the University in 1870 from the old college buildings, which had existed for three or four centuries in the High Street, to the new site at Gilmorehill. This transference was caused by the old site in the High Street having been taken by the City of Glasgow Union Railway, in terms of their Act of 1864, for the purposes of their line.

On the transference of the University to the new buildings the various bodies, defenders in the present case, imposed assessments upon the University, and principals and professors thereof occupying houses, in respect of their ownership and occupancy of the new buildings and other subjects in Gilmorehill, in virtue of the Acts empowering them to levy assessments, on the ground that any immunity which the University and professors may have hitherto enjoyed attached solely to the old buildings in the High Street, and did not pass with the University to the new buildings at Gilmorehill. The

present action was accordingly brought to try the question of the pursuers' right of exemption from the assessments so imposed.

The pursuers pleaded;—(1) In virtue of the immunities and exemptions from taxation conferred and confirmed by the letters, charters, Acts of Parliament, and others condescended upon, and by the ancient rights and privileges of the University of Glasgow, the pursuers are not liable in public and parish burdens, or other assessments within the power of the defenders, in respect of the lands or buildings belonging to the pursuers, and occupied for academical purposes. (2) In virtue of the said immunities and exemptions, and of established and inveterate usage, by which the pursuers and their predecessors have enjoyed and possessed such immunities and exemptions, and, *separatim*, in respect of their prescriptive usage of exemption, the pursuers are not liable in payment of any such assessments. (3) The immunities and rights of exemption from taxation inherent in the pursuers as a corporation, and the principal and professors of the University, and officials resident therein, and which have been from time immemorial possessed and enjoyed by them, notwithstanding the removal of the site of the University buildings subsist in full force and effect in regard to all assessments from which the pursuers were formerly exempt, made in respect of their ownership and occupation of these buildings for academical purposes.

The parochial board of the parish of Govan pleaded;—(3) The alleged immunities and exemptions founded on by the pursuers do not apply to the assessments imposed or hereafter to be imposed for relief of the poor; or, at all events, they must be held as having been abrogated by the provisions of the Poor-Law Acts. (4) The said alleged immunities and exemptions cannot be held, on a sound construction of the deeds containing the same, to exempt from assessment the ground and subjects for which the pursuers claim exemption, or the possessors and occupants thereof; and no such exemption has heretofore existed, or been recognised by any usage.

The Commissioners of Police of the burgh of Partick pleaded;—(2) The pursuers not being entitled to plead the said bull, letters, confirmations, charters, and Acts of the Scottish Parliament on which they found, against the Police Act of 25 & 26 Vict. c. 101, they are liable in the [1003] assessments imposed. (3) The lands belonging to the pursuers having been, subsequent to the formation of the burgh of Partick, liable in assessment under the Police and Improvement Acts, and having been so assessed, the pursuers are not entitled to have the same freed of such assessments, or to decree as craved by them, in respect of the acquisition or purchase thereof by them, or of the erection thereon by them, of houses or other buildings for University or academical purposes.

The Commissioners of Supply of the county of Lanark pleaded;—(3) On a sound construction of the several writs mentioned by the pursuers, and of the several statutes authorising the defenders to levy assessments, the said subjects at Gilmorehill belonging to the pursuers are not exempted from the said assessments.

The Lord Ordinary, on 8th February 1872, pronounced an interlocutor assoilzieing the defenders, other than the Commissioners of the county of Lanark for the purposes of the Acts 6 Will. IV. cap. 24, &c.*

---

* "NOTE.—Until the year 1864 the University of Glasgow was owner and occupant of about eighteen acres of ground, and of the college professors' houses and other buildings thereon, situated on the east side of the High Street of Glasgow. In that year the University entered into an agreement with the City of Glasgow Union Railway Company, under which the whole ground and buildings in the High Street of Glasgow then belonging to the University became the property of the railway company for the purposes of their undertaking; and the University acquired a large piece of ground at Gilmorehill, upon which the new University buildings and professors' and officers' houses have been built. That piece of ground is situated in the burgh of Partick, parish of Govan, and shire of Lanark; and it, and the College and other buildings thereon, as the pursuers aver, have been used since 7th November 1870, and will in time to come be used, exclusively for the purposes of the University. The agreement between the University and the railway company, which was ratified and confirmed by the City of Glasgow Union Railway Act, 1864, contains a clause saving and reserving all rights, privileges, and immunities conferred upon and attaching to the University, and the principal, professors, students, and officers thereof, in virtue of royal grant or charter, Act of Parliament, or immemorial usage; and declaring that such rights,

[1004] Against this interlocutor the pursuers reclaimed.

Before considering the case, the Court ordered farther information to be [1005] laid

---

privileges, and immunities shall not in any way be prejudiced, impaired, or affected by anything contained in the said Act or agreement.

"The present action has been raised for the purpose of having it found and declared that the University, and the principal, professors, and officers residing within the same, are not, in virtue of the royal letters, charters, and Acts of Parliament condescended on, liable, in respect of the said University lands and heritages at Gilmorehill, in payment of poors-rates in the parish of Govan, of assessments imposed for police and other purposes in the burgh of Partick under the General Police and Improvement (Scotland) Act, 1862, and of county police, prison, or other county rates in the shire of Lanark.

"(1) The Lord Ordinary is of opinion that the exemption from taxation claimed by the pursuers, in virtue of the royal letters and charters condescended on by them, and in particular in virtue of the letter under the Great Seal, dated 26th May 1579, by King James the Sixth, ratified and confirmed by Act of the Parliament of Scotland passed on 29th July 1587 (1587, c. 87, Thomson's Acts, iii. 487), and the charter of confirmation and novodamus under the Great Seal, dated 28th June 1630, by King Charles the First, ratified by Act of the Parliament of Scotland passed on 28th June 1633 (1633, c. 69, Thomson's Acts, v. 75), does not extend to the University buildings, houses, and precincts at Gilmorehill. The taxes from which exemption is sought were all taxes leviable in respect of the lands and heritages at Gilmorehill, from the owners and occupants thereof, before the University acquired them; and the exemption founded on does not, the Lord Ordinary considers, extend and apply to lands not the property of the University when that exemption was conferred, but [1004] acquired more than two hundred years afterwards. The Act 1587, c. 87, did not ratify the whole immunity granted by the letter of 26th May 1579, but only the immunity granted to the College 'that the haill rentis of the samen sal be in all tymes cuming frie of all taxatiounis and impositionis, as in the said lettre at lenth is contenit.' And the charter of confirmation by King Charles the First, of 28th June 1630, ratified by the Act 1633, c. 69, only exempts the professors, members, and dependants of the University 'residing in the same,' and their lands and estates, from all taxes, imposed and to be imposed. It is thought that the Scottish Parliament by these Acts only exempted the lands which were then known to belong to the University, and that it was not intended that the exemption should extend to lands to be acquired in future by the University, whether by donation or by purchase, in regard to which the effect of the exemption could not then be seen. Accordingly, it is the College lands and rents that are exempted,—that is, lands and rents then belonging to the College. The Lord Ordinary considers that this is the true meaning of the words used, and that there are no words in the Acts which can be held to apply to lands to be acquired in future. He conceives that, in order to confer such an exemption in respect of lands to be acquired in future, very clear and distinct terms to that effect in an Act of Parliament would be necessary, because it is a privilege of a very unusual character, and because it would increase the burdens or taxes of the other persons in the parish or district where such lands should be situated. There is no express provision to that effect in the University Acts, and no words therein from which such an exemption can be implied. In so far as the exemption can be maintained on behalf of the professors and officers, it cannot be held to apply to lands their private property. It applies only to houses or buildings within the University occupied by them. The assessments or taxes libelled on are imposed upon them only in respect of that occupation. As these houses or buildings did not belong to the University at the date when the exemption was conferred, but were only recently acquired, the Lord Ordinary is of opinion that the professors and officers cannot claim exemption from these assessments or taxes.

"The whole assessments from which exemption is claimed by the University and its professors and officers in the present action are imposed according to the annual value of the lands and heritages of the University at Gilmorehill.

"(2) In regard to the respondents' plea that the exemption from taxation claimed by the pursuers has been abrogated by the Poor-Law Act of 1845 and the other statutes in virtue of which the assessments or taxes libelled on have been imposed, the Lord Ordinary is of opinion that the said plea is not well founded. The said statutes are

before them with regard to the history of the alleged immunity, and the usage connected therewith, which was given in a joint minute in the following terms:—

"From the foundation of the University of Glasgow until the year 1460 the premises ordinarily occupied for University purposes were situated in the Rottenrow, near the cathedral, meetings of the University being held in the chapter-house of the Blackfriars, or in the cathedral. In 1460 James the first Lord Hamilton conveyed to the University a tenement and piece of land of about 4 acres on the east of the High Street in Glasgow, for the purpose of building a college. About 1465 the seat of the University was transferred from Rottenrow to High Street. In 1467 Sir Thomas of Arthurley conveyed to the Faculty of Arts another tenement lying also on the east side of the High Street, and to the north of the tenement foresaid, together with a piece of land stretching eastward to the Molendinar Burn. In 1563 Queen Mary made a grant to the University of the manse and kirkroom of the Blackfriars, and 13 acres of land which adjoined or were situated near to the preceding grants of land by Lord James Hamilton and Sir Thomas of Arthurley. In the early part of the eighteenth century the University purchased a considerable area of ground lying to the north of the lands and buildings already occupied by them. A portion of the area thus acquired was added to the University grounds, and upon the western extremity of this portion a new court or square of houses was erected for the residence of the professors.

"The whole area adjoining the High Street which belonged to the University was about 26 acres, of which 18 acres or thereby were occupied exclusively for University purposes. Upon these 18 acres, which were enclosed, were erected the library, common hall, and other buildings used in teaching, and also the houses of the professors; whilst a large portion of this area consisted of a park or garden, used for recreation or exercise by persons connected with the University. The remaining 8 acres were let to tenents.

"No taxes were ever paid in respect of any part of the foresaid area of 18 acres or thereby used for University purposes, or in respect of any of the buildings thereon, either by the University or its professors or officials, except as after mentioned. In the year 1743, after the acquisition of the said area, upon part of which houses for the professors were erected, the magistrates of the city claimed payment of the cess or land-tax in respect of the portion of said area included within the University precincts, but this claim was resisted by the University. The dispute was ultimately referred to Mr. George Sinclair and Mr. Thomas Millar, advocates, who pronounced a decreet-arbitral, dated 30th October 1746, finding that the University buildings and existing professors' houses were free from the cess imposed or to be imposed on the city of Glasgow. And farther, that any new or additional University buildings or professors'

---

affirmative; and it is a settled rule of law that mere general affirmative words do not repeal, by construction, a prior statutory exemption; and that unless there is an express repeal of such prior exemption, or unless the later statute is so repugnant to the existence of the exemption as by necessary and irresistible implication to shew that it must be held to be thereby repealed, the exemption subsists. There is no express repeal of the pursuers' exemption, and no provisions in the defenders' Acts which by necessary and irresistible implication lead to such repeal.

"As regards the Poor-Law Act of 1845, the majority of the Court were of opinion, in the case of The Scottish North-Eastern Railway Company v. Gardiner and Others, 29th January 1864, 2 Macph. 537, that the provisions of the Poor-Law Act did not repeal a prior statutory exemption. The grounds of that opinion are fully set forth in the opinions of the Lord President and of Lord Kinloch, and it is unnecessary to repeat them. The Lord Ordinary concurs in these opinions on this point, and he considers that they are not affected or over-ruled by the decisions pronounced in the House of Lords in the cases of Duncan v. The Scottish North-Eastern Railway Company, 9th May 1870, 8 Macph. H. of L. 53; and of The Commissioners of Supply for the County of Lanark v. The North British Railway Company, 11th July 1870, 8 Macph. H. of L. 141. The [1005] principles on which the case of Gibson v. Forbes was decided in the House of Lords, on 11th and 14th June 1852, 1 Macqueen, 106, which was cited in the case of The Scottish North-Eastern Railway Company v. Gardiner, also support the view now taken by the Lord Ordinary.

"As regards the other statutes under which the assessments libelled on are imposed the same principle applies."

houses, which should be thereafter erected on the High Street property should be similarly exempted, but that all other property of the University, not used for University purposes, should be liable for their due proportion of the said tax.

"The professors resident in the University have always paid imperial [1006] taxes, viz., window-tax, property-tax, and inhabited-house duty, in respect of the houses so occupied by them. They have also paid income-tax.

"In or about 1830, the chemistry class-room having been found to be unsuitable, the University erected, upon ground which had been acquired by them in that year, at a distance of about 120 yards from the site of the University, at the cost of £4300 or thereby, a new tenement, containing shops and also a chemical class-room. The latter was used for University purposes, whilst the shops were let, and the rents derived from them formed part of the revenues of the University. The chemical class-room was valued at the sum of £150 per annum. The property thus acquired by the University was not, prior to its acquisition by them, exempted from taxation, and since 1832 the University have regularly paid local and other taxes, including poors-rates, in respect thereof.

"In or about 1843 an observatory and house for an observer (the observatory and house forming one building) were erected at Horslethill, several miles to the west of the old University in the High Street. These buildings were erected, not by or for the University, but by private subscription, aided by a grant of £1500 from the Lords of the Treasury, which was given on the condition that certain astronomical and magnetic observations should be kept up, and that the results of these should be annually published. The buildings were afterwards handed over to the University in or about the year 1846, under an arrangement by which, with the sanction of the Lords of the Treasury, the University assumed the liabilities of the subscribers.

"The house of the observer has, since the building passed into the hands of the University, been occupied by the professor of astronomy. The house is valued at £70 per annum, and the observatory is also valued at £70 per annum, according to which valuation local and other taxes, including poors-rates, have been paid by the University since the subjects were taken over in 1846.

"In addition to the 8 acres aforesaid, the University has all along possessed various properties in Glasgow, and especially in the neighbourhood of the High Street site, which have not been occupied for University purposes. The University has not enjoyed immunity from public or local taxation in respect of the said properties, nor have professors resident outwith the University been exempted from such taxation.

"There are fourteen professors, who were old or faculty professors, to whom houses were appropriated in the University, and there are twelve modern professors who had no houses appropriated to them.

"By the ordinance (22, section 35) of the University Commissioners, the position of these professors, in regard to emoluments from College endowments, was ordained to continue unaltered; and accordingly there were erected thirteen houses in the new University buildings at Gilmorehill, which are now allotted to the principal and twelve professors to whose chairs houses were formerly appropriated, the professor of astronomy continuing to occupy the house provided at the observatory for the observer.

"The old University buildings having fallen much into decay, and become unsuitable for a University, the present site at Gilmorehill, extending to about 22 acres, was purchased, and the present University buildings were erected thereon, at a cost of upwards of £350,000, including the site.

"The new site of the University is wholly situate within the limits of the burgh of Partick, which includes an area of about 1000 acres.

"Up to the date of the transference of the University, these subjects were liable for, and in respect thereof the Police Commissioners of Partick levied, a proportion, ascertained according to the valuation-roll, of [1007] the annual burgh rate for watching, lighting, &c. The said subjects were also liable for all other rates duly imposed thereon, under 'The General Police and Improvement (Scotland) Act, 1862.'

"The said new site of the University is within the county of Lanark; and until the transference of the University, county rates were regularly levied in respect thereof. Up to said date the said subjects were liable for and paid poors-rates."

Argued for the pursuers;—(1) That the exemption was a personal one to the University as a corporation, and extended to all lands they might acquire for University

purposes. (2) That it had not been withdrawn by any of the statutes imposing new taxes. (3) That it applied generally to all taxation imposed or to be imposed.*

Argued for the defenders;—(1) That the exemption was recalled by the statutes which imposed the different taxes. (2) That it attached exclusively to the land held by the University at the date of the grant of exemption.†

At advising,—

LORD PRESIDENT.—This action is a declarator of immunity instituted by the University of Glasgow, and the leading conclusion of the summons is for declarator that neither the University of Glasgow, nor the principal, professors, members, or officials of the said University, resident in the precincts of the University, have been or are liable in respect of the lands and heritages belonging to and occupied by the said University, and by the principal, professors, members, and officers of the said University resident therein, situated at Gilmorehill, in the parish of Govan, and county of Lanark, in any poors-rates, or other assessment, taxation, or burden imposed or to be imposed for or in connection with the relief of the poor in the parish of Govan, or in any assessment, taxation, or burden imposed or to be imposed for police purposes in the burgh of Partick; and the conclusion goes on to seek immunity in the same way from a variety of other assessments, including the prison assessment, the assessment for the registration of voters, the county general assessment, and the county police assessment. Now, it was settled in the case of the University of Edinburgh *v.* Greig ‡ that universities, as such, enjoy no immunity from taxation of any kind, either general or local, and therefore this claim of the University of Glasgow must be rested upon grounds peculiar to itself. It will be observed that the demand in this summons is for immunity from local rates only. It is not said that the University is not liable in public taxes, but only that it enjoys an immunity from the payment of all local rates. This is rested upon a variety of royal grants which have been laid before us, commencing in the year 1453 with a letter of protection by King James II., granted within two years of the foundation of the University by the bull of Pope Nicolas V. in 1451. It is needless to examine these various royal grants in detail. The last of them in date is contained in a charter of Charles I. in 1630, which was ratified in Parliament in 1633. It will be sufficient probably for the purposes of judgment to examine the claim of immunity contained in that charter of 1630, for I think it is as broad and comprehensive in its terms as any of those contained in the prior grants. But before I proceed to examine the language of that statute it is neces-[1008]-sary to make two observations of a general kind. In the first place, there is no statutory exemption of this University, either in the statutes imposing taxes or rates from which immunity is sought, or in any special Act of Parliament passed in favour of the University itself. In the course of the argument, indeed, it was said that the exemption depended upon statute as well as charter, and that argument was founded upon the ratifications by the Scottish Parliament of certain of the crown-charters granted to the University, viz., of the royal letters of protection, and in particular upon the ratification in 1633 of King Charles's charter of 1630. But these parliamentary ratifications are not statutes, and have not the force of public Acts of Parliament. Mr. Erskine states this in a passage which is well worthy of consideration, in his Institutes, book i. title 1, sec. 39, where he is dealing generally with the Acts of the Scottish Parliament. He says,—"Private Acts were nothing but grants by the Parliament, or parliamentary ratifications of grants made by the Crown in favour of particular persons or corporate bodies. But none of these were proper laws; for 1st, They required no publication; 2d, Ratifications by their nature carry no new right, they barely confirm that which was formerly granted, without

* Muniments of the University of Glasgow, vol. i. pp. 248, 251, 291, 379; Magistrates of Edinburgh *v.* The College of Justice, March 23, 1790, 3 Pat. 155; Forbes *v.* Gibson, Dec. 17, 1850, 13 D. 341, and June 14, 1852, 1 Macq. 106; Colchester *v.* Kewney, 36 L. J. Exch. 172; All Souls' College *v.* Costar, Feb. 13, 1804, 3 Bos. and Pul. 635; Harrison *v.* Bulcock, 1 H. Blackstone, 68; Conservators of the Thames *v.* Hall, 3 L. R. C. P. 415.

† Scottish North-Eastern Railway Company, May 9, 1870, *ante*, vol. viii. H. of L. 53; North British Railway Company, July 11, 1870, *ante*, vol. viii. H. of L. 141; Allan *v.* Parochial Board of Edinburgh, July 14, 1849, 11 D. 1391; Scott *v.* Edmond, June 25, 1850, 12 D. 1077.

‡ July 20, 1865, *ante*, vol. iii. 1151, rev. June 8, 1868, *ante*, vol. vi. 98.

adding any new strength to it by their interposition; 3d, As by the forms of Parliament no person was called as a party to the passing of an Act, however deeply he might have been interested in it, private Acts were carried through *periculo petentium*, and could not hurt third parties who were not heard on their interests, according to the rule, *res inter alios acta aliis non nocet.* They were therefore open to reduction by the Court of Session, 1567, c. 18, No. 1; and in almost all the Scottish Parliaments holden since 1606, the last Act of the Sessions, entitled *Act salvo jure cujuslibet*, appears to have been enacted for the single purpose of securing third parties against the effect of private Acts and ratifications." It is therefore clear that the exemption here claimed cannot be said in any proper sense to rest upon statute. But, in the second place, it is necessary to observe that exemptions which rest upon royal grant, ratified by Parliament, are liable to be controlled and explained by usage, in the same manner and to the same effect as grants by crown-charters, grants of customs, or dues or tolls on transit, or the like. These can only be enforced in so far as they are supported by usage. And in like manner, an exemption such as we are dealing with at present can only be supported in so far as it is in conformity with the usage that has followed upon the grant or charter.

To revert now to the terms of the exemption, as contained in the charter of 1630, it is undoubtedly expressed in very broad and comprehensive terms:—"Eximendo simpliciter, quemadmodum et nos tenore presentis carte nostre eximimus prefatas personas rectores decanos facultatum prefectos doctores professores magistros regentes studentes bedellos scribas bibliopolas librorum compactores omnesque supposito et membra dictæ Universitatis et academie in eadem residentia, nisi sint prelati omnesque eorum servos nec non omnes et singulas eorum terras tenementa possessiones reditus beneficia minora prelatiis eorumque res et bona quecunque propria et communia mobilia et immobilia tam spiritualia quam temporalia, infra dictam civitatem Glasguensem et extra eandem, ab omni solutione omnium et singulorum vectigalium taxationum exactionum impositionum collectionum summarum monete, et ab omnibus vigiliis guardiis et pedagiis vulgo, lie watching, warding, and pedages: ac declaramus et ordinamus eos eorumque successores in futurum liberos et immunes fore ab omnibus tributis collectis et taxationibus ordinariis et extraordinariis ante hac impositis et imponendis super eos eorumque terras reditus summas monete res et bona quecunque communia aut propria quovismodo directe vel indirecte."

Now, there is no doubt that, in point of expression, this is an immunity which comprehends a personal exemption of every individual member of the University, of whatever rank or degree, and all their servants and attendants, from taxation. It is also an exemption of all the heritable estate of the University, and also of the members of the University, from all kind of taxation, and it is further an exemption of their whole moveable goods from any taxation that may be imposed upon that species of property. In short, as far as the persons and property of the University and its members are concerned the exemption is expressed in the broadest possible terms, and it would go so far as to exempt [1009] the members of the University whatever they might be, because it is not confined, apparently, to the situation of the University. The parties, no doubt, who are to be exempted are described as resident in the University, but the immunity is at least capable of being so constituted as to extend to their persons, wherever they may happen to be, and it also extends to their whole possessions, without reference to situation, for it is "within the city of Glasgow, or beyond the same." Further, as regards the taxes from which exemption is to be given, nothing can be more comprehensive. It is an immunity from every species of tax that has been or can be imposed, past or future. The only point in which perhaps the immunity is a little defective in comprehensiveness, is this,—it speaks of the estate of the University and its members, both heritable and moveable, but it does not say anything about estate to be hereafter acquired. I do not say that if this exemption had been supported by usage exempting the estate of the University wheresoever situated that that usage would not have been sufficient to support such a construction of the exemption, but taken by itself, and without usage to support it, it hardly, in literal expression, extends to future acquisitions of the University.

It must be admitted, and indeed there was no attempt to deny it, that this exemption has never been enjoyed or enforced to the full extent. As regards personal exemption, we have no evidence whatever that there ever was an enjoyment of that by the University or any of its members. The exemption, so far as usage is concerned,

has been confined to those taxes which are not indeed taxes in the literal and proper sense upon heritable property, but taxes imposed upon the University in respect of its being the owner and occupier of heritable property, and which are, in popular language, called taxes upon land, or upon heritable property. In the next place, it must be conceded that there never has been, in point of fact, any exemption from public taxes. The exemption has been from local rates only. And thirdly, it must also be admitted that the only subjects in respect of which this exemption has been enjoyed are the subjects owned and occupied by the University in the High Street of Glasgow for University purposes. The history of these subjects is given very distinctly in the joint minute which has been lodged by the parties, and which ascertains the facts upon which we are to proceed in dealing with the matter of usage. The greater part of the subjects in High Street were acquired at a very early period, and were, indeed, the first local habitation which the University had. Another portion of it was acquired at a more recent period. The date is said to be early in the eighteenth century, at which time the University purchased a considerable area of ground lying to the north of the subjects formerly occupied by them; and we are informed that a portion of the ground then acquired was added to the University grounds proper, and a new court or square of houses was erected there for the residence of the professors. There were about twenty-six acres in all belonging to the University, on the east side of the High Street, and eighteen acres were occupied exclusively for University purposes, the remaining eight acres been let to tenants.

Now, the usage, generally speaking, was this, that the eighteen acres, with the houses and buildings erected upon them, have been exempted from local taxation. The eight acres belonging to the University, but let to tenants, have been subject to local as well as general taxation. The University does not seem to have been possessed of any heritable property beyond the city of Glasgow. They are titulars of teinds in various parishes, but they are not, so far as I am aware, possessed of any land or heritable estate of that description; and therefore the taxes imposed in respect of the ownership and occupancy of land were, of course, confined to such subjects as were owned or occupied by the University within the city of Glasgow,—the general distinction, as regards their property within the city of Glasgow, being that, so far as it was occupied for proper University purposes, it was not taxed; and so far as it was let to tenants it was taxed. That, obviously, is a very great limitation of the exemption conferred by the statute of 1630, because, under that statute, it was quite clear, following the literal expressions of the statute, that the University were entitled to exemption for all their property within the city of Glasgow, and beyond the city of Glasgow, without the limitation of its being used for University purposes. It is thus [1010] very clear that the usage has to a great extent controlled and limited the grant of immunity contained in that charter and the previous royal grants. But a recent change in the property of the University has given rise to this question. The University has removed from within the city of Glasgow to a place beyond the city of Glasgow, though in its immediate neighbourhood. They have sold their estate within the city; they have purchased a new estate beyond the city, and thereon they have erected very extensive buildings for University purposes. And the question is, whether they are entitled to this exemption from local taxation in respect of the property newly acquired and created by building, to the same extent as they enjoyed that exemption with regard to the eighteen acres and buildings thereon in the High Street of Glasgow. The plea of the University rests chiefly upon this,—that the building and ground in the High Street of Glasgow has been exempted from taxation by force of the charter and usage following upon it, because they were devoted to University purposes. And they maintain that the usage is perfectly clear upon this, the distinction between the portion of the property used for University purposes and that which was not used for University purposes having been maintained past the memory of man; and they say, therefore, that whatever property is in their hands devoted to University purposes must be entitled to this exemption. On the other hand, the defenders maintain that the true effect of the usage following upon the charter is to confine the exemption to the particular property belonging to the University in the High Street, in other words, to the eighteen acres above mentioned and the buildings erected thereon. The question thus raised is a narrow one, and not by any means without difficulty. It depends a good deal—almost entirely—upon a consideration of what the usage really has been in point of legal effect. Now, on the one side, there is no doubt that the estate of the

University in the High Street was added to early in the eighteenth century, and the exemption was extended to that additional property in so far as it was devoted to University purposes. That seems to have occurred very early in the last century; and how it was that the exemption came to be extended to that newly acquired ground we do not particularly know. We only know the general fact that it was so extended. But, on the other hand, there are some facts in the history of the University of an opposite tendency. In the year 1830 the University acquired certain buildings which were not contiguous to their old estate, but separated from it, some 120 yards distant from the site of the University, and a part of that tenement, which consisted of a large building, was thenceforth occupied as a class-room for the teaching of a chemistry by the professor of chemistry in the University, there being a want of accommodation within the walls of the University itself for that purpose. The rest of it was let to tenants. Now, from 1830 downwards, that is, for a period now exceeding forty years, the whole of the property has been liable to taxation, and has paid all the local rates from which exemption is now claimed. That is a fact of very great importance in the case, as bearing upon the nature of the usage. This is the first time apparently, in 1830, that the University ever acquired any property separate from their original estate —not contiguous to it; and upon the first occasion they submitted to taxation in respect of that acquired property, apparently without objection, and have paid all the local rates upon it, without any distinction between that part of it which is devoted to University purposes and that part of it which was let off to tenants. Again, in the year 1843, the University acquired another property, consisting of an observatory, and a dwelling-house connected with it, which had formerly belonged to a number of private gentlemen who had erected the observatory by subscription. They had obtained some grants from Government to enable them to maintain the observatory, but after a considerable time it was thought desirable to make over this establishment to the University, and the University accordingly acquired the observatory and the dwelling-house attached, with the sanction and consent of the Lords of the Treasury, who gave their consent on the condition that the University should take upon them all the obligations and conditions to which the proprietors of the institution were liable to the Crown, thereby relieving the institution from its responsibility. I do not attach any importance to that clause as affecting this question of liability [1011] or exemption from rate. But the University thus acquired the property of these buildings, and the property was valued altogether at £140 a-year, one-half of that being the value of the dwelling-house attached to the observatory, which from that time downwards was occupied by the professor of astronomy as his official house. Now, this observatory, belonging to the University, and this professor's house, have both been made liable to taxation, apparently without objection; and from that time downwards, a period of nearly thirty years, the University or the professor of astronomy have paid taxes upon this dwelling-house, and the University have paid taxes upon the observatory itself. This is another example of the acquisition of property disconnected from the original site of the University, and it is the only other example that we have before us of any such acquisition. So far, therefore, as we have any evidence on the subject, the usage seems to have been that the University remained exempt in respect of all its old estate, including that portion which has been added to it and was contiguous to the original estate—that portion which was acquired in the early part of the last century; but as regards all acquisition at a distance from this original property, and not locally connected with it, the usage has been that the University has paid local taxes. Now, the original estate of the University no longer belongs to them. They have removed entirely from that quarter, and have acquired another property for University purposes, as I said before, at a considerable distance, and beyond the burgh. Their contention is, that although they have removed to this new situation their exemption shall follow them, the effect of that contention being that they shall now be exempted, not from the same taxes from which they have hitherto been exempted, not from the taxes imposed upon heritable property within the city of Glasgow, but from the taxes imposed in respect of heritable property situated in the burgh of Partick and county of Lanark. These taxes are very different, and they come in contact here also with a different body of taxpayers. Their exemption is now to be enjoyed, if it be enjoyed at all, as an exemption from other taxes than those they were exempted from during the past two centuries, and at the expense of a different body of ratepayers from those at whose expense they enjoyed their exemption in the city of Glasgow. Now, it appears to me that it is very

difficult to say that an exemption which depends for its validity entirely upon usage, following upon a crown grant, can be transferred in this way from one property to another, seeing that the usage is confined entirely to the single property situated in the High Street of Glasgow. Upon these grounds I have come to the conclusion expressed in the Lord Ordinary's interlocutor, that the University have failed to make out a case for exemption of their new land and buildings at Gilmorehill, of the same nature generally as the exemption which they enjoyed in respect of the old property in the High Street.

LORD DEAS.—I arrive at the same result with your Lordship, and so nearly upon the same grounds that, after the exhaustive explanation which your Lordship has given of the case, and of the principles upon which it depends, I think it would be quite superfluous for me to go into detail. The first thing of importance to observe is, that the taxes from which exemption is here claimed are all taxes in respect of heritable property. They may be said to be personal taxes in one view. They are levied on persons, but they are levied entirely in respect of the property which belongs to them; and they are therefore, I think, to be dealt with as taxes upon property. Now, the charters and confirmatory Acts of Parliament limit the exemption from taxes upon property to the property then belonging to the University. There is, therefore, upon the face of those deeds and statutes, no exemption from taxes on any property which might afterwards be acquired by the University. I think the consequence of that necessarily is, that unless an exemption has been acquired by usage for property which did not then belong to the University no such exemption can be claimed. That brings me at once to the second observation, which is all that I think it necessary to add, that we have here no such usage as can be held to extend that exemption beyond the description given of it upon the face of the deeds and statutes, to all heritable property which the University may acquire. That being so, it appears [1012] to me that these two observations are conclusive of this case. We have nothing to do here with the exemption given in these charters and statutes to the professors personally. We have only to do with taxes upon property; and I see nothing in the charters to give that exemption to property which they may afterwards acquire, and nothing in the usage to give that exemption to such property as is now in question, which they have recently acquired, and which did not belong to them at the date of these charters.

LORD ARDMILLAN.—I think I should unduly occupy the time of the Court if I were at any length to explain the grounds on which I have come to the conclusion that the Lord Ordinary has rightly disposed of this important action of declarator of immunity. I have formed my opinion after hearing a full and able argument, and after careful study of the titles and the papers, and of a distinct and judicious minute by the parties, which has enabled us to reach all the necessary facts of the case without a proof.

The claim of exemption from taxation made by the pursuers does not rest on any ground common to other seats of learning. It rests entirely upon royal letters and charters, ratified, indeed, by Parliament, yet not being, in any proper sense, embodied in statutory enactments, for Parliamentary ratifications are not of equal force with statutes. The claim rests on royal grant, ratified by Parliament, and not on statute.

I agree with your Lordship in regard to the construction of the royal grants, and in regard to the very wide character of the privilege of exemption conferred by these grants.

It cannot be doubted that, ever since the establishment of the University by the bull of Pope Nicolas V. in 1451, the University has enjoyed, and has doubtless deserved great favour and encouragement from successive monarchs; and exemption from taxation appears to have been one of the chief modes by which royal favour has been expressed. I need not enter particularly on the examination of these grants. The letter under the Great Seal by King James the Sixth of Scotland, dated 26th May 1579, and ratified by the Scottish Parliament 25th July 1587, and the royal charter of confirmation and novodamus by King Charles the First, dated 28th June 1630, ratified by the Parliament of Scotland on 28th June 1633, may be taken as illustrations, for they contain, in the widest terms, the grant of exemption. But the nature and limits of such grants must be liable to the interpretation which long-continued usage presents, and to the qualification which such usage creates. It is possible to understand these grants as conferring personal privileges on the University, and on all the professors, regents, rectors, doctors, students, &c., connected therewith—relieving them

from all taxes in reference to all lands and in all places. In that view there would be no limit to the exemption from taxation of all kinds, except that the parties exempted must be within the description enjoying the personal privilege. It is also possible to understand the exemption as confined to a definite locality, and as limited to the lands and buildings there belonging to the University, and occupied for University purposes.

I have no doubt that, in attempting now to ascertain the true meaning and scope of the exemption conferred, the nature and extent of prescriptive and immemorial usage is a relevant and most important subject of inquiry; for the royal grants are very ancient, and their present meaning and effect must depend to a great extent on the question, what has been the character of the prescriptive usage under these grants. It may be that the scope of such an exemption can be extended and enlarged by clear and uniform usage. It is to my mind still more clear that the scope of the exemption can be qualified and limited by such uniform and long-continued usage. Now, it is in this case clear on the ascertained facts—I may, indeed, say on the admitted facts—1st, that there has been no prescriptive usage to sustain the personal privilege of exemption to the extent of the almost unlimited comprehensiveness said to be implied in the terms of the ancient grants. That is not maintained in this action. No exemption has for centuries been enjoyed on the broad ground of personal immunity from all taxation. The only exemption which has been enjoyed, and the only exemption [1013] which is now pleaded, relates to houses and land possessed by the University in a certain definite locality, and used for University purposes. From imperial taxation, from window-tax, inhabited-house duty, property-tax and income-tax, no exemption has been enjoyed, or is now enjoyed, or now claimed; and for additional subjects acquired by the University some thirty or forty years ago taxes have been paid.

2d, There has been uniform prescriptive usage in favour of the exemption in so far as regards the lands and buildings in the original site owned and used by the University. There has thus been a departure from the great breadth and comprehensiveness of the royal grants. There has been a uniform prescriptive usage defining and limiting the exemption. It is to be observed that even the old grant of the exemption does not extend to lands to be acquired, and the usage has been limited accordingly.

We are now called on to recognise and enforce this claim of exemption in a new locality, in respect of taxes affecting new lands and new buildings, and we are called on to enforce it so as to impose increased burdens on a new class of ratepayers. The lands in and near Partick now in question have never hitherto been free from taxation. There has been no exemption in regard to Partick. The University has changed its site, and acquired valuable land and erected valuable buildings at Gilmorehill, in the district of Partick, and for these lands and buildings an exemption is craved which has never been hitherto enjoyed.

I feel myself compelled to concur with your Lordship in the chair in refusing to recognise this exemption. The presumption in favour of equality of taxation, and against exemption from taxation, rests on sound and strong grounds, legal and constitutional. Each ratepayer in this district of Partick, on whom an additional burden of taxation must be imposed if this exemption be recognised, has a right to urge this presumption, and to complain of any exemption creating inequality, and therefore producing injustice. The taxes from which exemption is craved are imposed by statutes which do not contain or refer to the exemption, and are imposed in respect of lands and heritages within the district. These lands of Gilmorehill, now belonging to the pursuers, were, like the land around them, liable to taxation, and the withdrawing of these lands of Gilmorehill from the incidence of statutory taxation does *prima facie* create inequality, and it cannot be supported on any but the clearest grounds. I am unable to find any sufficient ground for exempting the pursuers' lands. The extreme comprehensiveness of the original grant as a personal privilege is not now contended for, and cannot be sustained, for it is inconsistent with the practice of centuries. When the exemption comes to be considered as it ought to be, and to be taken as applicable to particular lands owned and used by the University, then only is it consistent with prescriptive usage; and so it has been enjoyed, and so only can it be claimed. But, so reading it, where is the authority for transferring the privilege of exemption to other lands not belonging to the University at the date of any of these grants, but recently acquired in a different locality, and where the exemption would affect the liabilities of different ratepayers in a different district. Lands long charged and now charged with

taxation cannot, by becoming the property of another, be brought within such an exemption.

So far as any authorities on the subject have been presented to us I think their effect is, not to support the exemption, but to sustain the legal principle of recognising prescriptive limitation, and the constitutional principle of equal taxation.

The University of Glasgow, at once venerable and vigorous, with glorious traditions and unabated power and spirit, is planted in the midst of a great city and district peculiarly distinguished by the enlightened appreciation and generous support of her literary institutions, and can well afford to dispense with exemptions from local taxation. "Non eget Mauris jaculis." She requires no adventitious aid to sustain her in the prosperous and distinguished course pursued for ages within the venerable walls which she has quitted, and now sustained with undiminished honour in the noble structure reared at Gilmorehill.

[1014] LORD KINLOCH.—There is no doubt that at an early period of its history very large and important privileges were conferred on the University of Glasgow, and all connected with it. Not to go further back than the charter by King Charles I., of date 28th June 1630, it was thereby provided that all the professors and students, and official persons, even to the booksellers and bookbinders, should be exempt from all taxations and impositions, not merely as regarded themselves personally, but as regarded their property, real and personal, wherever situated—"infra dictam civitatem Glasguensem et extra eandem." This charter received a ratification, though somewhat generally expressed, from Parliament, on 28th June 1663. Although according to our Scottish law and practice this ratification had much less force than belongs to a proper Act of Parliament, yet, undoubtedly, there were thereby conferred very serious and important rights.

But it is not maintained by the University that these extensive privileges now exist; and no further right is demanded than what rests on immemorial usage. It is therefore necessary to look to the usage both for the existence and measure of the right, for it cannot be disputed that where a right rests on usage the usage must determine not only the validity of the right, but its extent.

It is admitted, as to the grounds originally held by the University to the east of the High Street, and also certain others immediately adjoining, acquired in the early part of the last century, and appropriated like the others for University purposes, there has been an exemption enjoyed from local and provincial taxation, both by the University as in its corporate capacity owner of these grounds, and by the individual professors resident in the houses built on these grounds, in respect of their occupancy. But the same rule has not been indiscriminately applied in the case of ground or buildings severed in locality from these, even though removed but a little way off, and used equally for University purposes. This is shewn in the case of the premises acquired for the chemistry class-room, though only about 120 yards off; and in that of the observatory at Horselethill, some miles to the west, having a house attached for the professor of astronomy, in both of which cases local and other taxes have been paid.

The question now arises, whether the exemption from taxation is transferred to the new site of the University on Gilmorehill, a mile or two to the west, and to the grounds and buildings there occupied for University purposes. This raises a very serious question, for the practical effect undoubtedly is, that if the claim of exemption is sustained, the burden of a large amount of taxation is lifted off from property hitherto subject to it, and a proportional increase of the burden is imposed on the remaining property within the same burgh or parish.

I am unable to find sufficient legal grounds for sustaining the claim of the University. The usage on which their claim rests is not a usage which has ever transferred the exemption to any other property than that originally occupied by the University, and the immediately adjoining ground, which for a century and a-half has been incorporated with it. Any usage in regard to property locally severed from this original property is unfavourable to the claim. Proceeding on the principle that the usage must determine both the existence and extent of the right, I cannot find that transferability to other ground is an intrinsic element of the exemption. If, indeed, I could interpret the usage as meaning an exemption possessed by the University property simply as such, and not as situated in that particular locality, I would find, *vi termini*, that the exemption was transferred to the ground at Gilmorehill. But I have no

warrant for so interpreting the usage, simply because the usage does not speak on the subject, if indeed it does not speak to the contrary. I cannot put this meaning on the usage unless I find actual usage to this effect. In any other view the usage is, to say the least, silent, and so does not establish the claim.

On this ground I agree with the Lord Ordinary in rejecting the claim of the University. I would only add, that if this difficulty did not exist, it would require, as I think, very serious consideration, and a very careful examination of the taxing statutes referred to, before effect could be given to the claim of exemption—at least to the full extent claimed. I am not prepared to say that any [1015] exemption enjoyed from the taxes leviable at the date of the exemption will necessarily exempt from new and wholly different taxes afterwards imposed, more especially where, as in the case of lighting, watching, and sewerage, what is sought to be exacted is not so much taxation in its rigid sense as a charge for the supply of conveniences which otherwise proprietors would have to supply to themselves, and for which they have justly to pay. But into these separate considerations it is unnecessary to go, as the ground already adverted to is sufficient for the disposal of the case.

THE COURT adhered to the Lord Ordinary's interlocutor.

MACONOCHIE & HARE, W.S.—D. CRAWFORD & J. Y. GUTHRIE, S.S.C.—RONALD & RITCHIE, S.S.C.—MORTON, NEILSON, & SMART, W.S.—Agents.

No. 180. X. MACPHERSON, 1015. 2d Div.—Lord Ormidale, R.

THE LORD ADVOCATE, on behalf of Her Majesty, of the First Part.—*Lord-Adv. Young—Sol.-Gen. Clark—Rutherfurd.*
CARLOS PEDRO GORDON, of the Second Part.—*Millar—Watson.*

Succession-Duty Act (16 & 17 *Vict. c.* 51, *sec.* 2.)—*Predecessor—Disposition—Devolution by Law—Entail.*—An entailed estate, after the failure of other heirs, passed in terms of the destination to M. G. and the heirs-male of her body, one of whom having died without issue was succeeded by his paternal uncle, to the exclusion of his sisters, who but for the entail would have succeeded as heirs-portioners. *Held* that in the sense of the Succession-Duty Act the uncle did not succeed by "disposition" to the entailer as his predecessor (in which case the entailer being a lineal ancestor, the duty would have been 1 per cent. on the value of the succession), but that his predecessor was his nephew, the last possessor of the estate, from whom he took "by devolution of law," and was liable to pay duty at the rate of 5 per cent.

In 1740 John Gordon of Wardhouse, with consent of Arthur Gordon of Law, his eldest son, executed a deed of entail of the lands of Wardhouse and Kildrummy, &c. The destination was in the following terms:—"To and in favour of myself in liferent, during all the days of my lifetime, and the said Arthur Gordon (the entailer's eldest son) in fee, and to the heirs-male of his body, which failing to William Gordon, my son, procreat betwixt me and Mary Baird, my present spouse, and the heirs-male of his body, which failing, to the other heirs-male of my body, which failing, to the heirs-female of the last heir-male who shall be infeft in the lands and others above and after mentioned in virtue of this present settlement, and failing heirs whatsomever of all the male descendants of my body, to Mary Gordon, spouse to James Gordon of Beldornie, and the heirs-male of her body, which failing, the heirs whatsomever of her body, all which failing, to the heirs or assignees of the last possessor of the said estate who shall succeed thereto and be infeft therein in virtue of this present settlement, the eldest heir-female excluding heirs-portioners, and succeeding without division."

The previous heirs having failed, the destination to Mary Gordon and the heirs-male of her body took effect. The last possessor was John Joseph Gordon, who took as heir-male of Mary Gordon. He died in 1866 without leaving heirs-male of his body, and the estate then passed by force of the destination to his father's brother,

Carlos Pedro Gordon, the second party to this special case, who also took as an heir-male of Mary Gordon. John Joseph Gordon left two sisters.

By the Succession-Duty Act (16 & 17 Vict. c. 51, sec. 2) it is provided that "every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time [1016] appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." By sec. 10 the duty is 1 per cent. on the value of the succession, where the successor is the lineal issue of the predecessor; and 5 per cent. where the successor is a brother or sister of the father or mother of the predecessor.

The net revenue of the estates to which Mr. Gordon succeeded was £3568, 5s. 11d., and the value of an annuity of that amount on his life was £43,313, 16s.

The Lord Advocate maintained that the property descended to Mr. Gordon in virtue of the destination to the heirs-male of the body of Mary Gordon; that he took it by devolution from his nephew, John Joseph Gordon, who was his predecessor; and that he was liable to pay duty at the rate of 5 per cent.

Mr. Gordon maintained that he took the estates by way of "substitutive limitation," contained in the disposition or deed of entail made by John Gordon, his lineal ancestor, as the settlor, or disponer, testator, obligor, ancestor, or other person from whom his interest as successor was derived, and that the said John Gordon was thus his predecessor in terms of section 2 of the Succession-Duty Act; that he did not take the estates by "devolution by law" in the sense of the statute upon the death of John Joseph Gordon, the immediately preceding proprietor, and that the said John Joseph Gordon was thus not his predecessor in terms of the Act. Had the succession passed from John Joseph Gordon by "devolution by law" the estates would now have belonged to his two surviving sisters, as heirs-portioners or co-heiresses, as his successors. Mr. Gordon therefore maintained that as the entailer, John Gordon, was his "predecessor" in the sense of the second section of the Act, he was liable to pay duty only at the rate of 1 per cent.

In these circumstances the following questions were submitted for the opinion and judgment of the Court:—"1. Who is to be regarded, in the sense of the Succession-Duty Act, as the 'predecessor' of the said Carlos Pedro Gordon? 2. What is the rate of duty to which the succession of the said Carlos Pedro Gordon is liable?"

The Lord Ordinary (Ormidale) pronounced this interlocutor:—"Finds (1) that the deceased John Joseph Gordon, the heir of entail last in possession of the estate in question, is to be regarded in the sense of the Succession-Duty Act as the predecessor of Carlos Pedro Gordon; and finds (2) that the rate of duty to which the succession of the said Carlos Pedro Gordon is liable is 5 per cent."*

---

* "NOTE.—The Lord Ordinary has found this case to be attended with considerable difficulty; and that difficulty would, he thinks, have been still greater had it not been for the judgment of the House of Lords in the case of the Lord Advocate v. Lord Saltoun (21 D. 124, and 3 Macqueen, 659), and the light which has been thrown on the subject by the discussion which took place in that case, as well in this Court as in the Court of last resort. Although the case of Lord Saltoun is not exactly the same in regard to all its circumstances as [1017] the present, the Lord Ordinary is of opinion, for the reasons to be immediately explained, that the principles upon which it was decided in the House of Lords, reversing the judgment of this Court, are applicable to and must govern the present case.

"By the deed of entail of the estate in question in the present case, executed in 1740, the estate was disponed to or settled on Arthur Gordon (the entailer's eldest son) as institute, and a certain series of heirs, whom failing, to 'Mary Gordon, spouse of James Gordon of Beldornie, and the heirs-male of her body, which failing, the heirs

[1017] Mr. Gordon reclaimed. He argued;—It was decided by Lord Saltoun's * case that the head of a new stirps took by "disposition," not by " devolu-[1018]-tion

whatever of her body, all which failing, to the heirs and assignees of the last possessor of the said estate who shall succeed thereto and be infeft therein in virtue of this present settlement, the eldest heir-female excluding heirs-portioners, and succeeding without division.'

"The previous heirs having failed, and the destination to 'Mary Gordon, spouse to James Gordon of Beldornie, and the heirs-male of her body,' having come into operation, the estate devolved in 1762 upon Alexander Gordon, grandson of Mary Gordon and James Gordon; from Alexander Gordon it descended to his son John David Gordon; from him to his son Peter Charles Gordon; and from him to his son John Joseph Gordon, the last possessor, all as heirs-male of Mary Gordon, spouse of James Gordon of Beldornie, in terms of the entail.

"John Joseph Gordon, the last heir in possession of the estate, having died in 1866 without leaving any heirs-male of his body, but leaving three sisters, the estate devolved on Carlos Pedro Gordon, the present possessor, as next heir-male of Mary Gordon. Carlos Pedro Gordon is the uncle of the last possessor of the estate, being a younger brother of his father.

"The transmission of the estate, as now referred to, is made very plain by the genealogical tree appended to the special case.

"The first question submitted in the special case for the determination of the Court is, who is to be regarded, in the sense of the Succession-Duty Act, as the predecessor of Carlos Pedro Gordon? Is it the last possessor of the estate, John Joseph Gordon, or the maker of the entail? If the former, Carlos Pedro Gordon must be held, in the sense of the Succession-Duty Act, to have taken by 'devolution of law,' in which case the rate of duty will, in terms of sec. 10 of the Act, be 5 per cent. If the latter, he must be held to have taken, in the sense of the Act, by 'disposition,' in which case the rate of duty payable by him will be 1 per cent.

"By the Succession-Duty Act it is provided (sec. 2) that 'every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession"; and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.'

"Having regard to this clause of the Act, it might not inaccurately be said that Carlos Pedro Gordon has taken partly by 'disposition' and partly by 'devolution of law,' inasmuch as while, on the one hand, the deed or disposition of entail is the origin of his right; on the other hand, it was only after estab-[1018]-lishing, in accordance with the ordinary rules of the law of succession applicable to his position, that he was heir-male of Mary Gordon substituted to John Joseph Gordon, the last possessor of the estate, that he could assert any claim to it. It is in this way that the difficulty which attends the present case arises.

"It appears, however, to the Lord Ordinary that the difficulty has to a considerable extent been removed by the judgment in Lord Saltoun's case, and the very ample discussion which preceded it both in this Court and in the House of Lords. It may now, the Lord Ordinary thinks, be held as settled—(1) that as the Succession-Duty Act applies to the whole United Kingdom, its language must be interpreted in a popular sense, without regard to the technicalities of conveyancing or of title, whether of English or Scotch law, so that the same rule may govern the taxation of the succession to property in every part of the United Kingdom; (2) that where the succession is by 'disposition,' the granter or settlor of the disposition—that is to say, the maker

* Her Majesty's Advocate *v.* Lord Saltoun, 16th Dec. 1858, 21 D. 124, 3 Macq. 659.

by law." Mr. Gordon was the head of a new stirps. He did not take by devolution by law from his nephew. Had the succession been [1019] regulated by devolution by

---

of the deed of entail in the present case—is the predecessor, and where by 'devolution of law,' the last possessor of the estate is the 'predecessor'; (3) that substitute heirs of entail succeeding not *nominatim* or as one of a fresh stirps, but in their order in accordance with the ordinary rules of the law of succession applicable to the case under a general destination to heirs, whether male or female, or other character, take by devolution of law; (4) that, as a corollary to the last rule, the predecessor of the heir so taking is not the maker of the entail, but the last heir who possessed the estate; and (5) that when a party succeeds under an entail as an heir named by the entailer in his deed of entail, or as one of a fresh stirps called to the succession by the entailer, he is to be held as taking by disposition, and not by devolution of law.

"In accordance with these rules, it was decided in Lord Saltoun's case that the party succeeding to the estate there in question, being expressly nominated by the maker of the entail as the head of a fresh stirps to take failing certain other heirs, was to be dealt with as having succeeded by disposition. But in the present case Carlos Pedro Gordon has not been expressly named by the entailer, and does not succeed as one of a fresh stirps. He takes as one of the class of heirs-male of Mary Gordon, succeeding in his order on the death of the last possessor, John Joseph Gordon; and this being so, the last possessor, John Joseph Gordon, must, in the opinion of the Lord Ordinary, be held to be the predecessor of Carlos Pedro Gordon, who, on his part, must consequently be held to have succeeded by devolution of law.

"Although Carlos Pedro Gordon is not expressly nominated to the succession by the entailer, and is not one of a fresh stirps, but succeeds merely as one of the heirs-male of Mary Gordon, called generally as a class to the estate, yet as he is the uncle, and not the lineal descendant of the last possessor, John Joseph Gordon, it has been contended that Lord Saltoun's case cannot be held to govern the present, and that Carlos Pedro Gordon must be held as taking by disposition from the maker of the entail, and not by devolution of law from the last possessor, John Joseph Gordon, as his 'predecessor.' This was maintained, as the Lord Ordinary understood, on the ground that it was only where a party succeeded not as an heir-male or female, or in any other restricted character, but as heir general or at law, that he can be held to take by devolution of law. The Lord Ordinary, however, has been unable to discover, in Lord Saltoun's case, any authority for this construction of the statute; on the contrary, he has been unable to read the opinions as reported of the noble and learned Lords who took part in the determination of that case without concluding, not only that they did not proceed upon any such construction, but that, having regard to their reasoning, they must be held to have considered it unsound. Thus the Lord Chancellor (Campbell), after stating (p. 677 of Macqueen's report), that 'in the present case the appellant is named and circumstantially described in the deed, he takes directly from the donor by virtue of the deed, and she unquestionably [1019] was the "settlor," "disponer," or "ancestor," from whom, in one sense, his interest in the estate was derived,' goes on to observe, 'I would not by any means presume to express any opinion beyond what was necessary for this particular case, but I may say that, in harmony with the decision which I venture to propose, viz., that here the maker of the settlement is the predecessor, and not the last preceding possessor, I consider it equally clear that if the appellant were to die, leaving a son, the son would take by devolution, the appellant being considered his predecessor, and so it would go on by devolution from generation to generation till a new stirps came under the entail. Nothing, as it appears to the Lord Ordinary, could well be more in point to the present case; for Carlos Pedro Gordon is not one of a new stirps, expressly called by the entailer in a certain event to succeed, but one of the heirs-male of the body of Mary Gordon, the head of the last stirps. If he had succeeded not in his order according to the legal rules applicable to his class as an heir-male of the body of Mary Gordon, but as a fresh stirps called by the entailer, or as expressly named in the deed of entail, he would be in the position of Lord Saltoun, and would, like him, have had the entailer as his predecessor; but here the heirs-male of Mary Gordon, of whom Carlos Pedro Gordon, the present possessor of the entailed estate, is one, must be held to have taken and to take by devolution of law, each in his order being the predecessor of the one immediately following him, till, in the words of Lord Campbell, 'a new stirps came in under the entail.'

law, Mr. John Joseph Gordon's two sisters would have succeeded. The maker of the entail, and not John Joseph [1020] Gordon, was Mr. Gordon's "predecessor." He was therefore liable in duty only at the rate of 1 per cent.

The Lord Advocate argued;—Lord Saltoun's case only decided that *nominatim* heirs took by disposition. No doubt, in one sense, every heir of entail took by disposition; but that was not the meaning of "disposition" in the statute. Wherever the law had to be appealed to to say who was to succeed, the party entitled took by devolution by law. Mr. Gordon was not called *nominatim*. He was called as the heir-male of Mary Gordon, and the law had to be appealed to to say who her heir-male entitled to succeed was.

At advising,—

LORD JUSTICE-CLERK.—The question submitted for your Lordships' decision in

---

In like manner, Lord Cranworth, in Lord Saltoun's case, uses expressions equally, if not more clearly, calculated to exclude the construction of the Act contended for by the private party in the present case, for he says (p. 680 of report),—'Where a successor derives his title by descent, whether as heir general or as heir in tail, there, by a reasonable construction of the Act, the person from whom he claims as his ancestor is the predecessor, so that it then becomes unimportant to consider from whom the title was originally derived by settlement or will.' There are other observations in the opinions of all the noble and learned Lords in Lord Saltoun's case to the same effect; and in none of them can the Lord Ordinary find—although that case related to the succession of heirs under a deed of entail—that heirs must be heirs at law in order to render applicable the rule that, except in the case where a substitute is called by the entailer *nominatim*, or as the head of a fresh stirps, they are to be held to be respectively predecessor and successor to each other. Not only can the Lord Ordinary find no such construction pointed at in the report of the case of Lord Saltoun as applicable to heirs of entail, but he finds much in it to the contrary.

"On principle and general reasoning also, as well as the authority of Lord Saltoun's case, the Lord Ordinary thinks that here Carlos Pedro Gordon must be held to have taken not by disposition, but by devolution of law. In a destination to heirs of the body of Mary Gordon the deed of entail does not specify the individuals who are to succeed; and any person taking under a destination, as Carlos Pedro Gordon has done in the present case, must do so, not simply by force of the deed of entail, but by reason, further, of his being at common law the heir of the body of Mary Gordon. In the words of Lord Neaves in Lord Saltoun's case (Court of Session Reports, p. 133), 'the destination being in favour of a certain class of legal heirs, which it is left to the law to work out, it seems reasonable to say that this series of persons would take by devolution of law, and might be held to derive right from the party to whom they are thus substituted in the character of heirs, the deed leaving it to the law to ascertain and fix their rights in relation to that party as their ancestor. In that view each of the heirs of this class would be held as the predecessor of the immediately succeeding proprietor, and would pay succession-duty accordingly; and the same principle might, though not with equal force, apply to every class of legal heirs, such as heirs-male of the body, heirs-male,' &c. This view of the matter, besides being reasonable in itself, appears to the Lord Ordinary to be in accordance with the opinion of the noble and learned Lords who took part in [1020] determining Lord Saltoun's case, and more especially with the reasoning of the Lord Chancellor in that case.

"Without dwelling longer on the matter, the Lord Ordinary may state his ground of judgment in the present case, supported, as he thinks it is, by the case of Lord Saltoun, thus:—When the party who succeeds to an estate does so in respect of his having been called by the maker of the entail *nominatim*, or as one of a fresh stirps, he may be said to take by the express direction of the maker of the entail, who consequently is his predecessor, from whom his interest is derived; but, on the other hand, when the party who succeeds to an entailed estate does so not by the nomination of the entailer, or by his express direction as one of a fresh stirps, but as one of a class of a series of heirs in succession to a preceding heir of the same class, whether of the body, male or female, or of other character, it must be held that his interest is derived from his immediate ancestor, who in that case must be held to be his predecessor. It is in accordance with the rule as thus stated that the Lord Ordinary has answered the questions submitted in the special case for the determination of the Court."

this special case, adjusted between the Lord Advocate and Mr. Gordon, is one arising under the Succession-Duty Act. Mr. Gordon has succeeded to the entailed estate of Wardhouse and others, on the death of his nephew, under a deed of entail which destined the estate, on the failure of prior heirs, to Mary Gordon and the heirs-male of her body. The heir last infeft was John Joseph Gordon, a descendant of Mary Gordon. He left no male issue, and the lands have now devolved on his uncle, Mr. Carlos Gordon, as the nearest heir-male of the body of Mary Gordon. The question relates to the amount of duty which Mr. Gordon ought to pay to the Crown; and that question depends on whether Mr. Gordon takes by disposition or by devolution of law, and who is to be considered as his predecessor in the sense of the Succession-Duty Act.

The general principles which regulate the construction of this statute, as applicable to the succession of heirs of entail in Scotland, were so fully examined in the case of Lord Saltoun, both in this Court and the House of Lords, that it is not necessary to consider them at any length. The statute is one passed for revenue purposes. It is designed to regulate taxation in both ends of the kingdom. Its language is not scientific, but popular, and must be applied in its substance and spirit without regard to the technicalities of conveyancing. And as far as may be, it must be so construed as to render the incidence of taxation equal, or at least analogous, under either system.

The question whether, succeeding under a strict entail executed according to Scottish forms, an heir of entail takes by disposition, or by devolution of law, might, without straining the words, have been solved in either way. An heir of entail succeeds, beyond all question, by a title of inheritance. The institute only takes by direct gift. The substitute is an heir of provision. The heir last infeft is his ancestor or predecessor, and to him he must serve as his heir of provision. It might therefore be asserted consistently enough that he takes by devolution of law.

On the other hand, while such is his formal and feudal character, an heir-sub-[1021]-stitute under a strict entail takes substantially no right from the heir last infeft, whatever be his blood relationship to him. He does not represent him. He derives nothing from him, and it is wholly immaterial in what degree of propinquity he stands to him. His right rests on the tailzie itself, or, in other words, on the expressed will and destination of the granter embodied in the deed of entail. He might therefore not unreasonably be considered as taking solely by virtue of and under that disposition.

In the case of Lord Saltoun both views were maintained, and very earnestly pressed, in this Court. The decision affirmed the first alternative—that all substitute heirs took by devolution of law from the heir last infeft. The minority of the Judges—not altogether agreed in their views—concurred in thinking that Lord Saltoun at least, taking as he did as an heir named in the settlement, although the heir-at-law of the proprietor last infeft, derived his right from the entailer. The analogies of the law of England largely entered into the opinion of Lord Ivory in arriving at the opposite result. Lord Ardmillan as Lord Ordinary held all heirs of entail to take by disposition, and Lord Neaves and the Lord President proceeded on a view to which I shall afterwards advert.

The judgment was reversed in the House of Lords, and it was held that Lord Saltoun, being named in the settlement, took by disposition from the entailer.

We are now to endeavour to deduce from the full and well-considered opinions in that case a general canon by which these words in the Succession-Duty Act are to be construed for the future, and looking to the terms of these opinions I do not think it difficult to do so.

It has been maintained for the reclaimer in this case that the rule established by the judgment of the House of Lords was this: That wherever the terms of the destination coincided with the line of legal descent—that is, when the heir succeeding under the destination would have succeeded if there had been no destination—he must be held to take by devolution of law; and that in all other cases he takes by disposition. It would have been remarkable if this had been the rule established by this judgment, seeing Lord Saltoun was the heir *alioqui successurus* to the proprietor last infeft, and yet was found to take by disposition.

But, after a careful consideration of the opinions delivered, I am satisfied that no such rule can be extracted from them. On the contrary, the principle on which

we must construe these words, as applied to our Scottish system, seems to be that when an heir is called not *nominatim*, but under a generic designation as the descendant in blood of the first of a separate stirps, he takes by devolution of law. When, on the contrary, he is called *nominatim*, or under a descriptive designation as the first of a new stirps, he takes by disposition.

This rule, clearly formulated in the judgment, does not proceed on any popular reading of the words of the statute. It is arrived at simply by holding the words "disposition" and "devolution of law" to be equivalent, as applied to settled estates, to the technical expressions in the English law of real property, "purchase," and "descent." The meaning of these words we can only gather from books of authority, for it is not that which the words themselves would popularly suggest. As far as I can presume to appreciate the distinction between them, it is this, that the descendants of the body of the head of a separate stirps take by descent, and that all who are called to the succession otherwise, whether by name or by designation, take by purchase —*per formam doni*. It is needless to say that not a shadow of such a distinction exists in the law of Scotland. An heir succeeding under the fetters of a strict entail is simply an heir of provision, nor does it affect his right in any way whether he is named in the deed or only so designed as to be ascertained. If he takes under the designation of an heir of the body of a previous heir, this description is only of service as ascertaining the person intended by the entailer to succeed; and that once ascertained, he takes through the will of the entailer, as an heir of provision with precisely the same rights, and no others, as *nominatim* substitutes, or those designated as the head of a new stirps. The terms "heir-male," "heir-female," "heir of the body," and such like, are simply descriptive, and the right taken under them is precisely the same in its nature and results as if the name of each heir had been [1022] written in the deed of entail. It is otherwise, however, in the law of England. As I read the judgment of Lord Cranworth in the case of Lord Saltoun, he who takes by descent is held to take by devolution of law, and he who takes by purchase is held to take by disposition. I can find no other rule laid down for our guidance, and to this, therefore, we must conform.

It was suggested by my brother, Lord Neaves, in the case of Lord Saltoun, that when it was necessary to invoke the law in order to ascertain who was entitled to succeed, as in destinations to classes of heirs, that might be said to constitute a devolution of law. No doubt it might, in a popular sense; but I hardly think the principle squares with the English rule; for one called as the heir of the body of a third party, not within the succession at all, can only be ascertained by applying the rules of law; but in England he would take by purchase, as the head of a new stirps. And if it be said that in such a case the rules of law are only invoked to ascertain who is entitled to succeed, the obvious answer is that the same remark is equally true when the person called is the heir of one within the line of succession.

In short, the distinction in question has no place with us; but the rule, if I rightly understand it, is easily applied. There is no difficulty in ascertaining which of the heirs-substitute of entail are named in the deed, or are the head of a stirps, and which are the descendants in blood of the last head of a stirps. The character of the succession is exactly the same in either case; but it is easy to discriminate between them. In this case Mr. Gordon, although he succeeds his nephew as next heir of entail, is a blood descendant of Mary Gordon, the head of the existing line of descent. He therefore takes by devolution of law, and must pay duty on the footing that the heir last infeft was his predecessor. That being decided, there is no question remaining as to the rate.

LORD COWAN.—I have arrived at the same conclusion, and adopt in all respects the reasoning on which your Lordship's opinion has been formed. Were we called upon to consider and decide the case as a purely Scottish question I should have been inclined to adopt the argument so well stated on the part of the reclaimer. But in the construction of this British statute, intended to regulate taxation for both England and Scotland, we must take for our guide the views stated in the House of Lords in the case of Lord Saltoun. The grounds on which the reversal of the judgment of this Court proceeded I have carefully considered, particularly those stated by Lord Cranworth; and adopting the principles of construction of the statute there given effect to by the House of Lords I cannot see my way to any other conclusion than that to which the Lord Ordinary has arrived. As your Lordship has fully stated the

grounds of judgment, and which I quite adopt, I need only say that the Lord Ordinary's interlocutor ought in my opinion to be adhered to.

LORD BENHOLME.—This is certainly a very interesting case, and it necessitates a great deal of somewhat metaphysical discussion, especially as the two different systems of law in the two countries are to be affected by the same statute. We, I think, are bound to adopt the principle, if we can extract it, from the judgment which the House of Lords has pronounced in Lord Saltoun's case. I think it is our duty to endeavour to ascertain what are the principles in consistency with that judgment by which we are to determine similar Scotch cases in future. Now, I am inclined to think that the opinion of Lord Neaves in the case of Lord Saltoun, if it does not exactly state the principle, is the clearest opinion that I have seen by which we are to ascertain how we are to walk in time to come. I think in substance it is correctly announced when we say that it is a case of devolution, when as an element entitling the party it is necessary to call in a step of legal succession. No doubt, wherever there is an entail, the entail is also necessary in every step of the succession. But where in carrying out an entail there is not required any consideration of the consanguinity of the person who serves to the person to whom the service is expede, but the entail points out, by its own independent description, the individual who is to take next, that is a case of purchase, and I think under that rule falls the case which [1023] your Lordship suggests, that the head of a new stirps is designated as the heir-male of a person deceased, because in that case I think the designation of heir-male of a stranger who has never taken is a mere description. The party serving in such a case does not take from the party whose heir-male he is described to be. He is described as an independent head of a stirps. He is designated not by the individual name, but by description, which description does not involve the element that he is taking anything from the person to whom he is stated to be related. He is related not as taking anything from him, but by blood. I think that explanation will perhaps enable us to see that, after all, the opinion of Lord Neaves puts the case exactly, if you clearly understand what is meant by purchase. Purchase is when the person who is to take is ascertained by individual nomination, or such description as does not involve legal consanguinity to the last holder.

LORD NEAVES.—The Act which has been referred to here is not framed with very great precision, and the attempt to use a sort of neutral language or *lingua franca* that will equally apply to English law and Scotch law is one attended with some difficulty. I do not know whether or not it has been very successful. It necessarily follows that the Act being so framed, when a question arises in the Courts of the different countries each Court will endeavour to look at its own law, which it knows best, to see how it will apply, and whether it would coincide with some analogous law in the other country. That is a very natural thing, and it was done to a great extent in the case of Saltoun. It appears to me that as to the practical questions here, neither the case of Saltoun nor the present case is attended with difficulty. Perhaps that is a presumptuous thing to say of the Saltoun case, where the majority of this Court was the other way; but looking back on it now, I think the ground on which the minority went cannot be shaken. Of course in an entail everybody that takes takes by virtue of the deed; but I think it is a plain proposition that a person *nominatim* called by the entailer takes by direct gift. But then the question arises as to successive heirs in a certain groove of succession, and that is the case we are now disposing of. We have got *nominatim* parties here at this stage of the entail. The last person to take expressly called *nominatim* was Mary Gordon; and after her comes a series of legal successors belonging to a known category of the law, for a series of heirs-male of the body is a very well known thing in the law of Scotland. From the time she was out of the way, it has been running in a series of heirs coming under that legal character. That did not occur in Lord Saltoun's case, but I think I mentioned that it was one of the things that might occur,—that those who succeed *alioqui successuri* were one class, but that there might also be heirs-male or heirs-male of the body that would also take, no doubt by the deed so far, but also by devolution of law, because they stood in a certain relation in point of succession to the immediately previous possessor of the estate. I certainly think there is some room for what Lord Benholme says, that that is a different case from calling in a stranger, not in respect of his relationship to the previous possessor, but in respect of his connection with some total stranger, who is not himself called to the estate. No doubt you may require to consider in what relation he stands to that stranger, but that does not affect

his position in the succession. He is the first of that order or new groove of succession; and I think he begins and takes by the designation of the entailer. But when you get the groove of succession begun, which began here with Mary Gordon, I think that till that ends it is the law that finds out the successor, in reference to his relationship to the immediate party from whom his claim entirely flows. And that is to me sufficient to decide this case. I do not know that it is our duty to inquire into purchase and descent; and however natural it may be for the Judges in England in the House of Lords to consider their law, I do not know that we are bound to do so. But that very view is pointed at by Lord Cranworth, when he says—Where a successor derives his title by descent, whether as heir general or as heir in tail, that does not mean an heir to a total stranger, but as an heir in tail of the party who preceded him; and in that point of view it still occurs to me as correct, and as sufficient for the [1024] decision of this case. Questions may arise in other cases, but in this case I understand we are all agreed that this party takes by devolution of law, because he takes in the character of heir to a certain stirps, and not in relation to the entailer.

THE COURT adhered to the Lord Ordinary's interlocutor.

ANGUS FLETCHER, Solicitor of Inland Revenue—CAMPBELL & LAMOND, C.S.—Agents.

[*Followed*, Lord Advocate *v.* E. of Zetland, 1877, 4 R. 199.]

No. 181. X. MACPHERSON, 1024. 19 July 1872.* Exchequer Cause, Lord Ormidale.

THE RIGHT HONOURABLE THE LORD ADVOCATE, Pursuer.—*Sol.-Gen. Clark—T. Ivory.*

THE RIGHT HONOURABLE JOHN ROGERSON ROLLO, LORD ROLLO, Defender.—*—Adam—Macpherson.*

Superior and Vassal—Crown-Charter of Confirmation—Implied Discharge.—Held by Lord Ormidale that the Crown, after granting to a vassal a charter of confirmation, containing a discharge of one year's non-entry duties, was not thereafter entitled to claim arrears of feu-duties.

On 10th November 1853 the Right Honourable John Rogerson Rollo, Lord Rollo, made up titles as heir to his father, William Lord Rollo, who died on or about 8th October 1852, and obtained two crown-charters of confirmation in his favour (1) of the lands of Easter Rossie, and lands and barony of Pitcairns and others lying within the parish of Dunning and shire of Perth; and (2) of the lands and barony of Duncrub, and others, the latter of which sets of land and baronies had been held by the defender's predecessors under the Crown for more than forty years prior to 1853.

In 1868 the Lord Advocate, as representing Her Majesty, presented an information, claiming arrears of feu-duties for certain lands embraced in the second charter for forty years prior to 1853, the date of the charter, and for subsequent arrears which were not disputed, stating that when this charter was taken out by Lord Rollo it appeared the lands were in non-entry for one year; and he was accordingly charged for the several lands and others contained in it the sum of £8, 0s. $2\frac{4}{12}$d. as non-entry and duplication duties exigible for the same. Some time after the taking out of this charter it was discovered that the feu-duties expressed therein as payable to the Crown were not in charge of any of the Crown Receivers for collection and had never been paid to the Crown, and in consequence application was made to Lord Rollo's agent for payment of the arrears for forty years prior to the date of the last public investiture, which was in 1853, according to the uniform practice existing in Exchequer.

The Lord Advocate pleaded;—The feu-farm and other duties of the lands of Granco called the Chapel lands of Dunning, and the lands of Kingcledie and teinds thereof, not having been paid by the defender and his predecessors, and the plea of the negative

* Decided 24th Jan. 1872.

prescription not being applicable to a claim by the Crown, decree should be pronounced for the amount claimed in favour of the Crown, with expenses.

The defender pleaded;—All feu-duties prior to 1853 were discharged by the delivery of the charters in that year.

The Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof, finds that by the minutes Nos. 8 and 14 of process the claim of the Crown in this case has been restricted to the [1025] sums in counts 3 and 4 of the information averred to be due from the defender 'as the feu-farm and other duties of the lands of Granco called the Chapel lands of Dunning and the lands of Kingcledie and teinds thereof': Finds as regards the sums still claimed by the Crown it is admitted by the defender that he is resting owing the same, so far as they fell due subsequent to 1853: Finds that the parties are agreed that the sums now claimed as falling due by the defender subsequent to 1853 amount to £23, 5s. $8\frac{4}{12}$d.: Finds as regards the sums claimed by the Crown as having become due prior to 1853, that it has not been established that they are resting owing by the defender: Finds on the contrary, that the defender having been received or entered by the Crown on 10th February 1853 as vassal in the lands in question in place of the former vassal, and having then been granted a crown-charter of confirmation in which there is no reservation of any claim for prior feu-duties or other casualties, it must be held that all such prior feu-duties or other casualties had been thereby discharged or passed from: Therefore finds the defender liable in terms of the fourth count of the information, as restricted by the minute No. 8 of process, to the extent of the said sum of £23, 5s. $8\frac{4}{12}$d., and *quoad ultra* assoilzies him, and decerns: Finds the defender entitled to expenses; allows an account thereof to be lodged, and remits it when lodged to the Auditor to tax and report." To this interlocutor his Lordship appended the following—

"Note.—In regard to the sum in which the defender has been found liable, viz., the amount of feu-duties of the lands of Granco, called the Chapel lands of Dunning, and the lands of Kingcledie and teinds thereof, falling due since the date of his entry, there has never been any dispute. On the contrary, the defender, in his answers to articles 6 and 7 of the condescendence, expressly admits his liability for that sum.

"But as to the arrears of feu-duties alleged to have become payable prior to the defender's own entry, and the completion of his titles to the lands in question in November 1853, he denies and disputes all liability. He maintains that in respect of the crown-charter which was then granted to him, and which contains no reservation of any claim to arrears of prior feu-duties or other casualties, all such must be held to have been discharged or passed from. On the other hand, it has been maintained by the Crown that as the charter relied on by the defender does not contain any express discharge of prior feu-duties, and as no receipts or other evidence have been produced of their having been paid, the defender's liability for them must extend back for at least forty years prior to the date of his own entry in 1853. If this contention on the part of the Crown be sound there seems to be no reason in principle why the term of the defender's liability should not be carried back even further than forty years prior to his entry, in 1853; for it was pleaded in support of the claim as made, that the long negative prescription did not apply to the Crown. In the view, however, of the case which has been taken and acted upon by the Lord Ordinary, it is unnecessary to enter into a consideration of the question whether the negative prescription applies to the Crown or not.

"If the question which it was necessary for the Lord Ordinary to determine, and which has been determined by him in favour of the defender—viz., whether the granting of a charter to him must be held as equivalent to a discharge of or passing from all feu-duties previously falling due—had arisen with a subject superior it was conceded that no other conclusion could have been come to than that given effect to by the interlocutor now pronounced. This indeed is very clear on the authorities; for it was so decided in the cases of The Earl of Cassilis *v.* Lord Bargany, February 1682, Mor. 6414; Gibson *v.* Scott, 2d February 1739, Mor. 6500; and the Incorporation of Tailors of Glasgow *v.* Blackie, &c., 11th June 1837, 13 D. 1073. And that superiors and vassals and their men of business have from time immemorial, or at least from the date of the earliest of [1026] these decisions, acted on the assumption that such was the law, and that it might be safely relied on, there can be no doubt.

"The question, therefore, is narrowed to whether the same or a different rule of law

is to be held as applicable to the Crown. It was contended on the part of the pursuer in the present case that the same rule of law cannot be given effect to as against the Crown, in respect—1st, That the reasons why it was established in questions arising with subject superiors have no bearing or force when attempted to be applied to questions with the Crown; and 2d, That at any rate the practice in Exchequer in the granting of crown-charters excluded the rule, even supposing it might otherwise be held to be applicable.

"What, then, are the reasons why the rule of law was established that a charter by progress granted by a subject superior implies a discharge of or passing from all prior feu-duties or other casualties? The primary object, no doubt, of a superior in granting a charter by progress, is to renew or confirm the fee in one person in place of another; but the very terms in which he does so almost necessarily, if not expressly, import or imply that all prior feu-duties or casualties have been paid and settled, or at least passed from and discharged. Accordingly, the new charter gives out to or confirms in favour of the new vassal the lands or other subjects, and declares them to be thereafter held by him for payment not of past arrears of feu-duties—although feu-duties are *debita fundi* —but of a certain feu-duty for the future. To take, for example, the charter of confirmation on which the defender founds in the present case—the charter which was granted to him in 1853—it bears to confirm in favour of the defender and a certain order of heirs of entail the lands in question, and the various deeds, as therein mentioned, to be holden, the said lands, 'in blench and feu-farm respectively (according to the duties underwritten), fee and heritage for ever.' And the yearly feu-duty of the lands in question is afterwards specified with a double of the same only for the first year of the entry of each heir. Now, the defender having on his entry paid the non-entry duties, and a double of the feu-duty for the year of his entry, was fairly entitled to assume, from the terms of the charter he then received, that he would hold the lands free from any demand or exaction by the Crown as superior, except payment of the stipulated annual feu-duty. But, according to the present contention of the Crown, he is liable in payment of the feu-duties for forty years prior to his entry; and as feu-duties are *debita fundi*, the lands might, if he did not pay them, be entirely evicted from him. Indeed, were such a liability to be held in law as well founded, it might frequently happen that the arrears of feu-duties due by a vassal to his superior would greatly exceed the whole value of the lands or subjects held by him; and yet, as he had no means through any record or otherwise of making himself aware of such liability at the time of his entry, he might become subject to it helplessly and unconsciously, to his great loss and injury. And, moreover, it might happen that no available recourse could be had by him upon the former vassal, who was the party truly liable in payment of the arrears, in respect of his emerging bankruptcy, although it might be that to that party he had paid a large price on the footing that the subjects were free from any such burden or liability. On the other hand, the superior, it may be assumed, must have known of the arrears at the time of the entry; and if he did not then insist on their being settled, or at least reserved *sibi imputet*—keeping these considerations in view, the Lord Ordinary can very well understand the reasons which led to the establishment of the rule of law, that in a question at least with a subject superior the granting of a charter of progress without any reservation implies or imports a discharge of all prior feu-duties or other casualties, and that the same reasons apply equally to the case of a crown-holding appear to the Lord Ordinary to be indisputable. If so, the rule of law itself ought to be held to apply to cases where the Crown is superior equally as in cases where a subject is superior.

"But then it was argued for the Crown in the present instance that the decisions of the Court in the cases above cited were pronounced in respect of the practice or usage in the granting of charters by subject superiors, while not only no such practice or usage, but the very opposite, has existed in Exchequer, [1027] in the granting of crown-charters. The Lord Ordinary cannot accede to this view, but, on the contrary, thinks it ill founded. There is no indication in the reports of the earlier cases of the Earl of Cassilis *v.* Lord Bargany, and Gibson *v.* Scott, of any proof or other inquiry having been gone into as to the practice; and neither is any such indication to be found in the later case of the Incorporation of Tailors of Glasgow *v.* Blackie and Others. It is true that one of the reports in the Dictionary of the case of Lord Cassilis (p. 6416) bears, 'The Lords found that in regard superiors use to clear all the casualties before the entry of the vassal, that the precept of *clare constat* included all, both ward duties, blench, feu

and non-entries, and did import a discharge thereof.' But none of the other three reports of the case contain any reference to the usage of superiors, and the Lord Ordinary thinks it clear that the judgment could not have proceeded on any such usage as its essential or sole foundation, seeing that the question had been determined differently only eight years previously, in the case of Aytoun *v.* Duncan, 14th January 1676, Mor. 6464. And in regard to the late case of the Tailors of Glasgow *v.* Blackie, it is obvious, the Lord Ordinary thinks, that the references which, according to the report, were made by some of the Court to the practice, were merely to the effect that it would be objectionable and wrong to alter or go back on the rule of law which had been established by the older cases after it had presumably been so long acted on and recognised in practice.

"Then, as regards the alleged opposite practice in Exchequer, the Lord Ordinary is of opinion that it has not been established by the proof. Not a little indeed of the evidence adduced cannot be held to prove anything at all on the subject. For example, the memorials and other proceedings in connection with the disputes between the Crown and General Grant of Ballindalloch and Lord Douglas cannot be taken, the Lord Ordinary thinks, as proof of anything, except that there were such proceedings, having for their object an adjustment of certain differences which had taken place between the parties. No doubt these differences would appear to have related to arrears of feu-duties; but whether in circumstances to shew that there was a general practice in Exchequer of the nature now alleged on behalf of the Crown does not appear. And it is certainly not a little remarkable that the only case that has been discovered in which the right of the Crown to enforce recovery of arrears was sustained should be that of Campbell of Lochnell in 1838. But even as regards that case, it does not appear that the verdict and judgment therein proceeded in any respect on the alleged practice. And still less satisfactory perhaps, as making out a general practice, are the papers relating to Alexander Gardner, one of the officers in Exchequer, and the measures taken by him to recover arrears of feu-duties, especially when in connection with these measures it is kept in view how very small the amount of arrears and recoveries was compared with the number of crown-charters which have been, according to the testimony of Mr. Adam Longmore, granted in Exchequer. That gentleman says that in the twenty years from 1826, when he entered the office, till 1847, he had compared and took part in the settling of 10,000 crown-charters, while Mr. Robert Glegg says he knows of no more than fifty instances of recoveries of arrears. Another very remarkable feature in the parole proof is disclosed in the testimony of Mr. Bellairs, the present Crown Receiver, who, while he states that he is in the practice of insisting for payment of arrears of feu-duty, at the same time explains that he has almost invariably settled such cases by way of compromise; and not only so, but always accompanied his demand for payment with an offer of compromise. It is not unlikely that all along, from the earliest time downwards, every payment of arrears of feu-duty by entered vassals may have been made by the vassal, not as matter of right, but by way of compromise, rather than risk a litigation with the Crown, who, till the passing in 1856 of the Act 19 & 20 Vict. cap. 26, sec. 24, could not be subjected in expenses, even when unsuccessful. In short, looking at the whole proof, written and parole, the Lord Ordinary has had no hesitation in holding it to be quite insufficient to establish such a practice as could derogate from the rule of law, which must otherwise be held to be firmly established, and equally applicable to the Crown, as superior, as to subject superiors. The only [1028] other points touched on, although very slightly, in the argument for the Crown, were, 1st, that the Crown cannot be prejudiced by the negligence of its officers; and 2d, that since the passing in 1847 of the Act 10 & 11 Vict. cap. 51, regulating the mode of granting crown-charters, the officers in Exchequer are not entitled to delay or withhold granting a charter pending a dispute as to arrears of feu-duty. But in regard to the first of these points, it has to be remarked that the old Scots Act, 1600, cap. 14, which is the only thing of authority bearing upon the question, so far as the Lord Ordinary can discover, applies exclusively to the negligence of the King's officers 'in the pursuing or defending of any of his actions or causes,' and does not affect the present question at all. And in regard to the point said to arise out of the 10 & 11 Vict. cap. 51, the Lord Ordinary is not satisfied that that statute has the effect imputed to it. But whether the issuing of a charter could have been delayed or not pending a dispute as to arrears of feu-duty, it cannot be doubted, the Lord Ordinary thinks, that in such a case a reservation, at least of the claim, could be competently inserted in the charter, or, at any rate, that the charter might

be issued in such a way as to shew that a claim for arrears existed, and was to be insisted in. On no ground, therefore, does the Lord Ordinary think that the present question, arising as it does with the Crown, is distinguishable from any similar question that might arise with a subject superior; and if he be right in this, it follows from the authorities that the question is no longer an open one, and has now been rightly determined."

A reclaiming note presented by the Lord Advocate against this interlocutor was not insisted in.

DONALD BEITH, W.S., Solicitor H.M. Woods, &c.—ARCHIBALD STEUART, W.S.—Agents.

INDEX OF MATTERS

IN

VOLUME X.

[Points decided in the House of Lords are printed in *Italics*.]

CASES DECIDED IN THE REGISTRATION APPEAL COURT.

Schoolmaster—24 & 25 Vict. c. 107 (Parochial and Burgh Schools (Scotland) Act), sec. 18.

3. By sec. 18 of the above Act it is enacted that "nothing in this Act shall be held to interfere with any arrangement which may have been concluded between the heritors and schoolmaster of any parish for the retirement of such schoolmaster except as regards the house and garden and premises attached thereto, which shall in every case be made over at the term of Whitsunday next after the passing of this Act to the person actually discharging the duties of schoolmaster." *Held* (1) that the provision was not limited to arrangements made prior to the Act; and (2) (*diss.* Lord Ormidale) that where heritors had subsequent to the Act arranged that a retiring schoolmaster should retain the schoolhouse, &c., he was not entitled to be enrolled as a voter in virtue of his possession.

Opinion (*per* Lord Ormidale) that the condition as to retaining possession being invalid, the whole arrangement as to the schoolmaster's retirement fell to the ground, and he must be considered as still the parish schoolmaster, and entitled as such to the possession of the school-house. Paton *v.* Morison, 23 Oct. 1871, p. 77.

Faggot Vote—Sale—Fictitious.

4. An estate was purchased *pro indiviso* by forty-three persons at the price of £15,005, of which £13,500 was allowed to remain as a burden on the estate, and the balance, or £35 a-piece, was paid by the alleged purchasers, it being expressly declared that they should incur no personal responsibility for the £13,500. The bondholder appointed a factor on the estate, the rents being applied to pay the interest, and the alleged purchasers receiving no part of them. *Held* that the sale was nominal and fictitious, and that the alleged purchasers were not entitled to the franchise. Hill *v.* Hill, 23 Oct. 1871, p. 79.

Superior and Vassal—Feu-Duties—2 & 3 Wm. IV. c. 85, sec. 7.

5. A superior is not entitled to the franchise as proprietor of the lands feued, but only as proprietor of the feu-duties. Lee *v.* Matheson, 23 Oct. 1871, p. 81.

Superior and Vassal—Feu-Duties—Casualties.

6. In estimating the value of feu-duties, as affording a qualification for the franchise, the value of casualties of superiority cannot be taken into account. Lee *v.* Matheson, 23 Oct. 1871, p. 81.